

The Second Amendment and the Constitutional Right to
Self-Defense

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ABSTRACT

The Second Amendment and the Constitutional Right to Self-Defense

William G. Merkel

This dissertation analyzes the contextual background, drafting history, text, original understanding, interpretive evolution, and contemporary judicial application of the Second Amendment to the United States Constitution. The dissertation develops the argument that as originally understood, the Second Amendment protected a right to keep and bear arms closely linked to and dependent upon service in the lawfully established militia. Two recent United States Supreme Court decisions, *Heller v. District of Columbia* and *MacDonald v. City of Chicago*, depart from this original understanding and recognize a constitutional right to weapons possession for purposes of purely private self-defense – particularly self-defense in the home. The dissertation recognizes that there are grounds for recognizing such a right, and that these include natural law, substantive due process, procedural due process, the Ninth Amendment, and emanations from particular provisions in the Bill of Rights including the Second Amendment. At the same time, the dissertation develops the case that the original

public understanding mode of interpretation avowedly applied by the Supreme Court in its recent right to arms decisions relies on untenable “law office” history to justify results not dictated by the text, structure, or original understanding of the Constitution or by prior Supreme Court precedent.

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Dedication

For my loving and beloved parents, George and Nancy Merkel, and for the ladies
in my life, Gayle Goudy and little Clara Merkel.

CHAPTER ONE

THE CONSTITUTIONAL RIGHT TO SELF-DEFENSE AND
 SELF-DEFENSE IN INTERNATIONAL LAW:
 REFLECTIONS ON THE STATE OF NATURE, DEADLY DRONES, TRAYVON MARTIN,
 AND SOME UNSETTLED LEGAL QUESTIONS

It is a long-established axiom among political theorists that when people leave the state of nature and enter into civil society, they accept the enforcement of limitations against some of their rights so as to protect and indeed maximize other personal and collective rights—including the right to security—to the greatest extent possible.¹ In modern constitutional democracies, it is

¹ This proposition was central to the political philosophy of Thomas Hobbes, John Locke, and William Blackstone, three of the English-speaking world's foundational thinkers on governmental legitimacy.

Thus, in endeavoring to convince his readers to accept the authority of the English Commonwealth after the execution of Charles I, Hobbes writes “[f]rom this fundamental law of nature, by which men are commanded to endeavour peace, is derived this second law: that a man be willing, when others are so too, as far forth as for peace and defence of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself. For as long as every man holdeth this right, of doing anything he liketh; so long are all men in the condition of war. But if other men will not lay down their right, as well as he, then there is no reason for anyone to divest himself of his: for that were to expose himself to prey, which no man is bound to, rather than to dispose himself to peace.” THOMAS HOBBS, *LEVIATHAN*, Ch. XIV sec. 5, (1651), at 86 in Oxford World's Classic Edition (1996) (1651).

According to Locke's *SECOND TREATISE ON GOVERNMENT*, written either to encourage overthrow of the government of James II in 1685 or to justify the newly established constitutional settlement after the Glorious Revolution in 1689, “wherever, therefore, any number of men so unite into one society as to quit every one his executive power of the law of Nature, and to resign it to the public, there and there only is a political or civil society. And this is done wherever any number of men, in the state of Nature, enter into society to make one people one body politic under one supreme government: or else when any one joins himself to, and incorporates with any government already made. For hereby he authorises the society, or which is all one, the legislative thereof, to make laws for him as the public good of the society shall require, to the execution whereof his own assistance (as to his own decrees) is due. And this puts men out of a state of Nature into that of a commonwealth, by setting up a judge on earth with authority to determine all the controversies and redress the injuries that may happen to any member of the commonwealth, which judge is the legislative or magistrates appointed by it. And wherever there are any number of men, however associated, that have no such decisive power to appeal to, there they are still in the state of Nature.” JOHN LOCKE, *TWO TREATISES ON*

generally accepted also that legislatures may legitimately adjust the balance among these rights to enforce popular preferences about the rights packages deemed most desirable by the citizenry.² In a society in which courts enforce certain rights against legislative judgments,

GOVERNMENT Bk. 2, Ch. 7, §89 (1689). In a later passage in the SECOND TREATISE, Locke elaborates “If man in the state of nature be so free, as has been said; if he be absolute lord of his own person and possessions, equal to the greatest, and subject to no body, why will he part with his freedom? Why will he give up this empire, and subject himself to the dominion and control of any other power? To which it is obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others: for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to quit a condition, which, however free, is full of fears and continual dangers: and it is not without reason, that he seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name, property.” *Id.* at §123.

For Blackstone, writing to celebrate the firmly established constitutional order of the 1760s some seven decades after its foundations in the Glorious Revolution, “every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life.” 1 WILLIAM BLACKSTONE, COMMENTARIES *125 (1765).

The contextual background to *Leviathan* is explored in QUENTIN SKINNER, HOBBS AND REPUBLICAN LIBERTY, 178-82, 198-208 (2008). RICHARD ASHCRAFT, REVOLUTIONARY POLITICS AND LOCKE’S TWO TREATISES OF GOVERNMENT (1986), follows Peter Laslett in arguing (entirely persuasively in my view) that John Locke’s *Two Treatises on Government* were published as a radical revolutionary manifesto prior to the Rye House Plot of 1683 rather than as an after the fact justification for the Glorious Revolution as earlier generations of scholars had assumed. Stanley Katz’s insightful introductory essay to the Chicago editions of Blackstone’s *Commentaries*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765-1769 WITH AN INTRODUCTION BY STANLEY N. KATZ, x-xii (1979), explains that Blackstone’s sections on constitutional law and governmental legitimacy delicately balanced his perceived need to immunize the existing constitutional arrangement against any potential revolutionary challenge notwithstanding that order’s own revolutionary origins in 1688-89.

² Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, IN CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES, 39, 40-42 (Michael Rosenfeld ed., 1994); Michel Rosenfeld, *The Rule of Law and*

legislatures are of course limited in their capacity to adjust rights and balance them against other rights.³ Some rights (say the right against arbitrary deprivation of life by the state) are entirely beyond legislative discretion. The legislature may infringe upon them only in very limited circumstances, in the case of the right to life, probably only for the purposes of facilitating self-defense and defense of the society, and, in societies with legal orders that tolerate execution under the law, carrying out capital punishment pursuant to a lawful death sentence.⁴ Other less

the Legitimacy of Constitutional Democracy, 74 S. CAL. L. REV. 1307 (2001); IAN LOVELAND, CONSTITUTIONAL LAW; A CRITICAL INTRODUCTION 8-18 (2d ed. 2000).

³ See generally LOUIS HENKIN, THE AGE OF RIGHTS, 118-24 (1990); cf. *Marbury v. Madison*, 5 U.S. 137 (1803); *United Mizrahi Bank Ltd. v. Migdal Village*, C.A. 6821/93, 49(4) P.D. 221 (1995), two foundational cases justifying judicial review of legislative acts for conformity with the United States Constitution and the Israeli Basic Laws, respectively. Chief Justice Marshall relies essentially on compact theory to hold that the sovereign will of the people in ratifying the Constitution trumps the will of the people's elected agents reduced to statutory law, while Chief Justice Barak holds that Basic Laws passed by the Knesset in its constitutive as distinct from legislative capacity have constitutional status that renders the Basic Laws superior to ordinary statutory law. On the tension between popular democracy and judicial policing of constitutional sovereignty, see generally HANS KELSEN, GENERAL THEORY OF LAW AND STATE (Anders Wedberg trans., 1961), ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962), JOHN HART ELY, DEMOCRACY AND DISTRUST (1980), ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000), RON HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2007), MARK TUSHNET: WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2009).

⁴ Consider e.g., respecting the United States, the Sixth Amendment Right to Counsel, the Cruel and Unusual Punishment Clause of the Eighth Amendment, the Due Process Clauses of the Fifth and Fourteenth Amendments the enormous body of constitutional jurisprudence on the death penalty they have spawned; and, in the European context, Articles 2 and Protocols Six and Thirteen to the European Convention on Human Rights first limiting and then eliminating the authority of governmental actors to impose capital sentences or otherwise deprive persons of life except when acting in necessary self-defense, defense of others, or to suppress a riot or insurrection. The substance of the right is defined in Article 2 of the Convention as follows:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - a. In defence of any person from unlawful violence;

fundamental rights (take the right to operate a motor vehicle) are clearly subject to legislative discretion, and their restraint is frequently permissible, perhaps for purposes such as criminal punishment, traffic safety, environmental protection, to preserve public order, to protect third parties and allow their indemnification, or to maximize social utility pursuant to the legislature's policy preferences.⁵ Even strong libertarians generally concede that governmental restraint of liberties that are otherwise immune from interference may be permissible to protect third persons from harm.⁶

In the United States, the question is hotly debated whether gun possession (and the right to use fire arms in self-defense) falls closer to the fundamental, inalienable end of the spectrum

b. In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c. In action lawfully taken for the purpose of quelling a riot or insurrection.

⁵ See generally IAN LOVELAND, *CONSTITUTIONAL LAW: A CRITICAL INTRODUCTION*, at 8-18 (2d ed. 2000) (introducing the study of British Constitutional Law from a comparative perspective, and contrasting the time honored Diceyan understanding of unbridled legislative discretion with American style judicial review and the post-Human Rights Act of 1998 British system subjecting Parliamentary statute making to judicial policing to ensure compatibility with fundamental European human rights norms).

⁶ John Stuart Mill's famous harm principle holds that personal liberty may not be legitimately curtailed by government authority except in situations where an actor's conduct harms or threatens harm to other persons. In Mill's original formulation, "the sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign." JOHN STUART MILL, *ON LIBERTY*, 18 (1859). By referencing preventative self-defense, Mill appears to concede that government may intervene to prevent incipient harm, not just to punish wrongdoers after the fact.

(like the right against arbitrary deprivation of life), or nearer the relativistic, conditional, legislatively adjustable end of the spectrum (like the right to drive a car).⁷ A five-justice majority on the Supreme Court favors a position nearer the fundamental side.⁸ My view is different.⁹ This introductory essay briefly summarizes the reasons why, and then suggests several perspectives that may afford greater insight into the nature and limits of the right to self-defense than does the originalist course embraced by the Supreme Court in *Heller* and *McDonald*, the two recent cases in which the Court read a private right to self-defense against potential attackers into the Second and Fourteenth Amendments.

The body of the thesis consists of eleven different pieces (four encyclopedia entries, two book reviews, three law review articles, one critical essay, and one unpublished surreply to a leading academic critic of my work). Collectively, these pieces summarize and critique Second

⁷ On heated debate and cultural conflict over the twinned questions of gun rights and gun control, see generally DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* (2003), SAUL CORNELL, *A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2007).

⁸ See *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago* 561 U.S. ___ (2010). *Heller* recognized a Second Amendment right to keep commonly held weapons for purposes of self-defense in the home, and marked the first time the Supreme Court had clearly acknowledged a Second Amendment right not connected to service in the lawfully established militia. *McDonald* applied the substantive right described in *Heller* against state and municipal governments.

⁹ See, e.g., William G. Merkel, *The District of Columbia v. Heller and Antonin Scalia's Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV., 349 (2009) (arguing that Justice Scalia's allegedly originalist opinion in *Heller* is historically unsupportable, and that the Second Amendment was not originally understood to stand in the way of legislative restrictions on gun use and possession); Heller as *Hubris*, and How *McDonald v. City of Chicago May Well Change the Constitutional World as we Know it*, 50 SANTA CLARA L. REV. 1221 (2010) (arguing that there is insufficient evidence to support the claim that the original understanding of the Fourteenth Amendment contemplated incorporation of a private right to arms against the states, that Justice Alito's opinion places far too much stock in the dubious historical claims relied on by Justice Scalia in *Heller*, and that state and municipal gun control provisions that do not offend equal protection principles were not considered to violate the Fourteenth Amendment when it was ratified).

Amendment scholarship, explain the Supreme Court's holdings in *Heller* and *McDonald*, lay out my interpretation of the Second Amendment, explain why the Second Amendment as originally understood did not encompass a purely private right to self-defense, and why incorporation jurisprudence up until *McDonald* does not support application of a private right to self-defense against the states as a derivative of the Second Amendment right against the federal government.

This introductory Chapter contextualizes the material that follows and explains the themes that tie together the thesis chapters, and then concludes by outlining questions to be explored in my future work.¹⁰ But before introducing the work that comprises the body of the thesis, I begin here by setting out some of the numerous questions left open by the *Heller* and *McDonald* decisions, and explain why originalism—the dominant mode of thought on the late Rehnquist and Roberts Courts—is ill-suited to addressing the important self-defense related questions that the Court will confront in the coming years.¹¹ In particular, I argue that ancestor worship provides an inadequate normative basis for judicial adjustment of legislatively determined rights, and that considerations of federalism and democratic experimentalism suggest the Supreme Court should hesitate to preempt legislative policy determinations by force-fitting contemporary problems into a one-size-fits-all mold fashioned on largely fanciful conceptions of eighteenth century beliefs.¹²

While fictive original understanding of marginally related constitutional text provides a poor basis for evaluating claims premised on the right to self-defense, insights drawn from the international law of armed conflict offer a potentially useful and normatively cogent alternative matrix for analyzing the right of individuals to defend themselves against actual, imminent, or

¹⁰ See pp. 35-40 *infra*.

¹¹ See pp. 11-13 *infra*.

¹² See pp. 13-17 *infra*.

potential armed attack, and the ancillary right to arm oneself to deter and repulse possible future attacks.¹³ In planned projects outlined at the end of this Chapter, I will focus particularly on general principles of the law of self-defense shared by diverse municipal systems and public international law to develop a framework for analyzing self-defense claims under American law¹⁴ that I hope will be both more intellectually honest and more principled than the rhetorically inflected Second Amendment-driven public discourse on self-defense that has erupted in response to the Trayvon Martin shooting and the Aurora, Colorado tragedy.¹⁵ For present purposes, in anticipation those future projects, the next section of this Chapter applies principles derived from the public international law of self-defense to Attorney General Holder's defense of the United States' targeted assassination of Al-Qaeda operatives by remote operated drones¹⁶ and to George Zimmerman's putative use of defensive force to kill Trayvon Martin.¹⁷ This analysis suggests relative advantages of comparative law over originalism in distinguishing between principled and abusive reliance on the right to self-defense.¹⁸ The introductory Chapter then concludes by outlining the remaining Chapters of the thesis (all but one of which have been published), explaining their over-arching themes and connections, and linking them to the questions I will explore in my future projects on the right to self-defense.

Questions Left Open by Heller and McDonald

¹³ See pp. 19-23 *infra*.

¹⁴ See pp. 23-28 *infra*.

¹⁵ See, e.g., http://www.huffingtonpost.com/2012/08/15/dave-mustaine-megadeth-si_n_1784525.html, in which the lead singer of heavy metal band Megadeth maintains that Aurora was staged to provide a pretext for gun control; and <http://gunowners.org/a7302012.html>, maintaining that if George Zimmerman were in the Aurora movie theatre, he would have stopped the shooter.

¹⁶ See pp. 23-28 *infra*.

¹⁷ See pp. 28-32 *infra*.

¹⁸ See pp. 33-36 *infra*.

The Supreme Court's recent foray into the arena of armed self-defense has, as the well-worn cliché would have it, opened more questions than it has answered. Indeed, *Heller* and *McDonald* actually answer very few questions concerning the scope of policy options permissible to national, state, and local legislatures and administrative bureaus.¹⁹ The holding in the two cases is that the Constitution protects “the individual right to possess and carry weapons in case of confrontation,”²⁰ but that this right is subject to “reasonable regulation.”²¹ The Court's binding legal instructions, then, are cast in very general terms. We know after *Heller* and *McDonald* that neither national nor state government may render it all but impossible for an individual to keep and have access in the home to an operational handgun of a sort commonly owned by the general public for purposes of self-defense.²² We know that the same restrictions apply against national legislative authority as apply against the states and municipalities.²³ And we know that, according to dicta uttered by Justice Scalia in *Heller* and echoed by Justice Alito in *McDonald*, laws relating to control and prohibition of unusual or particularly dangerous weapons, possession of weapons by convicted felons or the insane, and access to weapons in certain sensitive places such as schools and government buildings are presumptively unaffected by the constitutional right to arms.²⁴ But that is probably the full extent of our knowledge. Neither legislators, administrators, nor the general public have yet been instructed by the Supreme Court as to how the newly recognized constitutional right to armed self-defense impacts laws concerning:

¹⁹ Cf. Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703 (2012).

²⁰ *Heller*, 554 U.S. at 592; *McDonald*, 130 S.Ct. at 3050.

²¹ *Heller*, 554 U.S. at 625; *McDonald*, 130 S.Ct. at 3047.

²² *Heller*, 554 U.S. at 635; *McDonald*, 130 S.Ct. at 3050.

²³ *McDonald*, 130 S.Ct. 3050.

²⁴ *Heller*, 554 U.S. at 625; *McDonald*, 130 S.Ct. at 3047.

- 1) Carrying weapons outside the home,
- 2) Carrying weapons inside a vehicle,
- 3) Self-defense outside the home or in vehicles,
- 4) Limitations on the number of weapons individuals may own,
- 5) Waiting periods,
- 6) Conditioning gun ownership on psychological evaluation,
- 7) Inspections of weapons,
- 8) Taxation,
- 9) Sport shooting,
- 10) Hunting,
- 11) Gun collecting,
- 12) Licensure,
- 13) Registration,
- 14) Mandatory safety training,
- 15) Restrictions on gun ownership arguably analogous to but not directly within the categories of presumptively permissible regulations listed by Justices Scalia and Alito,
- 16) Weapons related to service in the lawfully established militia (there is some irony on this last point, all the more so in the light of the once respected rule of *United States v. Miller*).²⁵

²⁵ *United States v. Miller*, 307 U.S. 174 (1939), was the most important Supreme Court decision on the Second Amendment prior to *Heller*. *Miller* was distinguished and not overturned in *Heller*, but for decades constitutionalists and Courts of Appeal had agreed nearly unanimously that *Miller* restricted the Second Amendment right to weapons linked to service in the lawfully established militia. In *Miller*, Justice McReynolds wrote “In the absence of any evidence tending

In the nearly five years since the *Heller* decision, over 100 gun-rights-related cases have been docketed or decided in United States Courts of Appeals.²⁶ All of the questions listed above and others linking Second Amendment-related claims to other constitutional values such as freedom of expression²⁷ or freedom from unreasonable search and seizure²⁸ are now being litigated, and in the absence of particular instructions from the Supreme Court, federal and state courts have applied varying standards of review ranging from permissive²⁹ to differing iterations of intermediate scrutiny.³⁰ So far, however, only one post-*Heller* federal Court of Appeals case has upheld a right to arms based challenge to government action. The Seventh Circuit has issued a preliminary injunction against the City of Chicago, lifting a ban on firing ranges in the City of Chicago that rendered compliance with a hand gun licensing scheme requiring one hour of

to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.” *Id.* at 178.

²⁶ List on file with author. As of August, 2012, Federal Courts of Appeal have decided 101 cases involving post-*Heller* Second Amendment claims. *See also* Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1565 (2009) (“By January 15, 2009, lower federal courts had decided over seventy-five different cases challenging gun control laws under the Second Amendment.”).

²⁷ *Nordyke v King*, 664 F.3d 776, 793 (9th Cir. 2011) (Court rejects gun rights claim premised on expressive conduct doctrine under First Amendment); *cf.* Darrel A. H. Miller, *Guns as Smut; Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009)(exploring analogies between the Second Amendment right described in *Heller* and the First Amendment protected right to possess obscene materials in the home).

²⁸ *United States v. Derrick*, 2012 U.S. Dist. LEXIS 76540 (E.D. Pa. May 31, 2012).

²⁹ *See, e.g., United States v. Vongxay*, 594 F. 3d 1111, 1117 (9th Cir. 2010).

³⁰ *See, e.g., United States v. Williams*, 616 F.3d 685 (7th Cir. 2010) (upholding prohibition on convicted felon possession of firearms in 18 U.S.C. § 922(g) as substantially related to an important government interest); *United States v. Carter*, 669 F. 3d 411 (4th Cir. 2012) (upholding 18 U.S.C. 922 (g) as reasonably related to substantial government interest); *United States v. Decastro*, 682 F.3d 169 (2^d Cir. 2012) (holding that heightened scrutiny is triggered only where a regulation substantially burdens the Second Amendment right).

annual training burdensome, thereby vitiating the right to have a handgun to defend the home.³¹ In reaching its decision to enjoin the firing range ban, the Court noted that Second Amendment standards are still emerging, making it difficult for trial courts to apply the still largely undefined right with precision. In this light, understanding the theoretical underpinnings of the new right acquires considerable practical import. I would like to suggest that going forward there must be better alternatives than originalism, especially originalism premised on patently false history.

The Limits of Originalism

The original public meaning methodology expounded by the *Heller* and *McDonald* Court does not correlate well with the non-militia-linked right to armed private self-defense voted into life by a one justice majority in each case.³² The substantive right with which the Court was ultimately concerned—i.e. the right of individual persons to be armed in anticipation of the need to defend themselves against private aggression—was simply not discussed, or was discussed only marginally, when the young Republic took up the question of ratifying the Amendment.³³ Indeed, it is not far off the mark to reflect on two unrelated conversations that have little if any intersection. One conversation, spanning the years 1788-91, concerned principally the virtues of the universal militia and the dangers of standing armies, while a separate conversation, playing itself out in our own time, concerns the liberty of individuals to guard against the criminal element. It is more than passing strange that disputants in the second conversation should look

³¹ See *Ezell v. City of Chicago*, CA 7 (2012) at <http://caselaw.findlaw.com/us-7th-circuit/1573261.html>.

³² Cf. Winkler, *supra* note 26, noting that even though *Heller* has been hailed by some as a triumph of originalism, the decision actually rests on current popular understanding of the right to arms, and suggesting that this logical inconsistency actually strengthens the opinion by making it more relevant and more likely to endure.

³³ See detailed discussion in Chapters 9 and 10 below.

to the long gone participants in the first for validation and approval. Perhaps there is even a hint of the tragic-comedic when present political actors appeal to past authority, claiming involvement in a conversation that logically cannot become real.³⁴ And yet, as Professor Jamal Greene trenchantly argues, originalism is all too real to ignore, because it has political currency and appeal, and this insures it will to some measure shape law in a more or less democratic polity – or at least that it will do so as long as its political appeal endures.³⁵

Originalism may be a false philosophy,³⁶ yet it is anything but impotent. The tragedy of originalism then is of a different nature than Belshazzar’s appeal to gods of wood and iron or Canute’s imploring Wotan to command the North Sea to stand still. For a false god, originalism has a lot of clout. That power, though, has its limits. As deployed in contemporary constitutional politics, originalist methodology is more concerned about dressing up and justifying intuitions than offering enlightenment or informing normative vision. Not that “conversation” with the past need be a corrupt enterprise. Efforts to “read,” “discover,” “discover,” “uncover,” “deconstruct,” “reconstruct,” or “enter” the founding era past have yielded rich enlightenment in the textual explorations of many non-originalist historians of the

³⁴ For a series of essays on originalism as comedy and farce, see DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002).

³⁵ Jamal Greene, *Selling Originalism*, 97 *GEO. L.J.* 657 (2009).

³⁶ See, e.g., re. the dubious historical pretensions of original public meaning originalism, Saul Cornell, *The People’s Constitution vs. The Lawyer’s Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 *YALE J. OF L. AND HUMANITIES*, 295 (2011); Martin Flaherty, “*History Lite*” in *Modern American Constitutionalism*, 95 *COLUM. L. REV.* 523 (1995); Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 *CHI.-KENT L. REV.* 909 (1996). See, e.g., re. the shortcomings of original intent-based model of originalism largely supplanted by the original public meaning school, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. REV.* 204 (1980); Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 *HARV. L. REV.* 781 (1983); Michael Dorf & Lawrence Tribe, *Levels of Generality in the Definition of Rights*, 57 *U. CHI. L. REV.* 1057 (1990).

constitutional era.³⁷ To be meaningful and transformative, however, excursions into bygone worlds require modesty, effort, study, and perspective if they are not to end up bogged down in the banal and narcissistic projections of presentist voyeurs. There is a world of difference between the careful reconstructive archetechtonics of, say, Eric Slauter's *The State as a Work of Art*, in which now dead metaphors reanimate as powerful leitmotifs,³⁸ and *Heller*, in which cultural raiders swiftly pillage the usable past for artifacts whose significance they cannot accurately explain.³⁹

The Limits of Ancestor Worship

Apart from the problem of indeterminacy that bedevils original public meaning and original intent-based originalism alike, and the susceptibility of historical evidence to manipulation by advocates and results-oriented judges, and apart from normative questions associated with the dead hand of the democratically deficient past,⁴⁰ there remain telling prudential reasons not to adhere slavishly to policy preferences of bygone days, even when clever jurists manage to articulate avowedly “neutral reasons” for doing just that. At the risk of indelicacy, salient prudence-based reasons for shunning past practice focus on the problem that for those who accept the existence or even the possibility of human progress, the United States in

³⁷ See, e.g., ROBERT A. FERGUSON, *READING THE EARLY REPUBLIC* (2006); JAY FLIEGELMAN, *DECLARING INDEPENDENCE: JEFFERSON, NATURAL LANGUAGE, AND THE CULTURE OF PERFORMANCE* (1993); PETER S. ONUF, *JEFFERSON'S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD* (2000).

³⁸ ERIC SLAUTER, *THE STATE AS A WORK OF ART: THE CULTURAL ORIGINS OF THE CONSTITUTION* (2009).

³⁹ The image of “standard model” Second Amendment enthusiasts as historical raiders is developed with telling acumen in Jack N. Rakove, *The Second Amendment: The Highest State of Originalism*, 76 CHI-KENT L. REV. 103.

⁴⁰ For more on these ills, consult FARBER & SHERRY, *supra* note 34.

which the Constitution was framed was infinitely more barbarous than the United States of today.⁴¹ As Jefferson reflected nearly 200 years ago,

I am not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.⁴²

Jefferson appears to have contemplated less rigid adherence to the frozen norms of yesteryear than Justice Scalia had in mind in *Heller*. Of course, Justice Scalia's adherence to ancient values allegedly written into constitutional text is – at least nominally – conditional. As he wrote in his *United States v. Virginia* dissent "to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: they left us free to change."⁴³ But the claim that norms discovered in two hundred year old constitutional text are immune to charges associated with the dead hand of the past because they are subject to alteration by the amendment process is quite problematic. Writing that our fictive ancestors left "us" free to change presupposes that they had a capacity to bind "us" in the first place and that they might legitimately bind us not only to norms but to onerous procedures required to surmount those norms' deep entrenchment.

⁴¹ To contextualize the founding generation's fascination with barbarism, modernity, and human progress, consider J.G.A. POCOCK, *BARBARISM AND RELIGION* (6 vols. 1999-) (analyzing and situating EDWARD GIBBON'S *DECLINE AND FALL OF THE ROMAN EMPIRE* (1776)).

⁴² Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) (inscription at the Jefferson Memorial, Washington D.C.). As the letter to Kercheval suggests, Jefferson's characteristically enlightened faith in human progress endured well into the Age of Romanticism. Consider also the following admonition against unthinking devotion to the ways of the past: "When I contemplate the immense advances in science and discoveries in the arts which have been made within the period of my life, I look forward with confidence to equal advances by the present generation, and have no doubt they will consequently be as much wiser than we have been as we than our fathers were, and they than the burners of witches." Thomas Jefferson, Letter to Benjamin Waterhouse, 1818. PAUL LEICESTER FORD, *WRITINGS OF JEFFERSON, MANUSCRIPT EDITION*, 15:164.

⁴³ *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

Jefferson's remarks on the dubiousness of authority from barbarous times thus adumbrate a larger problem about originalism: The founders' intent about intent is anything but clear.⁴⁴ An original public meaning oriented originalist might glibly retort that intent is irrelevant (because the public meaning originalist says only original public meaning matters). Whatever the relevance of intent to modern constitutional understanding, it is not clear that the ratifying generation was any less skeptical about the normative capacity of their language to bind a future body politic in perpetuity than Jefferson was about the desirability of his generation visiting its political preferences on those not yet born.

Federalism and Democratic Experimentalism

Considerations of federalism and democratic experimentalism also caution against mapping out a future dependant on alleged original public understanding of a private right to arms.⁴⁵ In a federal system like that of the United States, with numerous jurisdictions with substantial legislative authority, the best way to maximize the happiness of the largest number of persons may well be to allow local legislatures to experiment in the fashion suggested by Louis Brandeis⁴⁶ and offer residents different packages of immunities, obligations, government services, and taxes. Those who cherish guns will naturally gravitate towards gun friendly

⁴⁴ See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HAR. L. REV. 885 (1985).

⁴⁵ On democratic experimentalism see generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

⁴⁶ "It is one of the happy incidents of a federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

jurisdictions, while those who believe public safety is better served by gun control will gravitate towards jurisdictions with substantial restrictions on gun ownership.⁴⁷

My preferred option rests on two premises. First, the Supreme Court's view that constitutional text mandates a strong right to guns even outside the context of service in the lawfully established militia is not (as Justices Scalia, Alito, and Thomas insist it is) dictated by the original public meaning of the constitutional text when it was ratified. In fact, as I explain in

⁴⁷ Pat Hubbard, my colleague at the University of South Carolina School of Law, has suggested a potentially serious reservation against the democratic experimentalism based argument that freedom of movement allows those who object to majority preferences to "vote with their feet" and move to another jurisdiction where majority preferences mirror their own. For Professor Hubbard, this argument is uncomfortably similar to the intolerant refrain of patriots during the era of the Vietnam War, who embraced the mantra "America – love it or leave it," and urged those who objected to the war to forsake their citizenship on grounds of ideological impurity. As Hubbard explains, leaving ones home is entirely too high a price to pay for the privilege of favoring policies not endorsed by the majority of voters in the jurisdiction. I counter that minority or officious individual veto of majority-favored policies is not without enormous social and utilitarian costs in its own right. When Officer Heller won his case, the results were hardly Pareto neutral, or even Kaldor Hicks efficient. The majority of District of Columbia residents were not rendered more happy and content by the decision, and arguably public safety (or at least majority favored policies respecting public safety) were adversely impacted as well.

Perhaps the most extreme variant of the voting with your feet modality of democratic-experimentalism is that espoused by the radical U.S. expat academic Jonathon Moses who argues that freedom of migration across international borders will maximize civic contentment allowing all of humanity to participate in a global market for packages of government policies, services, and protections, JONATHAN W. MOSES, *INTERNATIONAL MIGRATION: GLOBALISM'S LAST FRONTIER* (2006). I applaud Moses for being willing to pursue the principle to which he adheres to their ultimate limits. But when I heard him make the case for open borders at a plenary session of the European Association of American Studies Conference at the University of Oslo in 2008, the overwhelming sense among Northern hemisphere academics and policy makers attending seemed to be the severe free rider problems associated with immigrants seeking out advantageous benefit plans that they had not helped finance through a life-time of taxation would doom a world wide open borders strategy to the same sort of race to the bottom difficulties that vexed the United States in the early twentieth century prior to the establishment of the modern American regulatory state during the New Deal. My more modest argument respecting the Second Amendment does not concern social and economic rights that require financing by means of onerous taxes. Unlike Moses' scheme, offering U.S. citizens different packages of gun control in different jurisdictions is unlikely to lead to chaos and free-riding.

detail below,⁴⁸ the original public meaning of the Second Amendment did not extend to arms possession outside the context of militia service at all, and, according to the careful quantitative research of historian Nathan Kozuskanich, well over ninety-five percent of uses of the phrase “bear arms” and its cognates surviving in pamphlets, journals, books, and recorded legislative debates in late colonial British North American and in the early Republic unambiguously refer to militia service or military duty.⁴⁹ Second, *contra* to many strong libertarians, I do not assume that Pareto optimality is the touchstone of all legitimate government action. According to Pareto, no government action is justified that leaves any single person worse off than he or she was before the government intervention.⁵⁰ Thus, redistributive taxes would be illegitimate, because many wealthy persons object to paying higher taxes than poor persons. But Pareto optimality is too harsh a standard. It is in fact an injunction against virtually all governmental action. To take an extreme example, the Thirteenth Amendment is not Pareto optimal, because some plantation owners were unhappy after abolition of slavery. Unlike strict disciples of Pareto, my general sense is that majority preferences can in many instances be legitimately enforced against a dissenting minority. Federalism and Brandeisian experimentalism provide one safeguard against majority abuses. After all, when it comes to guns, we can be fairly confident that a great many states in the U.S. will opt for permissive rules in the foreseeable future. Many people (including of course Justices Scalia, Alito, and Thomas) believe that judicial enforcement of the Second Amendment provides another essential security. I read the text of the Constitution differently,

⁴⁸ See Chapters 8 & 9, comprising Merkel, *The District of Columbia v. Heller and Antonin Scalia’s Perverse Sense of Originalism*, 13 LEWIS & CLARK L. R. 349 (2009), and Merkel, *Heller as Hubris and How McDonald v. City of Chicago May Well Change the Constitutional World as We Know It*, 50 SANTA CLARA L. REV. 1221 (2010).

⁴⁹ Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms*, 29 J. EARLY REPUBLIC 585, 587 (2009).

⁵⁰ See Richard Posner, *ECONOMIC ANALYSIS OF THE LAW*, 16-20 (8th ed. 2011).

and I am convinced that most individuals would have shared my view when the text was enacted and ratified.

Alleged plain meaning and original public understanding of constitutional text are not the only plausible claims in favor of allowing what Alexander Bickel called counter-majoritarian intervention by the judiciary.⁵¹ Before the rise of originalism, public choice theory as reflected in the work of John Hart Ely⁵² and still more famously in *Carolene Products Footnote Four*⁵³ set out three criteria under which the normal default rule protecting legislative preferences against judicial intervention might yield. The first paragraph of then Justice Stone's famous Footnote invoked express prohibitions in constitutional text, the second paragraph spoke of unworkable impasses in the political process created by the corrupting influence of entrenched and unyielding power, and the third paragraph most famously of all described the case of discreet and insular minorities who might be targets of deliberate majority abuse. If I am right about the text of the Second Amendment, the judicially created right to arms clearly falls outside Paragraph One of *Carolene Products Footnote Four*, because the text concerns only arms bearing in the militia. I am very much inclined to think that Paragraph Two of Footnote Four is likewise inadmissible as a special claim for judicial intervention on behalf of gun rights, because if anything, gun advocates have succeeded in rigging the local, state, and national political processes against gun control legislation.⁵⁴ Paragraph Three may have some purchase on the local level in cosmopolitan urban settings, but it is by no means clear to me that officious

⁵¹ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

⁵² JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

⁵³ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

⁵⁴ *See, e.g.*, Sari Horwitz & James V. Grimaldi, *NRA-led Gun Lobby Wields Powerful Influence Over ATF*, WASH. POST, Dec. 15, 2010, but one installment of a long series of pieces by Horwitz and Grimaldi exploring the influence of the NRA in Washington.

intermeddlers from Montana or Alabama should enjoy veto power by judicial proxy over the decisions of elected legislatures in New York City or Chicago.⁵⁵ When it comes to gun rights on the national plane, the Third Paragraph seems wholly inapplicable, seeing as gun enthusiasts are probably not a minority at all, they are certainly not discreet and insular, and thanks to Brandeisian experimentalism, they are always free to leave San Francisco or D.C. for more congenial climes.

Another migration-related consideration (this one invoking Jonathan Moses' global variation of Brandeisian experimentalism⁵⁶) gives me pause respecting the Supreme Court's recent fabrication of a private right to weapons possession and its incorporation against the states. As far as I know, a right to weapons possession is not considered fundamental in any legal system outside the United States. I do not know of any international human rights instrument or any constitution in another society with a well-developed system of justice that protects a right to guns. This causes me to wonder whether the right in question is really fundamental in character. Perhaps it is merely an American idiosyncrasy. That said, the right to self-defense, particularly the right to self-defense in contexts where government cannot or does not protect individuals claiming the right, is acknowledged around the world.⁵⁷ This realization

⁵⁵ The problematic character of single person veto over policies favored by the majority is illustrated most poignantly in the case of eighteenth century Poland, where every aristocrat in the numerous hereditary upper house enjoyed the "liberum veto," i.e. the capacity to block policy favored by the majority in both houses and the executive. This rendered Poland incapable of responding to foreign aggression, leading ultimately to the state's partition, annexation, and disappearance. See <http://krugman.blogs.nytimes.com/2010/02/05/the-senate-becomes-a-polish-joke/> (Paul Krugman op ed. exploring contemporary parallels) and NORMAN DAVIES, *GOD'S PLAYGROUND: A HISTORY OF POLAND: VOL. 1 TO 1795* (1979) (leading English language study of eighteenth century Polish political history).

⁵⁶ See MOSES, *supra* note 47.

⁵⁷ In public international law, serious comparative reflection on the nature of self-defense in different municipal legal systems goes back at least to the time of the Suez Crisis, when D.W. Bowett developed the claim that an international legal right to (collective) self-defense

likewise causes me to think that it might be more sensible to discuss self-defense on its own merits even in our own country, rather than treat it as a legacy of constitutional language addressed to a militia system the nation abandoned long ago.

Insights from the Law of War

I have argued that originalism offers inadequate normative guidance respecting the meaning of the right to self-defense in contemporary American law in large part because there is little substantive overlap between the founding era conversation respecting the meaning of the Second Amendment and current debates concerning the right to self-defense. There is however a very substantial body of contemporary legal discourse that yields rich insights, attracts powerful contributions from around the world, and overlaps in substance to a very large degree with contemporary American concerns regarding self-defense as a fundamental right under municipal law. This body of law is *jus ad bellum*, the international law governing the initial application of force that may or may not engender armed conflict.⁵⁸

As long ago as the Caroline Dispute of 1837-1842, involving British use of force against a ship used by American soldiers of fortune to assist insurgents in Canada, U.S. Secretary of State Daniel Webster and British Minister to the United States Lord Ashburton were able to agree

(including anticipatory self-defense) was inherent in the general principles of international law because a municipal analogue existed in legal systems around the world. *See* D. W. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* (1958) (expanding arguments first set out in the *British Year Book of International Law* in 1955/56).

⁵⁸ The municipal analogy, exploring self-defense under the law of armed conflict and self-defense in municipal law under to the same principles of analytic jurisprudence is developed powerfully in GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL – VOLUME ONE: FOUNDATIONS* (2007) and GEORGE P. FLETCHER AND JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* (2008).

on the basic analytic outlines of justified self-defense in international law.⁵⁹ The jurisprudence of the International Court of Justice has added precision and gloss (and at times, some confusion) to the legal regime explaining when defensive force is justified. A state's lawful resort to defense force must target an actual armed attack, and that attack must rise to the level of being "significant."⁶⁰ Whether the use of defensive force against an imminent but not yet executed attack is legal is hotly debated;⁶¹ the Bush Doctrine purporting to justify the use of force against mere potential (but not imminent) threats has been almost universally repudiated.⁶² The Court itself has never embraced the right to defend against anything other than an actual attack. To act lawfully, the defending state must use force against the party responsible for the attack.⁶³ Finally

⁵⁹ John E. Noyes, "The Caroline: International Law Limits on Resort to Force," in *INTERNATIONAL LAW STORIES* 263 (John E. Noyes, Laura Dickinson & Mark W. Janis eds., 2007).

⁶⁰ *Cf.* The Corfu Channel Case (U.K. v. Alb.) 1949 I.C.J. 4, 29-35 (Dec. 15) (U.K. use of naval force to clear mines unlawful since the deployment did not serve the purpose of defending against an armed attack) *and* The Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.), 1986 I.C.J. 14 (June 27) (Nicaragua's sending of assistance to El Salvadoran rebels in the form of weapons and logistical support not a significant armed attack justifying the use of defense force by the intervening United States) .

⁶¹ ANTONIO CASSESE, *INTERNATIONAL LAW*, 357-363 (2d ed. 2005). The I.C.J. has never expressly endorsed anticipatory self-defense, but state practice and publicists go both ways. I find a terminological distinction between anticipatory self-defense against an imminent attack (consider Lord Ashburton's formulation of instant and overwhelming necessity or the situation of Israel in 1967 when combined Egyptian/Syrian armies massed on the borders and President Nasser announced his intention to destroy Israel) and preemptive self-defense (consider the Bush doctrine purporting to justify strikes against potential threats) cogent and useful. State practice suggests that at least some acts of anticipatory self-defense are not viewed as illegal. In contrast, Bush Doctrine style preemptive self-defense has been endorsed by no authorities outside the United States.

⁶² W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525 (2006).

⁶³ *Oil Platforms (Iran v. U.S.)* 2003 I.C.J. 161 (Nov. 6) (U.S. strikes on Iranian oil platforms unlawful where it was unclear whether prior attacks were carried out by Iranian or Iraqi forces), *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004 I.C.J. 136 (July 9). The controversial advisory opinion on the Wall has been read by some commentators including Professors George Fletcher and Jens Ohlin to permit the use of defensive force only against attacks by states, but if this is what the

and crucially, the defending state's use of force must be necessary to repulse an actual attack, and it must be proportional in the sense of not exceeding the level of force required to effectively defend against that attack.⁶⁴

The I.C.J. is the principal judicial organ of the U.N., and its opinions on the use of force draw heavily on two specific provisions of the U.N. Charter, Article 2(4) prohibiting “the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations” and Article 51 preserving “the inherent right of individual or collective self-defense if an armed attack occurs.” However there is nothing in the I.C.J.'s jurisprudence to suggest that the normative content of the law of self-defense is depends primarily on the Charter text. In fact, the Nicaragua Case, perhaps the I.C.J.'s most important decision on the use of force and the scope of lawful (collective) self-defense, relied on customary international law, not the U.N. Charter.⁶⁵ It is fair to say then that the

I.C.J. intended, the opinion in the Wall is inconsistent with prior opinions (Case Concerning Military and Paramilitary Activities) and reason. Professor Mary Ellen O'Connell argues that the advisory opinion only speaks to the legitimate use of defensive force under the U.N. Charter, holding out the possibility that Israel might legally defend against non-state actors as long as the legal basis for that action is something other than the U.N. Charter – perhaps jus cogens, customary international law, natural law, or general principles of law. But since Article 51 speaks to the inherent right of self-defense, a more natural assumption is that the Charter provision on the use of defensive force merely incorporates existing international law, in which case O'Connell's position becomes incoherent and the advisory opinion indefensible.

⁶⁴ Oil Platforms (U.S. destruction of Iranian platforms neither necessary to defend against any attack or proportionate to the threat of imminent attack in the form of further missile launches), Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) 1966 I.C.J. 266 (July 8) (Use or threat of use of nuclear weapons exceedingly unlikely to satisfy necessity and proportionality requirements except in extreme case where survival of a state or people threatened).

⁶⁵ The Vandenberg Amendment, attached by the United States Senate as a reservation to the Declaration acknowledging the compulsory ipso facto jurisdiction of the I.C.J., precluded the Court from taking cases involving the U.S. where legal issues to be decided depended on construction of a multi-lateral treaty (including the U.N. Charter) unless all states parties to the treaty affected by the case were joined as parties. The U.S. argued that its use of force against Nicaragua was justifiable as an exercise of collective self-defense on behalf of El Salvador,

I.C.J.'s jurisprudence of self-defense does far more than parse the text of the Charter, it draws also on customary international law and general principles of law to flush out the elements and contours of the international right to legitimate self-defense.

It is precisely these insights from general principles of law and customary international law that I argue offer a principled alternative to originalism for those seeking to develop the newly acknowledged constitutional right to self-defense and apply it to pressing contemporary problems under municipal law.⁶⁶ In this light, it is particularly worth noting that the legal principle that states have a right to self-defense implies that states have a right to be armed. Indeed Alfred Verdross, the earliest expositor of the foundational principle of modern international law that jus cogens rules may not yield to competing rules of lesser normative value, used treaties rendering a state unable to defend itself as a principal illustrative example of a rule-making forbidden by jus cogens.⁶⁷ But to say states may be armed is hardly to say that they have an unlimited and immutable right to weaponry. As the I.C.J.'s Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons reminds us, it has been a fundamental principle of Hague law for a century that the capacity to inflict suffering on an attacker or the

Honduras, and Costa Rica. Since the latter three states were not parties to the case, issues under the Charter were not opposable against the U.S. The Court decided the merits based on customary international law regarding the use of force, citing the U.N. Charter provisions on the use of force as evidence of customary international law. The U.S. withdrew its Declaration recognizing the compulsory ipso facto jurisdiction of the I.C.J. to highlight its objections to the Court's decision in the jurisdictional phase of the case prior to the decision on the merits.

⁶⁶ Resort to foreign and international materials in the context of deciding U.S. cases is itself the subject of famous controversy among the justices of the Supreme Court. It is perhaps not surprising that those committed to originalism are most hostile to consideration of non-U.S. sources, even for purposes of developing general principles of law already inherent in American jurisprudence. See, e.g., Antonin Scalia and Stephen Breyer, *A Conversation Between U.S. Supreme Court Justices*, 3 INT'L J. CONST. L. 519 (2005).

⁶⁷ Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571 (1937). Verdross path-breaking article has an interesting double-edged quality in that it can be easily read to delegitimize both the punitive aspects of the Versailles Treaty and looming Nazi aggression against Austria and Czechoslovakia.

enemy is not unlimited.⁶⁸ In the Hague Conventions of 1899 and 1907 states consented to the first modern arms control limitations, and the global arms control regime now extends beyond bans on poison gases and exploding bullets to prohibitions and limitations respecting nuclear weapons, biological weapons, chemical weapons, landmines, and cluster munitions.⁶⁹ To pursue the municipal analogy back to its foundations, consenting to these limitations reflects in real terms the same calculus among states that Hobbes, Locke, and Blackstone attribute to individuals at the formation of the social contract, that is, a decision to accept binding and enforceable limitations on the capacity to use force in order to promote individual and collective security.

Reflections on Drones and the Comments of Attorney General Eric Holder and President Carter

Reflecting on the most salient question currently confronting the United States under the international law of self-defense suggests provisional insights that might help us constructively rethink debates about the limits of self-defense under American municipal law brought to prominence by George Zimmerman's shooting of Trayvon Martin. Let me begin with some observations concerning the use of drones against Al Qaeda operatives.

The deployment of unmanned drones for purposes (depending on one's perspective) of precise military strikes or targeted assassinations⁷⁰ has generated enormous controversy

⁶⁸ Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), 1996 I.C.J. 226 (July 8).

⁶⁹ See generally MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE: CASES AND MATERIALS, 665-720 (2d ed. 2009).

⁷⁰ The controversy surrounding targeted assassination in the context of the War on Terror extends well beyond issues directly tied to the use of drones. A new book by a pseudonymous author claiming to be a Navy Seal involved in the U.S. military raid that killed Osama Bin Laden

worldwide controversy during the Obama presidency.⁷¹ In particular, Attorney General Eric Holder's defense of drone attacks on terrorist targets in his speech on the national security policy of the United States delivered at Northwestern University on March 5, 2012 has provoked heated debate.⁷² Those whose sense of nationalism easily flares into febrile patriotic ire have expressed singular outrage at governmental policies targeting U.S. citizens for assassination. In many instances, the underlying intuitive assumption of those offended by the Attorney General's remarks appears to be that good government may do what it wishes to others, but it may not kill citizens except by lawful execution—by which means it may kill them in abundance. But less jingoistic and violence prone thinkers have also condemned Holder's remarks, and it is likely the

in Abbottabad, Pakistan holds out that the object of the mission was assassination, and that there were no plans to attempt to arrest or take Bin Laden prisoner. *See* MARK OWEN, *NO EASY DAY* (2012).

⁷¹ Commentary and analysis—whether popular, political, and academic—on drone strikes, and more broadly, targeted assassinations, is voluminous. *See, e.g.*, The Public Committee Against Torture in Israel & Palestinian Society for the Protection of Human Rights and the Environment v Government of Israel & Others (Supreme Court of Israel: Dec. 11, 2005); David Kretzmer, *Targeted Killings of Suspected Terrorists: Extra-Judicial executions or Legitimate Means of Self-Defence?*, 16 EUR. J. INT'L L. 171 (2005); Richard Murphy & Asheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405 (2009); Speech of Harold Hongju Koh, Legal Adviser of U.S. Dept. of State, Address to the Annual Meeting of the American Society of International Law, Washington D.C., Mar. 25, 2010; Report of the Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings* (UN Doc. A/HRC/14/14/Add. 6), May 28, 2010; Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, Notre Dame Law School Legal Studies Research Paper No. 09-43 (July 2010); Robert Chesney, *Who May Be Killed? Anwar al-Awlaki As A Case Study in the International Legal Regulation of Legal Force*, 13 Y.B. INT'L HUM. L. 3 (2010); Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HAR. NAT'L SEC. J. 145 (2010); Kenneth Anderson, "Targeted Killing and Drone Warfare: How We Came to Debate Whether there Is 'A Legal Geography of War'," Washington College of Law Research Paper No. 2011-16; John C. Dehn & Kevin Jon Heller, *Targeted Killing: The Case of Anwar al-Aulaqi*, 159 U. PENN. L. REV. PENNUmbra 175 (2011); Tara Mckelvey, *Inside the Killing Machine*, NEWSWEEK, Feb. 13, 2011; Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill A Citizen*, N.Y. TIMES, October 8, 2011; David Cole, *Killing Citizens in Secret*, New York Review of Books Blog, Oct. 9, 2011; *Justifying the Killing of An American*, N.Y. TIMES, Oct. 11, 2011; David Cole, *Killing Our Citizens Without Trial*, New York Review of Books, Nov. 24, 2011; *The Power to Kill*, N.Y. TIMES, March 10, 2012.

⁷² *See* <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>

national security strategy outlined by the Attorney General as much as the long train of abuses at Guantanamo that sparked President Carter's New York Times op ed condemning the Obama Administration for continuing the dismal system of human rights violations first set in motion by a subcabinet Torture Team during the George W. Bush's first term.⁷³

President Carter is of course correct that by the standards of international human rights and procedural fairness in criminal prosecution, targeted assassination is barbarous and wholly indefensible. But everything depends on the selection of governing paradigm. The claim that under the law of armed conflict necessary and proportionate force (including lethal force) may be used to prevent an imminent armed attack or thwart an ongoing attack by an actor who happens to be a citizen is not terribly shocking. It is in fact an entirely orthodox understanding of the jus ad bellum as articulated as long ago as the Caroline Affair. Admittedly, contemporary authorities are split on the legality of anticipatory self-defense in the case of an attack that is imminent but not yet actual, but since 1967 at least the trend among publicists and in state practice has been towards acknowledging the rightfulness of acting once an aggressor is poised to launch an imminent strike. And for present purposes, it is not analytically necessary to premise a coherent argument in favor of the use of defense force against Al Qaeda on the imminence of any future attacks, for Al Qaeda openly acknowledges that it has attacked the U.S. and that its conflict against the U.S. continues unabated. If a state of armed conflict continues to exist between the U.S. and Al Qaeda, then members of Al Qaeda, U.S. nationals included, are presumably not civilians but legitimate military targets of the U.S. subject to the restrictions

⁷³ Jimmy Carter's New York Times op ed "A Cruel and Unusual Record" appeared June 24, 2012 and is available at http://www.nytimes.com/2012/06/25/opinion/americas-shameful-human-rights-record.html?_r=4. On the Bush era origins of the policies Carter critiques see PHILIPPE SANDS, *LAWLESS WORLD: THE WHISTLE-BLOWING ACCOUNT OF HOW BUSH AND BLAIR ARE TAKING THE LAW INTO THEIR OWN HANDS*(2005) and PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES* (2008).

imposed by the jus in bello as elucidated by the Attorney General. In other words, if armed conflict exists, the U.S. may target Al Qaeda members whether or not they are attacking or about to attack the U.S. or U.S. nationals.

That said, several things disturb me profoundly about the Attorney General's comments at Northwestern. First, there is the assumption that the Fifth Amendment applies only or principally to US citizens, which makes no sense textually, since the rights it protects are those of "persons."⁷⁴ If text does not support limiting the Fifth Amendment to citizens, what does? Is it suspicious that "Americans" form a master race, or that "non Americans," in words that might come from Chief Justice Taney in *Dred Scott*, have no rights that the US government is bound to respect? Secondly, I wonder what purpose other than pandering to jingoists is served by extraneous invocations of originalism. What the founding fathers thought about the applicability of the law of armed conflict to US action against US citizens is not obviously relevant, but rather more obviously something about which Holder does not know very much. Finally, there is (especially towards the end) a nod to American exceptionalism, which likewise serves no legally

⁷⁴ Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), where Chief Justice Rehnquist reasoned that the Fourth Amendment did not apply to the warrantless seizure of evidence found in the home of a Mexican national in Mexico by U.S. agents, since the Fourth Amendment protects the "right of the people" of the United States. This reasoning was rejected in vigorous dissents by Justice Brennan (joined by Justice Marshall) and Justice Blackmun, who maintained that constitutional restraints on governmental abuse apply to all action by U.S. and state officers anywhere in the world. This universal and non-racist approach to judicial enforcement of individual rights echoed Justice Murphy's classic dissent in *Yamashita v. Styer*, 327 U.S. 1, 66 (1946). Chief Justice Rehnquist's reliance on the Fourth Amendment's textual linkage to "people" suggests that the Fifth and Fourteenth Amendments rights of persons may apply globally against abuse by U.S. and state governmental actors, while the Second Amendment guarantee, like the Fourth, applies only in favor of "the people" of the United States. This line of reasoning leads to incongruous consequences respecting the constitutional right to arms, which under might *Verdugo Urquidez* could protect non-U.S. nationals against abuse by state governmental actors since by the terms of the Due Process Clause of the Fourteenth Amendment it is incorporated in favor of any "person," but leave non-U.S. citizens unprotected from abuse by federal actors, since the Second Amendment right applies directly in favor of "the people."

analytic purpose, and which I am also inclined to write off to pandering. But I will say this: In accepting the binding and outcome determinative character of international law, Holder has conceded much more than his predecessors in the Bush administration would have been likely to do, and on that score at least, the speech represents a salubrious development.⁷⁵ Still, as George Fletcher pointed out a decade ago in the immediate aftermath of September 11, the U.S. government's blending of the law enforcement and armed conflict legal regimes not only leads to analytically unclear thinking, but easily promotes miscarriages of justice and warping of norms that may have pernicious consequences in other contexts as well.⁷⁶ One could say much the same about the government's assumption that there is a watered down version of the Constitution that applies in wartime respecting U.S. governmental action against non-citizens. This is not the written Constitution with which I am familiar. It is, to draw on Justice Jackson's cautionary admonitions in his dissent in *Korematsu*, a shadow constitution that paves the way for executive primacy that left unchecked will grow into tyranny.⁷⁷ The abusive powers kindly governmental actors wield against bad people today will form precedents for less kindly governmental actors to employ against less bad (and less foreign) persons tomorrow.⁷⁸

⁷⁵ Consider by way of contrast the stance of John R. Bolton, United States Ambassador to the United Nations from 2005-2006, whose open hostility to international law was so severe that he routinely placed the phrase itself in quotation marks to signify his contempt. *See, e.g.*, John R. Bolton, *Clinton Meets "International Law" in Kosovo*, WALL ST. J., April 5, 1999 at A23. Many internationalists look forward to the day Bolton meets "international criminal law" in The Hague.

⁷⁶ *See, e.g.*, <http://www.lawandsecurity.org/Portals/0/Documents/Quarterly/spring04.pdf>, and in particular the ongoing debate between Professor Fletcher and Professor Ruth Wedgwood of Johns Hopkins on the legality of the U.S. war against Iraq and the importance of clear analytic distinction between the war and criminal justice paradigms in assessing the legality of various measures in the so called War on Terror.

⁷⁷ *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Jackson, J., dissenting).

⁷⁸ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 629 (Douglas, J., concurring).

Reflections on The Trayvon Martin Case and the Barbarism of Sea Slugs

Populists on the right bewail the government's targeted assassination of U.S. citizens. It does not seem matter to them, that under the law of war, the lethal application of government force to an Al Qaeda fighter of U.S. nationality is analytically indistinguishable from Union targeting of Confederate forces during the Civil War. Or, less charitably, it is perhaps the very applicability of that analogy that saps government action of legitimacy in the eyes of some radical antinomian populists. For some, there is with the possible exception of the New Deal no clearer paradigmatic case of the federal government going too far than its forceful suppression of the War of Rebellion between April, 1861 and May, 1865.⁷⁹ Perhaps I should not use the phrase "going too far." There is an ascendant strain in American libertarian thought that would hold any governmental action illegitimate precisely because it is governmental in character.

But populists lament not only the government's application of force. They seem to resent even more the government's interference with private applications of force. Enter George Zimmerman, or, more to the point, many of his defenders, and champions of Stand Your Ground laws and citizen arrest statutes. Max Weber's famous aphorism that the government has a monopoly on the legitimate use of force⁸⁰ may not command majority assent in contemporary America. Stand Your Ground laws, citizen arrest statutes, and the evisceration of the common law rule that the exercise lawful self-defense required the actor to retreat to a wall or ditch,

⁷⁹ See Daniel Feller, *Libertarians in the Attic, or A Tale of Two Narratives*, 32 *REVIEWS IN AMERICAN HISTORY* 184 (2004), reviewing pseudo-historical and propagandistic neo-Confederate writings, and TONY HORWITZ, *CONFEDERATES IN THE ATTIC: DISPATCHES FROM THE UNFINISHED CIVIL WAR* (1999), a perhaps far too sympathetic memoir of a well known journalist's year-long journey among the unreconstructed.

⁸⁰ Max Weber, *Politics as a Vocation*, Lecture to the Free Students Union of Munich University (January 1919) (available at <http://www.sscnet.ucla.edu/polisci/ethos/Weber-vocation.pdf>). In Weber's words "Today, however, we have to say that a state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory." (translated from the German).

bespeak an antinomian reversion to first principles and a severe fraying of the social fabric. It is one thing to acknowledge that the police cannot be everywhere to defend the populace, and that it might not be desirable to live in a state where government agents were sufficiently numerous and officious to be just about everywhere to respond in case of emergency real or contrived.

This suggests private self-defense as a fall back option. It is another to prefer the state of nature as a matter of course, and private self-defense as the governing paradigm of human relations.⁸¹

To return to the analogy between municipal and international law, the question is whether Article 51 presents an exception to Article 2(4) or whether it swallows Article 2(4) and the international order of which it is a principal bulwark whole.

The vigilante figures prominently in popular fantasy, and, perhaps, though the facts in the public sphere are very murky indeed, in George Zimmerman's fantastical self-image.⁸²

Deciphering the complex events leading to the death of Trayvon Martin requires hard work and measured judgment. So does sorting through the Florida Stand Your Ground Law and the small number of Florida Supreme Court cases offering guidance as to its meaning, and the perhaps conflicting commands of Florida's generally applicable self-defense statute partially supplanted

⁸¹ In extremis, this world is quite literally barbarous, or even subhuman. An analogy from discourse concerning the law of nations is instructive. Consider the noted literary critic Edmund Wilson's musings on resort to armed conflict absent a coherent *jus ad bellum*: "In a recent . . . film showing life at the bottom of the sea, a primitive organism called a sea slug is seen gobbling up small organisms through a large orifice at the end of its body; confronted with another sea slug of an only slightly lesser size, it ingurgiates that, too. Now the wars fought by human beings are stimulated as a rule . . . by the same instincts as the voracity of the sea slug." Quoted in MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS*, 60 (4th ed. 2006).

⁸² In a different factual and statutory context, an eerily similar case captured the nation's imagination in the 1980s when "subway vigilante" Bernard Goetz acted in anticipation of an expected attack and shot four youths who appeared menacing. Like the shooting of Trayvon Martin, the Bernard Goetz case was racially inflected on the ground, in the media, and in the popular imagination. See GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNARD GOETZ AND THE LAW ON TRIAL* (1990).

by the Stand Your Ground Law.⁸³ Read together, the statutes and the limited body of related Florida Supreme Court case law establish an incompletely theorized set of rules respecting partial and conditional forfeiture of the right to self-defense by initial aggressors.⁸⁴ While parts of the Florida Code originate in the Model Penal Code, Florida criminal law in its current state is

⁸³ The “Stand Your Ground Law,” FLA. CODE ANN. § 776.013(3), states “A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself.” FLA. CODE ANN. § 776.041(2) provides “The justification [of self-defense] is not available to a person who . . . initially provokes the use of force against himself or herself.”

⁸⁴ The theoretical importance of distinguishing between claims to exercise defensive force asserted by someone defending the status quo, on the one hand, and an initial aggressor who has unsettled a previously existing state of affairs on the other, is famously associated with Immanuel Kant’s analysis of the case of a shipwrecked sailor attempting to dislodge another sailor from a floating plank that will support only one man. *See* discussion in FLETCHER, GRAMMAR OF CRIMINAL LAW, *supra* note 58 at 49-55. By contrast to the muddled state of affairs under Florida law, consider the more highly theorized account in the German Federal Court’s (BGH) appellate decision of November 22, 2000 – 3 StR 331/00 reported in *Juristenzeitung* 2001, 664, with accompanying commentary by Professor Claus Roxin (author’s translation on file and available for consultation). The case involves the question of whether lethal force was justifiable self-defense in the case of a would-be assailant who found the tables turned against him. The initial aggressor, intending revenge for injuries suffered in an earlier incident, arranged an illegal cigarette smuggling deal with the eventual victim as a pretext for luring him into a forest so that he could be shot. When the eventual victim realized that the initial aggressor intended to assault him, the victim struck the aggressor with a club before the aggressor had a chance to pull out his weapon. At this point, the victim formed the resolution to kill the aggressor by means of a further club strike. The aggressor defended himself by discharging a lethal double-barreled shotgun blast into the victim. Thus, the aggressor entered the stage intending criminal assault. He ultimately acted with defensive force. The Appellate Court ruled that on these facts, the aggressor was guilty of criminally negligent homicide, because he could have foreseen that the use of deadly force might become necessary to defend his own life as a result of his contemplated assault. Professor Roxin disagreed, reasoning that “a provocateur surprised by a life-threatening attack should not be left defenseless. In the first place, the interests of the attacked person take precedence, as his life must be valued more highly than the readily understandable desire for retaliation on the part of the attacker. Secondly, if the State did not offer adequate protection against private acts of revenge, it would foster lynch law, which runs counter to the purposes of the criminal law. Admittedly, in cases of severe provocation, every other means to extricate oneself from the attack without injury, including even acceptance of definable risks, must be ruled out [before the resort to deadly force is justified.]” Professor Roxin would have acquitted on homicide and convicted for attempted grievous bodily harm.

not a theoretically coherent in the continental European sense, with a General Part and a Special Part, few inconsistencies, and overarching conceptual purposes. The Stand Your Ground Law is one of many appendages cobbled on to a doctrinal body that consists to a significant degree of accretions, relics, exceptions, vestiges, and sops to animated constituencies.

I do not mean to disparage lawmaking by democratic means, or even to suggest that law in the United States is deficient in that statutes and codes originate in legislative committees and in the work of lobbyists rather than in the work of academic philosophers appointed by a Napoleon or Bismarck. Indeed, I argue throughout the thesis that some burden rests on courts to explain with especial cogency their decisions unsettling the policies written into law by democratically accountable agents. But in this country, high courts have never shied away from theoretical reflection. Even Oliver Wendell Holmes' aphorism that the common law is a reflection of experience reflects a high level of theoretical abstraction and a detached, studied, systematic, perspective.⁸⁵ In that spirit, the Supreme Court of the United States might have done better than recognize a constitutional right to self-defense based on historical fantasy. And the Supreme Court of Florida, when it reviews the Stand Your Ground Law, would be well served to avoid consulting Anglo-Floridian origin myths embodied in the aggressively genocidal ghosts of Andrew Jackson and William Worth about the scope of legitimate self-defense.⁸⁶ It appears to me far more cogent to reflect, once facts are settled to the degree that the evidence admits, on

⁸⁵ OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

⁸⁶ Jackson, rightly or wrongly, is widely "credited" with originating the genocidal observation that "the only good Indian is a dead Indian." As a rogue General, he conquered Spanish Florida and offered it to the United States for annexation; as President, his signature helped make the Indian Removal Act of 1830 law. Worth pursued liquidation policies during the Seminole War that "pacified" peninsular Florida and opened it to Anglo-American settlement. See RUSSELL WEIGLEY, *HISTORY OF THE UNITED STATES ARMY*, 137-138, 162-63 (1984); BEN KIERNAN: *BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR*, 330-34 (2007).

whether George Zimmerman acted preemptively, or in anticipatory self-defense, or in actual self-defense, and whether his conduct and relevant provisions of the Florida Code are consistent with coherent criteria for delimiting the boundary between impermissible preemptive assassination and permissible, necessary, proportionate self-defense against an actual (or imminent?) attack. These inquiries are not the stuff of originalism, but of general principles of law gleaned from comparative study and analytic reflection.

The Way Forward

Admittedly, to a hard-headed observer, there may seem little realistic chance that the Supreme Court of the United States or a high court in one of the several states stands poised to cast off parochial reflections on allegedly exceptional American origins in favor of investigations into transnational principles of justice any time soon. In the context of the politically freighted issues of self-defense, gun control, and individual reliance on a Weberian public order, there is every reason to expect American jurists – who seldom swing too far from popular opinion – will remain beholden to popular beliefs in American exceptionalism and the continuing allure of foundation mythology. After all, when Justices Breyer and Scalia meet on the lecture circuit to rejoin the debate over the legitimacy of judicial consultation of foreign and international sources, even Justice Breyer suggests only occasional and modest borrowings from persuasive but not binding transnational sources.⁸⁷ In the sober words of Jeremy Waldron, “[w]e do not live in an age in which uttering magic words like “ius gentium” is sufficient to license the practice of

⁸⁷ See Stephen Breyer and Antonin Scalia, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519 (2005).

basing American legal conclusions on non-American premises.”⁸⁸ And yet, on closer reflection, it may be that this most charged of political arenas pitting the antinomian and anarchic champions of an unbridled right to armed self-defense against the statist rear guard urging measured restrictions on resort to force and access to arms is the ideal forum in which to push serious judicial forays towards internationally inflected principles-based analysis of conflicts and claims. I suggest two reasons for this counterintuitive nod in an optimistic direction. First—and this is the burden of the Chapters below—the originalist account of the right to armed self-defense is objectively absurd and facially dishonest. If the Miltonian, Jeffersonian, Madisonian, Holmesian, and Brandeisian faith in the Market Place of Ideas has any substance at all, in the long run, the originalist celebration of the cult of guns and violence will collapse under its own weight. Second, there is a highly coherent and jurisprudentially sound theory readily available to take its place. That theory is the analytic jurisprudence of self-defense founded in comparative study, cogently expounded in the works of George Fletcher, for current purposes most saliently in *The Grammar of Criminal Law*, which upon completion will run to three volumes covering American, Comparative, and International Criminal Law.⁸⁹

My thesis, then, represents my efforts to contribute towards the first phase of a three-stage process aimed at dismantling the originalist jurisprudence of the right to self-defense and replacing it with something better. The “something better” is already extant, and might be called the “Fletcher School,” founded on general principles of the law of self-defense. The criminal theorists and comparists working on elaborating these general principles of criminal law are in the process of completing the second phase of the process I envision. My future work in this

⁸⁸ Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 143 (2005).

⁸⁹ FLETCHER, *THE GRAMMAR OF CRIMINAL LAW, AMERICAN, COMPARATIVE, AND INTERNATIONAL: Volume 1 Foundations*, vii-xxi (2007).

field will focus on the third stage in the process, namely attempting to import insights from general principles of law into the American jurisprudence of armed self-defense with a view to supplanting the now ascendant but untenable originalist approach. In the federal courts, windows onto this general principles based discourse might open via substantive due process, privileges and immunities, the Ninth Amendment, emanations from specific provisions of the Bill of Rights including the Second Amendment, or frank invocation of natural law. My task going forward will be to help make the case that these pathways are more legitimate than the originalist course I urge forsaking. An enormous challenge lies ahead for those intending (as I do) to make the affirmative case for opening doors long closed, shuttered, and posted with labels warning that entry leads to values-inflected judging and to substitution of judicial will for legislative preferences. But honest confrontation with the jurisprudential substance underlying the debates on the legitimate use of guns ultimately involves the general principles of law, not historical fantasies about settlers and bears, or historical realities about civic republican fondness for the militia and distrust of the Army.

Outline of Thesis Chapters

The eleven Chapters that follow describe and critique the evolution of Second Amendment jurisprudence and related doctrine and theory up to the point at which the Supreme Court decided *McDonald v. City of Chicago* in 2010. Each Chapter is summarized below. All but one have been published. Four are encyclopedia entries, two are book reviews, three are law review articles, one is a critical essay, and one is an unpublished surreply to Randy Barnett, the leading academic critic of my work, whose strange conduct leading to the publication of his oft-cited *Was the Right to Keep and Bear Arms Conditioned in Service in an Organized Militia?* 83 TEXAS LAW REVIEW 237 is detailed below. The three law review articles (Chapters 3, 9, and 10)

comprise the heart of the thesis. A reader pressed for time might decide to skip or skim the other matter, although Chapters 2 and 5 raise significant theoretical questions about social expectations translating into constitutional rights and about academic honesty.

- 1) *The Second Amendment*, MACMILLAN ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES (2008).

This entry in one of the leading reference works on the Supreme Court describes the state of Second Amendment theory and doctrine up to the spring of 2008, when the *District of Columbia v. Heller* was docketed but not yet decided by the Supreme Court.

- 2) *Mandatory Gun Ownership, the Militia Census of 1806, and Background Assumptions Concerning the Early American Right to Arms: A Cautious Response to Robert Churchill*, 25 LAW AND HISTORY REVIEW, 187 (2007).

This essay in a peer reviewed specialty journal appeared as part of a forum analyzing the provocative work of historian Robert Churchill, perhaps the academic who has engaged most deeply in a Second Amendment context the relationship between popular behavior and practice and putative constitutional immunity from governmental regulation and prohibition. My essay takes a skeptical view of the empirical and theoretical premises behind the argument that widespread gun usage informed a judicially cognizable sense of constitutional protection for gun ownership in the young United States.

- 3) *A Cultural Turn: Reflections on Recent Historical and Legal Writing on the Second Amendment*, 17 STANFORD LAW AND POLICY REVIEW, 671 (2006).

This article contributed to an important symposium on the Second Amendment explores legal academic and historical writing on the Second Amendment through the year 2006 while paying particular attention to culturally inflected popular constitutionalism during the millennial period. It outlines six principal schools of Second Amendment thought, makes the case that the constitutional text is best read to couple the right to arms to service in the lawfully established militia, and expresses skepticism towards ascendant claims that the Amendment as originally understood protected a right to weapons possession for purposes of private self-defense. The article concludes by exploring parallels between popular contemporary constitutional and religious beliefs anticipating a coming Apocalypse.

- 4) *Raising Armies*, MACMILLAN ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES (2008).

This Encyclopedia entry explores the power of the federal government to raise armies. Understanding the evolution of the federal power to raise a substantial military contextualizes the decline of the militia, and with it the morphing of the once militia-focused constitutional right to arms into a private right to self-defense that goes far beyond the dominant original understanding of the constitutional text.

- 5) *Unpublished Excerpts Responding to Randy Barnett* originally submitted by H. Richard Uviller and William G. Merkel as part of *The Authors' Reply to Commentaries on, And Criticisms of The Militia and the Right to Arms, Or How the Second Amendment Fell Silent*, 12 WILLIAM AND MARY BILL OF RIGHTS JOURNAL 357 (2004).

Professor Randy Barnett exercises profound influence on the rapidly changing American constitutional landscape. His successful linkage of a libertarian vision of a minimalist federal government and to an alleged original public meaning that mirrors his political preferences now resonates widely among jurists, pundits, and wide swaths of the populace. Barnett's cramped version of the Interstate Commerce Clause perhaps figured more powerfully than any other constitutional theory in the campaign to convince the Supreme Court to torpedo the Affordable Health Care Act in 2012. Barnett's first major constitutional victory in the Supreme Court came with Justice Scalia's opinion for the five justice majority in *Heller*, which relied heavily on Barnett's *Was the Right to Keep and Bear Arms Conditioned in Service in an Organized Militia?* 83 TEXAS LAW REVIEW 237. From my admittedly interested perspective, the peculiar provenance of this influential piece merits note. The short form citation that appears in Justice Scalia's opinion is entirely consistent with the dictates of the BLUEBOOK, but masks the piece's overarching context captured in the long form title *Book Review Essay: Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia? The Militia and the Right to Arms, or, How the Second Amendment Fell Silent, by H. Richard Uviller and William G. Merkel*. Professor Barnett's book review originated as his submission to a 2003 symposium at William and Mary Law School focused on the book on the Second Amendment then just authored by the late Professor Richard Uviller and myself. Contributions to the symposium were slated for publication in the WILLIAM AND MARY BILL OF RIGHTS JOURNAL. Per the terms of the symposium agreement (and it is perhaps worth noting that all of us were paid an honorarium in advance), Professor Uviller and I reviewed Randy's initial submission, and returned our reply to his comments to the JOURNAL for inclusion in the symposium edition. Moving beyond the terms of the agreement among the symposium contributors and the JOURNAL, Randy reviewed our reply prior to publication, and rather than offering a sur-reply, reworked his comments to take account of our response and retailer and remove those components of his initial argument that we had most effectively rebutted. Although somewhat taken aback by this move, Richard and I decided to leave our original answer intact, and add a new afterword responded to Randy's amended complaint. Once he reviewed our new answer to his amended complaint, Randy decided to pull his contribution to the WILLIAM AND MARY BILL OF RIGHTS JOURNAL altogether, and publish it elsewhere. Shortly thereafter it appeared in the form ultimately relied on by Justice Scalia in the TEXAS LAW REVIEW. Thus, Professor Barnett's soon to be influential article had the benefit of being twice

reviewed prior to publication by the authors whose work it condemned, and being twice revised subsequent thereto with a view to purging some of its more ludicrous assertions. It also appeared in a forum that did not admit of answer, standing alone, rather than as part of a debate. Since Professor Barnett did not appear in print in the WILLIAM AND MARY BILL OF RIGHTS JOURNAL, Richard did not deem it appropriate that our response to his pulled contribution be included either. Those retracted sections, appear here for the first time since 2004, when they were removed from SSRN by someone (not Richard and not me). Professor Uviller and I co-authored the first segment. The After-Word on Professor Barnett's Amended Critique and the Conclusion are almost wholly my own. Perhaps Professor Barnett was particularly chagrined by what I wrote in Footnote 67. It points to Professor Barnett's shoddy research and unsupported claims regarding an alleged revival of the citizen militia in our times. These claims and the evidence behind them are in my view as dubious as the controversial and since defrocked historian Michael Bellesiles' claims about arms ownership and probate records that lead to Columbia University's decision to retract his Bancroft Prize in 2002.

- 6) *Book Review: Saul Cornell. A Well Regulated Militia: The Founding Fathers and the Origins of Gun Control in America, 112 AMERICAN HISTORICAL REVIEW 842 (2007).*

This short review essay endorses constitutional historian Saul Cornell's nuanced analysis of the evolution of four distinct veins of popular and professional legal thinking regarding the Second Amendment right since the founding period. The four strains of thought – a civic republican militia focused right, an antinomian right against government, a state right against an overbearing federal government, and finally a private right against private aggression – have not always been appreciated as conceptually distinct by commentators or theorists. This confusion has led not only to thinking that is sloppy in an abstract sense, but to gross misconceptualization of the relationship between private violence and constitutional authority during Reconstruction and to illogical responses to popularly endorsed and democratically sanctioned gun control measures in our own time. The review also affords an opportunity for me to suggest the relative virtues inherent in the essential pragmatic constitutional jurisprudence of Chief Justice Warren, who repeatedly shunned the alleged teachings of originalism on grounds of indeterminacy and dubious relevance to modern problems.

- 7) *Book Review: Stephen P. Halbrook. The Founders Second Amendment: Origins of the Right to Bear Arms, 114 AMERICAN HISTORICAL REVIEW 1074 (2009).*

This book review essay engages perhaps the most popularly influential theorist and advocate for the constitutional right to self-defense, Stephen Halbrook, who places gun rights and an unbridled liberty to defend oneself against attack and potential attack at the center of the American constitutional narrative. Halbrook, who holds a PhD in philosophy, is also a distinguished Supreme Court litigator who argued *Printz* and authored much-cited amicus briefs in *Heller* and *McDonald*. The review acknowledges that Halbrook has discovered and mustered more evidence in support of an individual-

rights-oriented reading of the original public understanding of the Second Amendment than any other authority on the subject, but stresses the continuing marginality of that evidence in the light of quantitative studies of usages of arms bearing and its cognates during the era in which the Second Amendment was ratified. Perhaps more importantly, the review highlights the tendentious character of Halbrook's meta-narrative, in which guns cease to be mere tools in the service of rights holding human actors but instead become the *summum bonum* of the constitutional order.

- 8) *The District of Columbia v. Heller*, GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW, (2012).

This extended entry in a peer reviewed three volume encyclopedia describes, analyzes, and contextualizes Justice Scalia's opinion for the five justice majority and the dissents by Justices Breyer and Stevens in the hotly contested *Heller* case recognizing a constitutional right to keep a handgun in the home for purposes of self-defense not related to service in the militia.

- 9) *The District of Columbia v. Heller and Antonin Scalia's Perverse Sense of Originalism*, 13 LEWIS AND CLARK LAW REVIEW, 349 (2009).

This article weighs Justice Scalia's *Heller* opinion in the balance, and finds it wanting. Rather than being a garden-variety case of originalism manqué, i.e. an effort to pin point a single original understanding when in fact meaning was hotly contested at the time constitutional text was created, *Heller* emerges as an act of (self?)-deception or conscious fraud. Few of the historical assumptions that underlie Justice Scalia's analysis withstand scrutiny. The majority holding-that the Second Amendment was originally understood to protect the right to possess any commonly held weapon for purposes unrelated to militia service such as self-defense and hunting-requires misreading, misunderstanding, or ignoring the bulk of relevant evidence such as the debates on the pending Amendment in the House of Representatives and the common meaning accorded bearing arms in newspapers and pamphlets of the day. Rather than using historical source material to inform his analysis, Justice Scalia operates with the faith-based assumption that the framers must have intended to protect a private right to gun possession, and then manipulates outlying evidence to dress up his claim in ill-fitting pseudo academic garb. In the process he demonstrates conclusively that the originalist methodology he trumpeted in A MATTER OF INTERPRETATION as the surest remedy against judicial injection of subjective values into constitutional adjudication is in fact nothing more than a harrow sham.

- 10) *Heller as Hubris, And How McDonald v. City of Chicago May Well Change the Constitutional World as We Know It*, 50 SANTA CLARA LAW REVIEW, 1221 (2010).

This article anticipated the likely application against the states and municipalities of *Heller's* newly minted right to arms for purposes of private self-defense. *McDonald v. City of Chicago*, was heard by the Supreme Court in the spring of 2010, but had not yet been decided when this article appeared. I argue here that the original understanding of the Second and Fourteenth Amendments cannot easily be reconciled with a judicially enforceable right to weapons possession unrelated to service in the lawfully established militia. The article pays particular attention to the differing moral claims of the Second and Fourteenth Amendment's on posterity, and revisits old questions about the constitutional warrant for incorporation which *McDonald* brought back to prominence some forty years after the process of judicial application of provisions of the Bill of Rights to the states had seemingly run its course. In so doing, the article calls into question glib popular and judicial assumptions believed to legitimize judicial review, and suggests that judicial veto of legislatively determined policy choices requires a far more cogent theoretical foundation than that provided by Justice Scalia's fetishistic and idolatrous adherence to caricatured visions of an "original public meaning" that allegedly held sway when constitutional text was proposed and ratified.

11) *McDonald v. City of Chicago*, GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW, (2012).

This encyclopedia entry explains and analyzes the Supreme Court's 2010 decision in *McDonald* to apply against states and municipalities the limited right to armed self-defense recognized against the federal government and federal enclaves in *Heller* two years earlier. This entry parses the justices' differing approaches to the meaning of Second Amendment and the significance of the Fourteenth Amendment in applying the Second Amendment right against the states and arguably altering its substantive scope. In addressing these questions, the five justices who wrote opinions (Alito, Thomas, Scalia, Stevens, and Breyer) expounded their underlying theories of judicial review, incorporation, and enforcement of rights not specified in the text of the Constitution. In particular, *McDonald* afforded the retiring Justice Stevens and his long-time sparring partner on the Bench Justice Scalia a final opportunity to debate the relative merits of legal process theory and pragmatism, on the one hand, and original public meaning focused originalism on the other.

CHAPTER TWO

THE SECOND AMENDMENT

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The fourth of twelve amendments proposed by the First Congress and forwarded to the states in 1789, the Second Amendment numbered second among the ten amendments ratified by the requisite nine states by 1791 to form the Bill of Rights. The short text of the Second Amendment is not without complexity and possibly ambiguity: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” This is the only provision of the Bill of Rights linking a rights guarantee to a textually articulated purpose, and one of only two provisions in the entire Constitution (the Copyright Clause being the other) to couple operative language directly to a specified objective. (The Preamble states purposes, but those purposes are not immediately connected to specific operative clauses).

United States v. Miller

The Second Amendment has rarely been interpreted by the Supreme Court, which last ruled directly on a Second Amendment question in *United States v. Miller*, 307 U.S. 174, in 1939. In that case, the Court, on direct appeal, overturned a decision of the United States District Court for the Western District of Arkansas quashing an indictment under Section 1132(d) of the National Firearms Act of 1934 that charged Jack Miller and Frank Layton with transporting an unlicensed double-barreled sawed-off shotgun across state lines. The trial Court had ruled that Section 11 of the Firearms Act violated the Second Amendment, but the Supreme Court, in an 8-0 decision by Justice McReynolds, disagreed, holding that:

In the absence of any evidence tending to show that possession or use of a “shotgun having a barrel of less than eighteen inches in length” at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly 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.

Recent Court of Appeals Decisions

For many years, United States Courts of Appeal uniformly read *Miller* to link the Second Amendment right to keep and bear arms to membership in the organized militia. As recently as 2002 in *Silveira v. Lockyer*, 312 F. 3d 1052, a three judge panel of the United States Court of Appeals for the Ninth Circuit held that the right to arms was a “collective right” protecting state militia units against federal disarmament. But in *United States v. Emerson*, 270 F. 3d 203 (2001), a Fifth Circuit panel construed *Miller* to hold that the Second Amendment protected possession of weapons of types that could be used in militia service. In so doing, the Fifth Circuit rejected the government’s claim that under *Miller* the Second Amendment protected the right to arms only in the context of actual militia service. According to the *Emerson* Court, the United States had pressed a similar argument in *Miller*, but the Supreme Court had adopted a narrower ruling, focused on the character of the weapon at issue rather than the claimants’ membership *vel non* in the lawfully established militia. *Emerson* was echoed by the D.C. Circuit in 2007 in *Parker*, ___ F 3d. ___, which stressed more emphatically the broad character of the right to arms it read into *Miller* and into the Second Amendment itself. According to the three-judge panel in *Parker*, the Constitution protects a right to own and carry any weapon suitable for militia service, even if the claimant is not a militia member. Moreover, the right extends to non-militia related purposes such as hunting and self-defense. As of this writing, the District of Columbia is seeking review of *Parker* in the Supreme Court, and many commentators expect the

High Court to grant *certiorari* in order to address the split in the circuits, clarify *Miller*, and revisit the scope and applicability of the Second Amendment right.

Academic Debate

While the Supreme Court has been relatively silent respecting the Second Amendment, academic comment and advocacy pieces respecting the meaning of the constitutional right to arms have proliferated in recent decades. Second Amendment writing has frequently been polemical, at times even sensationalist. Adherents of various schools and sub-schools of Second Amendment thought have sought to differentiate their interpretive models from those of their opponents, and participants in the Second Amendment debates as well as judges on United States Courts of Appeal have attached great weight to labeling the various Second Amendment schools. The argument that the constitutional right to arms protects state militia units against federal disarmament is frequently called the collective rights position. This argument generally stresses the importance the first part of the Amendment's text, "A well regulated Militia, being necessary to the security of a free State" This part of the Amendment is also emphasized by those who argue that the Amendment does protect an individual right to arms, but only to the extent that the right is related to service in the lawfully established militia. This second argument is sometimes labeled the "sophisticated collective rights argument," chiefly by those who do not agree with it. A third argument—that the Second Amendment protects a right to arms for purposes far beyond those related to militia service, including hunting and personal self-defense—is generally called the "individual rights" theory, even though its focus on individual as opposed to corporate rights alone does not differentiate it from the so called "sophisticated collective rights approach." Rather, an emphasis on private as well as corporate purposes, and a focus on the second part of the Amendment's text "the right of the people to keep and bear arms,

shall not be infringed,” clearly differentiates the private, individual rights approach from those stressing the primacy of the militia.

The Second Amendment and Reconstruction

Several leading constitutional theorists (Akhil Amar, Robert Cottrol, Sanford Levinson, and William Van Alstyne among them) have argued that the right enshrined in the Second Amendment in 1791 was fundamentally recast by the Civil War, Reconstruction, and, especially, the ratification of the Fourteenth Amendment in 1868. While conceding that the framers of the Bill of Rights may have been concerned with appeasing the Anti-Federalists’ concerns to preserve the militia as an alternative or counterweight to a potentially dangerous federal military establishment including a large standing army, Amar in particular has argued that the framers of the Reconstruction Amendments wished to facilitate the ability of Southern blacks and other Republican sympathizers to defend themselves against the Ku Klux Klan and likeminded agents of violent reaction. In the process, Amar maintains, the Fourteenth Amendment decoupled the right to arms from its militia foundations, recognizing a remodeled right to own guns for purposes of individual self-defense. It is however entirely unclear that this desire to enhance to the capacity of Reconstruction supporters to defend themselves would have been better served by private action than organization into militia units recognized by the Republican governments in the South, and whether the supporters of Reconstruction in fact had private as opposed to state sponsored defense in mind. In the post Slaughter-House era the Supreme Court twice addressed the relationship of the right to arms to the Fourteenth Amendment, holding in both *United States v. Cruikshank*, 92 U.S. 452 (1876), and *Presser v. Illinois*, 116 U.S. 252 (1886), that the Second Amendment limits the authority of the federal government, but not state or private actors. *Cruikshank* involved federal prosecution of white supremacists in Louisiana who participated in

the Colfax Massacre of 1873, in which members of the White League and Ku Klux Klan battled black militia units loyal to the Republican Party outside a polling station during a hotly contested election. The Supreme Court declined to uphold conviction of the supremacists under the Enforcement Act of 1870, on the grounds that the defendants had not interfered with any constitutionally protected rights, holding in the process that the Second Amendment did not reach private or state sponsored efforts to disarm black militia members. In *Presser*, the Court rejected a Second Amendment claim regarding state denial of permission for a private militia unit to participate in a parade while bearing arms, again on the grounds that the Second Amendment reached only federal action. The Supreme Court has not revisited Second Amendment claims against state actors since the wave of incorporation decisions of the mid-twentieth century applying various provisions of the Bill of Rights against the states through the Due Process Clause of the Fourteenth Amendment. Indeed, the right to arms remains one of only a handful of elements of the Bill of Rights not applied to the states.

Original Understanding

Scholarly debate and lower court litigation in recent years has honed in even more closely on questions surrounding the original meaning of the right to arms at the time the Second Amendment was ratified than on the possible impact of Reconstruction on the right to arms. Many supporters of a broad right to arms for purposes other than militia service have advanced originalist arguments stressing the individualistic, liberal ethos of the American Revolution. Historian Joyce Lee Malcolm has focused on the origins of American right to arms in the English Bill of Rights of 1689 (Article 7 of which proclaims “Subjects, which are Protestants, may have Arms for their Defence suitable to their Condition, and as allowed by Law”) as the basis for her contention that an Anglo-American personal right to weapons possession once recognized at

common law has abated in England but endures in entrenched form in the American Bill of Rights. This argument finds favor with champions of a vigorous right to self-defense, who maintain that the Second Amendment encompasses far more than a right to fulfill a legal obligation in the statutory militia. Among academic historians whose work focuses on eighteenth century American political thought, however, this is a minority position. Saul Cornell, Paul Finkelman, David Konig, Jack Rakove, Lois Schworer, and Robert Shalhope, among others, have focused on the anti-army trope in revolutionary rhetoric, and a centuries old suspicion of standing armies often associated with the civic republican readings of eighteenth century American politics of Bernard Bailyn, J.G.A. Pocock, and (a younger) Gordon Wood. In this reading, Anti-Federalist pamphleteers and tract writers who elicited from James Madison and other conciliation-minded members of the First Congress a promise to move amendments in hopes of augmenting the coalition in favor of the constitutional settlement were not particularly concerned with rights to hunt or protect private homes which they did not consider to be under threat, but rather feared the prospect that a larger, professional federal army established under the new Constitution would imperil individual liberties, local autonomy and the ability of states to function as quasi-sovereign political entities. Anti-Federalists desired—and to a limited degree the framers of the Second Amendment conceded—a hortatory constitutional commitment to place primary reliance on the militia rather than the federal Army for defensive purposes. Unlike the Army, the militia answered to state command when not summoned to federal duty, and unlike the Army, the militia was composed of citizens and civilians, not mercenaries and hirelings. The militia, therefore, was considered a bulwark of liberty, rather than a potential tool for tyrants. In this reading, the Second Amendment guarantee against disarmament coupled to the Article 1 Section 8 clause 16 power of Congress to arm and organize the militia represented a

constitutional hedge against the oppressive taxes and foreign wars of empire associated with large military establishments and executive supremacy.

The federal Militia Act of 1792 cemented the Congressional commitment to national reliance on militia, by requiring non-exempted white males between the ages of 18 and 45 to arm themselves with standardized weapons and equipment required for militia duty. Considerable controversy attaches to the question of compliance with these mandates and the level of arms ownership in the early Republic. Historian Robert Churchill has argued that wide arms ownership translated into a sense of legal entitlement and immunity against confiscation and aggressive regulation that inflected the Second Amendment, but his claims have been disputed by Cornell and Konig. It is clear at least that the general, universal militia envisioned by the framers disappeared in the early decades of the nineteenth century, giving way by mid-century to a patch work system of state licensed privately organized units in which a relatively small segment of the population was enrolled. The modern National Guard, ushered in by the Dick Act in 1903, differentiates between organized militia and unorganized militia, and it is now the subject of heated debate in gun policy circles whether membership in either organized or unorganized militia is a predicate for exercise of Second Amendment rights.

Comments by Individual Justices

Despite the paucity of Supreme Court case law construing the Second Amendment directly, several past and current justices have commented individually on the meaning of the Amendment. Justice Story, in his *Commentaries on the Constitution*, embraced a militia-focused view, and lamented the passing of the universal militia of the Revolutionary era as a signal of the

impending demise of an important institutional check against aspirant tyranny. According to Story,

[t]he right of citizens to keep and bear arms has justly been considered the palladium of liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers [I]t cannot be disguised that among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition from a sense of its burthens, to be rid of all regulations. How it is practicable to keep the people armed without some organization, it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt, and thus gradually undermine all the protection intended by this clause of the national bill of rights.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, Sec. 1896 pp. 607-608 (2d ed. 1851). In the years since, Justice Douglas (the single sitting justice who did not participate in *Miller*) and Chief Justice Burger have expressed strong contempt for private rights readings of the right to arms, while Justices Scalia and Thomas (the latter relying on an incomplete and misleading quotation from Story) have suggested affinity for the private rights reading. Moreover, the Bush administration has reversed a century of Department of Justice practice by endorsing a private rights reading of the Second Amendment, albeit one subject to limitation by reasonable regulations. In a related vein, many level-headed commentators including Erwin Chemerinsky, Michael Dorf, and Adam Winkler suggest that for purposes of testing the constitutionality of gun control legislation, the question of standard of review or level of scrutiny that the Supreme Court attaches to the Second Amendment right will prove almost as important as the questions of whether the right protects individual claims to possess weapons for private purposes, and whether it has been incorporated through the Fourteenth Amendment to limit the powers of the states as well as the federal government. It is entirely conceivable that law and order minded justices

might recognize a Second Amendment right that extends beyond the militia, but allow its curtailment under statute for purposes of achieving reasonable law enforcement objectives.

Further Reading:

2000. Symposium on the Second Amendment: Fresh Looks, *Chicago-Kent Law Review*, 76: 2-600; Amar, Akhil Reed. 1998, *The Bill of Rights: Creation and Reconstruction*. New Haven, Conn.: Yale University Press; Cornell, Saul. 2006. *A Well Regulated Militia: The Founding Fathers and the Origins of Gun Control in America*. New York: Oxford University Press; Halbrook, Stephen P. *Freedmen, The Fourteenth Amendment, and the Right to Bear Arms, 1866-1876*. Westport, Conn: 1998; Malcolm, Joyce Lee, 1994. *To Keep and Bear Arms: The Origins of an Anglo-American Right*. Cambridge, Mass.: Harvard University Press; H. Richard Uviller and William G. Merkel. 2002. *The Militia and the Right to Arms, Or, How the Second Amendment Fell Silent*. Durham, N.C.: Duke University Press.

CHAPTER THREE

MANDATORY GUN OWNERSHIP,
THE MILITIA CENSUS OF 1806, AND
BACKGROUND ASSUMPTIONS CONCERNING
THE EARLY AMERICAN RIGHT TO ARMS:
A CAUTIOUS RESPONSE TO ROBERT CHURCHILL

In "Gun Ownership in Early America," published in the *William and Mary Quarterly* in 2003,¹ Robert Churchill drew on probate inventories and militia records to make the case that arms ownership was pervasive in late colonial, revolutionary, and early national America. Churchill concluded with the observation that "[i]t is time to ponder what these guns meant to their owners and how that meaning changed over time."² In his substantial contribution to this volume of *Law and History Review*,³ Churchill takes up that challenge himself and advances the claim that widespread arms ownership engendered a sense of possessory entitlement, and that this notion of right informed constitutional sensibilities respecting guns and the Second Amendment. He acknowledges that a civic republican understanding focused on the militia was central to the framers' conception of the right to arms, but urges that another stream of discourse—individualistic, personal, and divorced from militia linked obligations—was present from the beginning. By the early nineteenth century, Churchill argues, this purely private view of the right to arms had become ascendant.

Churchill's most intriguing claim is that arms possession (in large measure because of its alleged ubiquity) acquired an aura of immunity against at least some assertions of government

¹ Robert H. Churchill, "Gun Ownership in Early America: A Survey of Manuscript Militia Returns," *The William and Mary Quarterly*, 3d ser., 60 (2003): 615.

² *Id.* at 642.

³ Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, *LAW AND HIST. REV.* 25, 139-75 (2007).

power during the period in which the Constitution and Bill of Rights were drafted and ratified. In colonial times, says Churchill, provincial and imperial military authority extended to seizure of guns for purposes of arming militia and ensuring security, but by the 1780s, these statist claims against privately held weapons were abating, never to return. The police power still allowed civil authorities to regulate firearms usage to preserve safety in towns and on public roads, promote public decorum, and protect the population of game, but assertions of governmental power to seize (rather than merely regulate) guns rapidly petered out in the new nation. Perhaps like other royal prerogatives that died a death of desuetude in the Whigish narrative of English history, the abeyance of governmental authority to confiscate arms begat a negative liberty against gun seizure, and this liberty soon took up a prideful place in the orthodox (or at least popular) understanding of constitutional rights. Churchill's argument is interesting, in several respects novel, and in many ways enlightening. But it is by no means clear that he accurately captures all the evidence on which he relies, or that his thesis can fully account for some important evidence that he glosses over or ignores. In fact, vital material Churchill misreads or omits points squarely back to the civic-republican focused reading of the constitutional right to arms he aims to play down or read away.

Consider, for instance, Congressional inquiry into the arming of the militia. On April 2, 1806, Joseph Varnum, then a six-term Republican Congressman from Massachusetts and major general in the Commonwealth's militia, presented a report from the "committee instructed to inquire what measures are necessary to be adopted to complete the arming of the militia of the United States" to the House of Representatives.⁴ The report, partly reprinted below, is difficult

⁴ *American State Papers*, 5, *Military Affairs*, 1:198-99. For information on Varnum, see the entry in *American National Biography* 22:278-79 by Edward W. Hanson of the Massachusetts Historical Society.

to reconcile with Churchill's findings concerning gun ownership among militia members in the revolutionary and early national periods, on which his argument that the Second Amendment protected a private as well as a militia-focused right to arms largely depends. Congressman Varnum drew on data familiar to the committee and reprinted in the Militia Census of 1806, a document officially communicated to Congress by the president nine days later on April 11, 1806.⁵ The results of that census, and the question of how they square with Churchill's account, are taken up next. In the report itself, Varnum's committee informed Congress

[t]hat, by the laws of the United States, each citizen enrolled in the militia is put under obligations to provide himself with a good musket or rifle, and all the other military equipments prescribed by law. From the best estimate which the committee have been able to form, there is upwards of 250,000 fire arms and rifles in the hands of the militia, which have, a few instances excepted, been provided by, and are the property of, the individuals who hold them. It is highly probable, that many more of the militia would have provided themselves with fire arms in the same way, if they had been for sale in those parts of the United States where the deficiencies have happened; but the wars in Europe have had a tendency to prevent the importation of fire arms from thence into the United States, which, together with the limited establishments for the manufacture of that implement in the United States, has rendered it impossible for individuals to procure them.⁶

The committee went on to say that the number of stands of public arms in the arsenals of the various states had not been ascertained, that there were about 120,000 fire arms fit for use and 12,000 in need of repair in the magazines of the United States, and that the committee was of the opinion that further public monies (\$62,100 to be exact) should be set aside for manufacture of fire arms in the armories of the United States "to provide for the exigency of war."⁷

The Militia Census listed the total numbers of men enrolled for each state rank by rank and the total numbers of rifles and muskets each state reported. Assuming that privates and

⁵ *American State Papers, 5, Military Affairs, 1:199.*

⁶ *Ibid.*, 199.

⁷ *Ibid.*, 198-99.

noncommissioned officers but not officers were expected to carry long guns as required by the Militia Act of 1792, the percentages of militia members each state reported as armed with rifles or muskets are as follows:⁸

- New Hampshire Infantry: 19,100 privates and 1,108 sergeants, 12,500 muskets; or 61.9 percent armed.
- Massachusetts Infantry: 53,316 privates and 1,108 sergeants, 46,218 muskets and 397 rifles; or 85.7 percent armed.
- Rhode Island Infantry: 4,414 privates and 302 sergeants, 3,052 muskets; or 64.7 percent armed.
- Connecticut Infantry: 13,952 privates, 1,144 corporals, 1,293 sergeants, 15,085 muskets; or 92.0 percent armed.
- Vermont Infantry: 13,708 privates, 1,011 sergeants, 8,824 muskets; or 59.9 percent armed.
- New York Infantry: 63,744 privates, 3,885 sergeants, 39,919 muskets and 1,928 rifles; or 61.9 percent armed.
- New Jersey Infantry: 21,742 privates, 1,142 sergeants, 12,423 muskets and 86 rifles; or 54.7 percent armed.
- Pennsylvania Infantry and Riflemen: 80,061 privates, 2,881 sergeants, 3,352 riflemen, 20,000 muskets, 3,352 rifles; or 27.1 percent armed.
- Delaware, not reporting.
- Maryland, not reporting.
- Virginia Infantry: 61,962 privates, 3,388 sergeants, 10,490 muskets, 2,734 rifles; or 21.3 percent armed.
- North Carolina Infantry: 37,871 privates, 1,774 sergeants, 16,571 muskets, 2,343 rifles; or 47.7 percent armed.

⁸ These are my rough calculations; I have left out sergeant majors and quartermaster sergeants because of their insignificant numbers and my uncertainty as to whether they were expected to muster with long guns. I have also omitted the reports for the District of Columbia, Mississippi Territory, and Indiana Territory, whose militia were few in number. The Orleans and Louisiana territories did not report. For the raw numbers see *American State Papers*, 5, *Military Affairs*, 1:202-3. For Churchill's important reservations about reading too much into these numbers see Churchill, "Gun Ownership in Early America." Churchill makes the case that the census should not be taken at face value; instead, he maintains, it is important to look at the documents generated at the brigade level on which the census was based. By failing to do so, Churchill cautions that historians will be misled because the census undercounts by measuring guns brought to muster, not guns held at home. But if this were a serious problem, one would expect Major General Varnum, with thirty years militia experience, to have been aware of it. He reported "upwards of 250,000 firearms and rifles in the hands of the militia"; the census lists by my count some 204,200 muskets and 52,900 rifles, suggesting strongly that it provided the basis of Varnum's figures. If Varnum knew of systemic undercounting, he failed to tell Congress, and misled his colleagues in the process. See *American State Papers*, 5, *Military Affairs*, 1:199.

South Carolina Infantry, Riflemen, and Light Infantry: 29,082 privates and rank and file, 245 pioneers, 165 corporals, 1,245 sergeants, 5,916 muskets, 5,731 rifles; or 37.9 percent armed.

Georgia Infantry and Riflemen: 16,650 infantry and rank and file, 835 sergeants, 1,782 muskets, 1,955 rifles; or 21.4 percent armed.

Kentucky Infantry: 29,386 privates, 1,679 sergeants, 3,966 muskets, 15,567 rifles; or 62.9 percent armed.

Tennessee Infantry: 14,285 privates, 308 corporals, 308 sergeants, 4,647 muskets; or 31.2 percent armed.

Ohio Infantry: 8,031 privates, 456 sergeants, 277 muskets, 3,238 rifles; or 41.4 percent armed.

Varnum's report points to the committee's concerns over a national militia less than fully armed and then proposes to rectify this problem by Congressional spending on arms production in federal arsenals for distribution (via the market? state purchase and resale? loan? Outright grant?) to unarmed militia members. As the numbers above make clear, the census he and the committee consulted in reaching this decision indicated the New England militia was substantially armed and that the middle state militia (except in Pennsylvania, home to large populations of Quakers and other conscientious objectors) was above half armed. But serious problems arose in the South and West (excepting Kentucky), and these problems were nowhere as acute as in Virginia. Churchill, however, argues that that disarmament there was more apparent than real. The census, he claims, counted only state owned arms (and not privately owned arms) in Virginia and several other states. Yet the committee reported that it did not know how many arms were held in the arsenals of the states, and this is very hard to incorporate into Churchill's interpretation of the census, unless his point is that Virginians who had been issued state owned arms kept them at home and brought them to muster where these guns (unlike the guns still in the arsenals) were counted.

Churchill's main thrust on this issue is that most Virginia militia members actually owned their own guns (why would they have so many fewer than their northern compatriots?), but

refused to bring them to muster in large measure because of a state history of confiscation. Here again Churchill's thesis stumbles over its own inconsistencies. The claim that Virginians were still influenced by expectations of confiscation in 1806 is not wholly in harmony with Churchill's larger argument that the power to seize atrophied in the 1780s even as a sense of immunity against confiscation took hold in the popular mind.

Varnum's report and the census finding of low armament in Virginia is troubling for the Churchill thesis in at least one other sense as well. If Churchill is right that Virginians had guns but did not bring them to muster, it becomes necessary to explain why a Jeffersonian controlled Congress closely tied to the Virginian president was unaware of this issue. This holds particularly for Major General Varnum himself, given his life-long service with Massachusetts citizen soldiery, his national responsibilities for militia oversight, and his personal relations with the president—he became Jefferson's candidate for Speaker of the House in the next Congress and won appointment when former Speaker John Randolph's faction broke with the administration. If the cause of the Virginia militia's seeming unreadiness was as Churchill supposes, it stands to reason that Jefferson's Virginia connections, including the state's three most recent governors—James Monroe (1799-1802), John Page (1802-1805), and William Cabell (1805-1808)—all Jefferson loyalists—would have informed the president, and that Jefferson would have passed to word to Varnum, one of his leading New England lieutenants in the House and chair of the committee responsible for supervising arming of the militia. Churchill's assumption is equally hard to square with then Governor Monroe's behavior six years earlier in 1800, when he was called on to consider the Virginia militia's potential effectiveness as a potential counter-weight to a Hamiltonian army unwilling to yield the presidency in the event of a Republican victory in the

national elections. Monroe made it a point to order arms from overseas, not to order Virginians to bring their arms out of hiding.⁹

In a cordial email to this reviewer, Churchill has stressed that the assumption of widespread arms ownership that underlies his thesis is the product of his detailed research into a variety of sources, including probate records, and the local militia rolls, which he found formed the basis of state figures included in federal militia censuses. In truth, my disagreements with Churchill have less to do with the prevalence of guns in early national culture (my sense is that the Census of 1806 is about right, his studied retort is that it substantially undercounts) than with the purpose and meaning that Americans attached to their ownership of guns, and the question of how that fed into their thinking (such as there was on this point) about the Second Amendment.

And in this respect, Churchill's argument appears based on an oddly ambiguous set of assumptions about statutory compliance. His reasoning relies on two premises. First, Americans complied willingly and broadly with colonial and state level militia-linked requirements to acquire guns. Second, they later followed the federal Militia Act's command that white men of arms-bearing years obtain a musket or a rifle. But he builds on these assumptions to argue that once Americans came into compliance, and became accustomed to a culture of arms bearing, the statutory purposes behind their acquisition of guns were subordinated. Ownership of guns took on an individualistic valence says Churchill, with hostility to gun confiscation reflecting less and less solicitude for the communitarian militia, and more and more a property-focused sense of private immunity. This understanding in turn became imbued with qualities perhaps more readily associated with modern Takings Clause jurisprudence (and its late eighteenth-century

⁹ See William G. Merkel, "To See Oneself as a Target of a Justified Revolution: Thomas Jefferson and Gabriel's Rebellion," *American Nineteenth Century History* 4.1 (2003): 1-31.

precursors), and the sort of "Lockean" rhetoric Locke may not have recognized, than with the anti-army trappings of old Commonwealth Whiggery.

I believe that Churchill reads too much libertarianism and too little republicanism into the problem, and that along the way he smoothes over some important ambiguities that his evidence, fairly read, will not resolve. Once more, the Varnum report is instructive. Varnum suggests that most militia eligible Americans wanted to comply with the Militia Act's requirement of arming themselves, but that many were unable to do so because guns were scarce. Whether Varnum was too charitable respecting the causes of widespread non-compliance (lack of guns as opposed to lack of will), the fact remains that, unless Churchill's largely conclusory surmise that many southerners and westerners were hiding their guns is true, nearly half the militia eligible population was non-compliant. Non-compliance was not an uncommon theme in recent American history. Churchill himself claims that non-compliance with the Act of 1792 (failure to appear armed on muster day) actually explains the alleged undercounting of guns in Virginia. Far more famously, the Sugar Act, Stamp Act, Townsend Duties, and Tea Act come to mind as late colonial statutes generating less than optimal compliance, as do the Whiskey Tax and Window Tax from the Federalist period. To be sure, these were imperial or at least national as opposed to provincial or state laws such as those Churchill cites to support his claim for a wide distribution of arms. But other provincial or state laws, including prohibitions against unlicensed preaching and absenting oneself from the established church in a manner not contemplated in the Toleration Act, were notoriously under enforced or unenforceable as well.¹⁰ If Americans were as widely out of compliance with late colonial militia-linked mandatory arming laws as their successors were with the U.S. Act of 1792, then serious problems arise at the beginning of

¹⁰ See RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA: COMMUNITY, RELIGION, AND AUTHORITY, 1740-90* (Chapel Hill: University of North Carolina Press, 1982).

Churchill's chronological chain linking the presumption of wide spread gun possession (required by statute) to familiarity to possessory impulses to claims of right to assertions of immunity to constitutionalization. And it is in the earlier period, where Churchill insists the discourse that ripened into rights talk began, that he relies most strongly on unadorned assumptions of statutory compliance, for the evidence from probate inventories and censuses becomes thicker only as the colonial period ends. If late colonial Americans were as non-compliant in regard to gun ownership as they were respecting tax payment and religious establishment, perhaps they were less obsessed with clinging to guns they did not have for individualistic property-focused purposes than they were animated with pro-militia and anti-army rhetoric for civic and republican ends.

Churchill's essay is problematic not simply for evidentiary reasons. His argument builds principally on the theoretical distinction between military authority to seize and police power to regulate guns, but this theoretical distinction may require substantial rethinking. It is premised at least in part on the assumption that measures relying on military authority were extraordinary and rare, while exercises of the police power were quotidian and norm defining. Even if this were true, however, it would in no way undermine the theory that fears of the standing armies and executive usurpation were central to the Second Amendment, for it was in extraordinary times of crises real or imagined or pre-textual that efforts to disarm the militia and set up a corrupt regime buttressed by the army were most to be expected. Churchill's underlying assumption, however, is in fact not true for the generation that experienced the Revolution and the constitutional crisis. As Alan Taylor among others reminds us, imperial wars between Britain and France were more common than not in the late colonial period, and those wars increasingly focused on the North American theater and increasingly mobilized the North

American population. A native-born American aged fifty when the new national government convened in 1789 had known more years of war than peace.¹¹ The great imperial and national political debates of that person's lifetime had focused on war, taxes to fund war, and the dangers of a government capable of enacting and enforcing the tax regime required to finance war or hold together a country sufficiently powerful to avoid war.

If war, or fear of war, or the need to pay for or avoid war was the norm for the founding generation, perhaps this does not so much undermine Churchill's principal claim as suggest that national attitudes were bound to change. Fears of undue assertions of military authority subsided in the decades that followed the revolutionary period, with a clearly civilian-controlled Jeffersonian system of governance firmly in place in the substantially demilitarized nation that became the antebellum republic. But this does not get Churchill wholly off the hook. His premises remain problematic for the earlier period in which he roots his analysis, and for colonial times, his terminological distinction between military powers and police powers in some respects is itself anachronistic.

The sharp distinction between military and police powers makes much more sense under the system of federalism and separation of powers adopted in the U.S. Constitution of 1788 than it does for the colonial system of governance. The national Constitution conveyed certain specified powers to the United States Congress (such as the power to raise and support armies), rested the Commander-in-Chief power in the federal presidency, and reserved the bulk of unspecified powers to the states, the latter including the general authority inherent in their quasi-sovereign status and partly confirmed in the Tenth Amendment to make general policy respecting health, safety, and morals. Whether the distinction between military and police

¹¹ ALAN TAYLOR, *AMERICAN COLONIES* 420-43 (New York: Viking, 2001).

powers will bear as much weight as Churchill would load on it in colonial times is a more doubtful proposition. The constitutional settlement reached during the Glorious Revolution in England left intact the royal prerogatives that Prince William insisted on keeping to make the Crown worthwhile, including those related to war and peace and command of the military. In the eighteenth century, however, these devolved in practice to the cabinet and the prime minister. From 1689, military funding was required to flow from Parliament, and the Bill of Rights spoke of allowing protestant subjects such arms as were allowed by law.¹²

On an ad hoc and imperfect basis, each colony's government of provincial assembly, governor, and council mirrored the British system, and during war time (which was, as mentioned above, as normal as not) military relations between colonial and royal government frequently became complicated and confused by the presence of regulars responsible directly to the Crown under whose commanders colonial militia sometimes served. How meaningful it is in this context to attempt to label weapons seizures for purposes of militia arming (often carried out under imperial pressure to get more local troops in the field) exercises of either police or military powers is difficult to say.¹³ The authority behind confiscation appears to have been sometimes imperial, sometimes local, sometimes prerogative, sometimes statutory, and sometimes a matter of ad hoc necessity. It is likewise open to question whether the coming of independence marked any conceptual sharpening of the distinctions between police and military powers respecting the issue of guns, so much as it did a general heightening of the popular preference for militia over

¹² See detailed discussion in Lois G. Schwoerer, "To Hold and Bear Arms: The English Perspective," *Chicago-Kent Law Review* 76 (2000): 27, and in H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR HOW THE SECOND AMENDMENT FELL SILENT* 47-56 (North Carolina Press 2002).

¹³ See, e.g., MICHAEL A. McDONNELL, *THE POLITICS OF MOBILIZATION IN REVOLUTIONARY VIRGINIA: MILITARY CULTURE AND POLITICAL AND SOCIAL RELATIONS 1774-1783* (Oxford University D. Phil. thesis, 1995).

regulars, and realization by the revolutionary leadership that regulars were as necessary during war as they were dangerous to peace and to republican principles.

Churchill's essay is engaging and thought provoking throughout. His central insight that power to regulate and power to confiscate are not one and the same is of crucial importance, both to understanding the meaning of the American right to arms at its origins, and to understanding the fevered politics that envelop that right in our own times. I have doubts, however, that Churchill's distinction between authority under police and military powers offers a complete and accurate account of changing attitudes towards the militia and the right to arms in the founding and early national periods. In his contribution to this volume, Saul Cornell has pointed to grave problems concerning Churchill's use of evidence from the constitutional period and from the nineteenth century.¹⁴ My own concerns focus on Churchill's extrapolations from assumptions perhaps too hastily drawn about the meaning of arms ownership to Americans in the late eighteenth and early nineteenth centuries. While Churchill has raised interesting questions and offered intriguing insights, he has also made generalizations that his evidence is not strong enough to support. In the end, I remain convinced that David Konig, Saul Cornell, and my late friend and mentor Richard Uviller and I were correct to stress the civic, militia-focused meaning of the right to arms that dominated discussion at the time of the Second Amendment's framing, and (as Cornell ably shows in this forum) continued to predominate long into the nineteenth century. There were, to be sure, countervailing voices. To ignore them would be false to the historical record and would wrongly deprive many enthusiastic supporters of a broad right to own guns of a sense of provenance to which they attach much meaning. Churchill is right to take those voices seriously. But in the article discussed here, Churchill exaggerates their

¹⁴ Saul Cornell, "Early American Gun Regulation and the Second Amendment: A Closer Look at the Evidence," *Law and History Review* 25 (2007): 197-204.

importance and forges for them a kinship with the mainstream that a careful reading of the record cannot always confirm.

CHAPTER FOUR

A CULTURAL TURN: REFLECTIONS ON
RECENT HISTORICAL AND LEGAL
WRITING ON THE SECOND AMENDMENT

If commentators on the Second Amendment agree about anything at all, it is only that disputants parsing the meaning and importance of the constitutional right to arms cannot avoid involvement in a larger cultural war (and this is the term almost everyone employs)¹ over the meaning and importance (vel non) of gun ownership to the American psyche and soul. Almost every scholar discussed in this short, inexhaustive review of recent literature calls for reasoned moderation (the other calls for well armed chaos),² but most writers in the field, including this one, and including those who neither own nor wish the government to seize guns find it all but

¹ See, e.g., DAVID C. WILLIAMS, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC 71, *passim* (2003); *Editors' Foreword*, 73 FORDHAM L. REV. 476 (2004); Stuart Banner, *The Second Amendment, So Far*, 117 HARV. L. REV. 898, 901 (2004) (reviewing Williams, *supra*); James H. Warner, *Guns, Crimes, and Cultural War*, HERITAGE LECTURE 393 (1992).

² I have in mind Randy Barnett's characterization of passengers on board United Flight 93 on September 11th, 2001 as (unorganized) militia members (a statutory truism for those who were males between 18 and 45, but one practically without meaning) and their resistance to the hijackers that lead to the downing of the plane in Pennsylvania as Second Amendment protected activity. Barnett does not belabor the fact that these passengers were unarmed. His point in arguing that the passengers' resistance constituted Second Amendment protected activity is not entirely clear, but the implication appears to be that if they and other commercial airline passengers were allowed to carry their personal weapons on board, we need not fear further hijackings. See Randy E. Barnett, *Saved by the Militia: Arming an Army Against Terrorism*, NAT'L REV. ONLINE, Sept. 18, 2001, <http://www.nationalreview.com/comment/comment-barnett091801.shtml>. With Jim Chen (writing under the pseudonym Gil Grantmore), I view Barnett's vision as a recipe for disaster not dictated by nor even reasonably related to any tenable reading of the Second Amendment. See Gil Grantmore, *The Phages of American Law*, 36 U.C. DAVIS L. REV. 455, 477-488 (2003).

impossible to avoid being swept up (sometimes against their will) in the impassioned fray pitting the gun culture against the culture of would be “gun grabbers.”³

Disputes over the Second Amendment have taken a cultural turn—or indeed, have been in large measure culturally inspired, or even culturally determined from the beginning.⁴ This observation holds whether we trace the onset of controversy to the origins of the Amendment itself during the late eighteenth century, or to debates over federal gun policy in the late 1960s, or to the more recent upsurge in scholarly publication on the Amendment, first chiefly in the form of essays by advocates in the 1980s, and then, starting around 1989, in think pieces and

³ Erwin Chemerinsky, in his thoughtful introduction to a major symposium on the Second Amendment at Fordham Law School last year, suggests that it is less a question of becoming swept up in the cultural wars than willingly embracing them, and fashioning one’s interpretation accordingly. “The point is that the meaning of the Second Amendment is not determined by the application of constitutional theory or interpretive methodologies. It is a product entirely of the values and politics of the individual. This does not deny that legal arguments are made in terms of text, framers’ intent, tradition, and social policy. Rather, in an area such as this, with strong arguments and views on each side, a judge or scholar inevitably will come to a conclusion and then justify it based on the ample available material.” Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective*, 73 FORDHAM L. REV. 477, 481 (2004).

⁴ The question of whether framers and ratifiers of the Second Amendment were largely within or without the ideological confines of the gun culture as we know it today is at the root of much if not most Second Amendment disputation. It has animated such diverse writers on the Second Amendment as Garry Wills, Randy Barnett, Saul Cornell, William Van Alstyne, Jack Rakove, and Don B. Kates, Jr. *See, eg.*, Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996); Saul A. Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENT. 221 (1999); Jack N. Rakove, *The Second Amendment: The Highest State of Originalism*, 76 CHI.-KENT L. REV. 103 (2000); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994); Gary Wills, *To Keep and Bear Arms*, NEW YORK REV. BOOKS, Sep. 21, 1995, at 62-73. In an upcoming issue of LAW AND HISTORY REVIEW, historians Cornell and Robert Churchill will rejoin this battle with detailed reference to a wealth of documentary material – some of it little discussed before; this author will contribute modestly to their debate by reflecting on perspective, purpose, and reconciliation of some familiar and some unjustly neglected evidence.

monographs authored by established and budding legal and historical academics.⁵ But to the extent that writing on the Second Amendment is not a special animal wholly apart and distinct from other species of constitutional scholarship,⁶ the pronounced cultural dimension to Second Amendment studies may actually suggest that reflection on the right to arms should take and is taking a prominent place in the academic mainstream, both in departments of history and schools of law. In terms of becoming a hot topic and a paradigm shaper, the culturally inflected Second Amendment's academic hour may be at hand in large part because culturally informed and culturally situated constitutional narratives of every stripe and every time period are fast becoming the order of the day for constitutionalists in both law and history faculties. (I am not well enough acquainted with goings on in political science departments and schools of government to say whether this holds there as well, but I would hardly be surprised if it did.)

Among historians, intellectual history of the constitutional era now embraces not just the writings of lawyers and political leaders, but the opinions of the people out of doors and the man and woman on the streets, the latter sort perhaps even holding pride of place over their more

⁵ Robert Spitzer compiled a comprehensive survey of legal academic writing on the Second Amendment for a 2000 symposium in the *Chicago-Kent Law Review*, tracing the development of the individual rights and collective rights readings of the right to arms through the twentieth century, focusing in particular on the sudden upturn in gun-rights oriented writing in the 1980s. See Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349 (2000) [hereinafter Spitzer, *Lost and Found*]. In his contribution to the Fordham symposium last fall, Professor Spitzer urged that the gun cultural wars have warped perspective on federal gun control, focusing attention on policies originating in the 1960s, and all but obliterating memories of successful gun regulation initiatives of the New Deal era from the nation's collective memory. See Robert J. Spitzer, *Don't Know Much About History, Politics, or Theory: A Comment*, 73 FORD. L. REV. 721 (2004) [hereinafter Spitzer, *History, Politics or Theory*]. Spitzer is probably right, but it is nonetheless true that the firearms regulations of the New Deal generated less print in the law reviews than the initiatives of the 1980s. That said, there were far fewer journals in which to publish in the 30s and 40s.

⁶ Jim Chen, writing as Gil Grantmore, makes the case that legal academic scholarship on the Second Amendment is characterized by indulgent and pernicious detachment from reality. Grantmore, *supra* note 2, at 503.

powerful and privileged contemporaries.⁷ These historical inquiries could quite naturally map onto the original understanding queries of judicial interpretivists of an Antonin Scalia stripe, whose quest for legitimizing constitutional meaning prompts them to seek out the significance the ratifiers attached to constitutional text at its origins, at the moment We The People delegated our collective, sovereign authority to our constitutionally appointed agents.⁸ But, alas (for the popular cultural historian of constitutional thought craving direct contemporary relevance), Justice Scalia prefers dictionaries of the times and well known and widely distributed elite writings such as *The Federalist Papers* and Blackstone's *Commentaries* as sources of enlightenment respecting open-ended phrases and ambiguous terms whose meaning does not plainly emerge from the constitutional text itself.⁹ Instead, culturally focused Second Amendment musings relate to the constitutional mainstream in the legal academy because emphasis on social movements and cultural evolution (probably most famously and paradigmatically in the work of Bruce Ackerman)¹⁰ dominate recent articulations of the

⁷ See, e.g., SAUL A. CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM & THE DISSENTING TRADITION IN AMERICA 1788-1828* (1999); LARRY D. KRAMER, *CONSTITUTIONALISM AND AMERICAN CULTURE: WRITING THE NEW CONSTITUTIONAL HISTORY* (Sandra F. VanBurkleo et al. eds., 2002) (including contributions by David Thomas Konig, Robert J. Kaczorowski, William M. Wiecek, G. Edward White, Henry N. and Jane L. Scheiber, Cynthia Harrison, Michael R. Belknap, John W. Johnson, Kermit L. Hall, VanBurkleo, Mark Tushnet, and Norman L. Rosenberg); LARRY D. KRAMER, *THE PEOPLE THEMSELVES, POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004). To take an extreme example, Peter Thompson, author of *RUM, PUNCH AND REVOLUTION, TAVERNGOING AND PUBLIC LIFE IN EIGHTEENTH CENTURY PHILADELPHIA* (1998) and authority on drinking in Philadelphia pubs, recently informed me with no sense of irony that his investigations into pub culture amounted to real history (some would counter they amount to abuse of mind and body), whereas my parsing and contextualizing (in a national political sense) of judicial opinions did not.

⁸ See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

⁹ *Id.* at 38, 130.

¹⁰ BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991), and ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998). But see Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 *YALE L.J.* 2003 (1998) (making the point that Ackerman's

constitutional narrative, especially in so far as that narrative strives to situate an account of constitutional change not just within the shifting ideological fashions of the lawyerly and judicial elite, but within the far broader evolution of thought within the democratic polity.¹¹

In this comment, I will survey a select few of the most recent culturally inspired accounts of the Second Amendment's origins and meanings that have appeared since the late Richard Uviller and I published our principal Second Amendment thoughts in a short monograph in late 2002.¹² As Richard would have said, disowning the textualist's maxim *inclusio unius est exclusio alterius*, no slight is intended to those pieces not discussed, and I mean not to imply that they are less important or interesting than those that are. But the field is not just burgeoning, it is exploding into lavish bloom, and keeping up with the literature has become as well-nigh impossible as keeping pace with recent writings in the other scholarly area that has occupied me most of the past decade, that of Jefferson and slavery. Then, too, there is the problem that much of the literature in the Second Amendment field is repetitive, pugnacious, and—to myself as much as to persons at other ends of the cultural spectrum—ideologically distasteful, making many pieces less than inviting to engage.¹³ The pieces considered here, a monograph by David

“popular” history actually relies mainly on inside Washington sources and that his interpretation of constitutional change during the Civil War and Reconstruction is seriously flawed in its neglect of the abolitionist movement's transformative impact on constitutional thought).

¹¹ See, e.g., CONSTITUTIONAL LAW STORIES (Michael C. Dorf ed., 2003), containing contributions by Stephen Ansolabehere, R. Richard Banks, David E. Bernstein, Ashutosh A. Bhagwat, Vincent Blasi, Jim Chen, Dorf, Christopher Eisgruber, Garret Epps, Daniel Farber, Lucinda M. Finley, Michael J. Gerhardt, Neil Gotanda, Cheryl I. Harris, Samuel Issacharoff, Michael W. McConnell, Seana V. Shiffirin, and Mark V. Tushnet.

¹² H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002).

¹³ On Second Amendment writing's frequently vitriolic and unscholarly character, even in (legal) academic journals, see, e.g., Cornell, *supra* note 4; Saul A. Cornell, “Don't Know Much About History:” *The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657 (2002); Rakove, *supra* note 4; Spitzer, *History, Politics, or Theory*, *supra* note 5; Spitzer, *Lost and Found*, *supra* note 5. My own optimistic impression is that over the last few years,

C. Williams,¹⁴ a pseudonymous (and hilarious) satire by Jim Chen under the name Gil Grantmore,¹⁵ several contributions to a 2004 Fordham Law Review symposium, short comments by Jonathan Simon,¹⁶ and an incorporation related essay by Akhil Amar¹⁷ (building on his own¹⁸ and Robert Cottol & David Diamond's¹⁹ more detailed earlier work in the area), pave the way for my closing thoughts on the cultural significance (to Americans generally, to African Americans past and present, and to gays and lesbians) of an incorporated or unincorporated right to arms in an America where yesterday's "out" culture now has friends in high and powerful places.

Back in 1989, in a piece that helped make the Second Amendment a respectable topic for academic discussion at academic institutions, Sandy Levinson poignantly mapped out the cultural conflict over gun ownership and regulation even as he called for academics to think more seriously about the merits of the NRA's individualistic reading of the right to arms.²⁰ The conflict was well-defined then and has only intensified since, with no signs of abatement on the horizon. Scholarly writing on the Second Amendment during 1990s was certainly inspired and shaped by the gun culture wars, and the two opposing cultural camps each had an allied school of

Second Amendment scholarship has actually become less savage and more thoughtful, with more academics joining advocates in the arena, and those academics devoting more serious and nuanced reflection to the subject than scholars did in the 1990s. That said, the Second Amendment game is still unusually brutal, and, apparently, uncommonly attractive to hacks and charlatans of various stripes.

¹⁴ WILLIAMS, *supra* note 1.

¹⁵ Grantmore, *supra* note 2.

¹⁶ Jonathan Simon, *Gun Rights and the Constitutional Significance of Violent Crime*, 12 WM. & MARY BILL RTS. J. 335 (2004).

¹⁷ Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 890 (2001).

¹⁸ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

¹⁹ Robert J. Cottol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991).

²⁰ Sanford Levinson, *The Embarrassing Second Amendment*, YALE L. J. 637 (1989).

Second Amendment interpreters: the individual rights writers (arguing that the Amendment protected a private right to arms for a broad array of purposes not necessarily linked to militia service) embraced by the gun culture, and the states' rights theorists (arguing that the Amendment protected state militia against federal disarmament) endorsed by the anti-gun culture.²¹ Yet published analysis of the right to arms during that period did not dwell heavily on cultural concerns as such, but rather engaged the subject on grounds of textualism and originalism.²² In terms of sheer numbers of publications and volume of print, the individual rights school (partly financed by generous grants from the NRA)²³ opened up a substantial lead, but by the beginning of the new century the states right school (partly financed by generous grants from at least one organization that did not share the NRA's ideals) was closing the gap, and historians, who had entered the field later than legalists, were lining up in opposition to the individual rights reading.²⁴

²¹ The most prolific gun friendly Second Amendment writers in the 1990s included Don B. Kates, Stephen Halbrook, Brannon Denning, and David B. Kopel; prominent voices in the outnumbered regulation friendly camp included Dennis Henigan, Carl Bogus, and David Williams. See Spitzer, *Lost and Found*, *supra* note 5, at 392-401.

²² See, e.g., Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U.L. REV. 107 (1991); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1 (1996); Glen H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995); Van Alstyne, *supra* note 4.

²³ See Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 14-15 (2000).

²⁴ Ten contributions critical of the individual rights interpretation of the Second Amendment appeared in *Symposium on the Second Amendment: Fresh Looks* in 76 CHI.-KENT L. REV. (2000); presentation and publication of the papers was supported by the Joyce Foundation. See Bogus, *supra* note 23, at 14-15. Historians critical of the thesis that the Amendment was intended to protect a wholly private right unconnected to militia service include Saul Cornell, Paul Finkelman, David Konig, Jack Rakove, Lois Schwoerer, and Robert Shalhope (who formerly endorsed the private rights view); among historians less skeptical of the private rights view are Robert Churchill and James Henretta; and those fully supportive of the individualistic reading include Robert Cottrol and Leonard Levy.

Today, it would be an oversimplification to describe Second Amendment scholarship as bifurcated between states rights and individual rights enthusiasts. There is an emerging middle ground, popular particularly among historians. David Thomas Konig, Saul Cornell, Richard Primus, as well as Richard Uviller and I, have urged acceptance of a centrist position, acknowledging that the right to arms was intended to attach to individuals, but stressing that it was also understood to serve overwhelmingly public purposes rather than private ones such as personal self-defense or the needs of hunters.²⁵ If truth be told, however, while all of the just named individuals have urged abandonment of both the states' rights and private rights models, each of us has generally reserved the greater part of his critique and condemnation for the private rights interpretation of the Amendment. Indeed, in attacking the private rights model, we frequently cite Jack Rakove, Carl Bogus, Paul Finkelman, and other scholars who remain more or less firmly attached to the familiar states' rights reading.²⁶ More clearly neutral in his embrace of "a third way" is David C. Williams, whose recent *Mythic Meanings of the Second Amendment* is discussed shortly.²⁷ Williams, like Uviller and Merkel, stresses the republican roots of the Second Amendment;²⁸ Saul Cornell and Dave Konig have aptly labeled the right a

²⁵ RICHARD PRIMUS, *THE AMERICAN IDEA OF RIGHTS*, 102-103 (1999); UVILLER AND MERKEL, *supra* note 12; Saul A. Cornell, *A New Paradigm for the Second Amendment*, 22 *L. & HIST. REV.* 161 (2004); David T. Konig, *The Persistence of Resistance: Civic Rights, Natural Rights, and Property Rights in the Historical Debate Over "The Right to Keep and Bear Arms,"* 73 *FORDHAM L. REV.* 539 (2004).

²⁶ *See, e.g.*, Bogus, *supra* note 22; Paul Finkelman, "A Well Regulated Militia:" *The Second Amendment in Historical Perspective*, 76 *CHI.-KENT L. REV.* 195 (2000); Rakove, *supra* note 4.

²⁷ *See* Williams, *supra* note 1, at 133.

²⁸ *See, e.g.*, David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 *YALE L.J.* 551 (1991) [hereinafter *Civic Republicanism*]; David C. Williams, *The Militia Movement and the Second Amendment: Conjuring with the People*, 81 *CORNELL L. REV.* 879 (1996) [hereinafter *Militia Movement*]; David C. Williams, *The Unitary Second Amendment*, 73 *N.Y.U. L. Rev.* 822 (1998) [hereinafter *Unitary Second Amendment*].

civic one,²⁹ thereby capturing the same public purposes quality of the right that Williams, Lois Schwoerer, and I would link to its ideological origins, pointedly adopting an idiom no longer quite so fashionable as it was twenty or thirty years ago.³⁰

In addition to the growing camp in the middle of the Second Amendment field, there is now much fissuring and flowering at the fertile and fascinating margins. Without too much straining, one could fairly easily tally up at least six variants of Second Amendment thought prominently debated in recent literature. The familiar two models of states' rights and private rights and the emerging centrist path describing a personal liberty that has meaning and substance only in the social context of civic obligation carried out within a public organization have at least three rivals. There is the highly significant variant of the states right model put forward by Carl Bogus, in which the right to arms is tainted by its linkage to slavery and the "hidden" purpose of protecting the slave patrols of the South against Federal disarmament.³¹ The private rights reading, for its part, may or may not emphasize a right to insurrection allegedly attendant to the right to arms. (As discussed below respecting David Williams' recent work, the same holds for the centrist model.) And finally, several interesting attempts have been made to explore the impact of the Fourteenth Amendment on the Second Amendment, including, most prominently, Akhil Reed Amar's argument that the individualistic Privileges and Immunities Clause of the Fourteenth Amendment severed the right to arms from its communal roots in the militia, thereby creating a purely private right designed to allow the freed people of

²⁹ UVILLER & MERKEL, *supra* note 12, at 248-52.

³⁰ See WILLIAMS, *supra* note 1; Lois Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27 (2000); UVILLER & MERKEL, *supra* note 12. The reference is to BERNARD BAILYN, *IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967), along with GORDON WOOD, *CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969) and J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975) one of the urtexts of republicanism.

³¹ Bogus, *supra* note 22.

the South to protect themselves against racist reprisals by discontented ex-Confederates reorganized into the Ku Klux Klan and other hate groups.³²

Like Second Amendment writing of the early and mid nineties, much of the work just described focuses on originalist concerns. But the overall emphasis is clearly shifting from textualist originalism to purposivist originalism, and hence from dictionaries to cultural context, from parsing constitutional language to pondering cultural sources of meaning and even purpose. No recent scholar of the Second Amendment has taken so pointedly a cultural perspective as David C. Williams. In this respect, Williams was very much ahead of the curve, focusing on the cultural context of the Amendment at its origins and in its operation in modern times in a series of law review pieces he authored in the nineties while most commentators in the field were still busily milking familiar parcels of original source material with dogged determinism and stoic disregard for their own historical ignorance.³³ But his major monograph of 2003 does much more than sum up and reiterate his earlier work. *Mythic Meanings of the Second Amendment* develops the premise that national constitutions do more than create structures and enumerate rights and powers, they also embody the foundation mythology of the constitutional orders they establish. Especially in the United States, the Constitution is a constitutive element not just of organic law, but of organic nationhood. And when definitions of nationhood are contested as they are in the United States today, rival constitutional mythologies join battle in a struggle to define cultural legitimacy. Bedrock America, largely conservative and anti-cosmopolitan, places

³² See AMAR, *supra* note 18, at 258-68; Amar, *supra* note 17. Amar was influenced in part by Robert J. Cottrol and Raymond T. Diamond who stressed the impact of Reconstruction on the right to arms in Cottrol & Diamond, *supra* note 19.

³³ Compare Williams, *Civic Republicanism*, *supra* note 28, Williams, *Militia Movement*, *supra* note 28, and Williams, *Unitary Second Amendment*, *supra* note 28, with Barnett & Kates, *supra* note 4, Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131 (1991), and Lund, *supra* note 22.

an individualistic Second Amendment at the center of its foundation narrative of self-reliance; elite America, blind and often hostile to provincial ways, relegates armed individualism to an atavistic past that constitutional democracy was designed to overcome.³⁴

³⁴ See WILLIAMS, *supra* note 1. Bedrock America's attitudes on this front are captured starkly in Hank Williams Jr.'s 1981 recording, *A Country Boy Can Survive*:

The preacher man says its the end of time
and the Mississippi River she's a going dry.
The interest is up and the stock markets down
and you only get mugged if you go downtown.
I live back in the woods you see,
my woman, and the kids and the dogs and me.
I got a shotgun and a rifle and a four wheel drive
and a country boy can survive. Country folks can survive.

I can plow a field all day long,
I can catch catfish from dusk till dawn.
Make our own whiskey and our own smoke too
ain't too many things these boys can't do.
We grow good old tomatoes and homemade wine
and country boy can survive, country folk can survive.

Because you can't stomp us out and you can't make us run,
cause we're them ole boys raised on shotguns.
We say grace and we say mam
and if you ain't into that we don't give a damn.
We came from the West Virginia coal mines
and the Rocky Mountains and the Western skies
and we can skin a buck, we can run a trout line
and a country boy can survive, country folks can survive.

I had a good friend in New York City
he never called me by my name just hillbilly.
My Grandpa taught me how to live off the land
and his taught him to be a business man
He used to send me pictures of the Broadway Nights
and I would send him some homemade wine
but he was killed by a man with a switchblade knife,
for forty three dollars my friend lost his life.
I'd love to spit some beechnut in that dudes eyes
and shoot him with my ole forty-five
cause a country boy can survive, country folks can survive.

With this focus on the role of contesting visions of the Second Amendment's meaning, purpose, and importance always in mind, David Williams analyzes in piercing detail how various subgroups within cosmopolitan and bedrock America have come to see subgroups on the opposite side of the great cultural divide as illegitimate and dangerous, even as un-American and outside the pale. This, to Williams, is particularly troubling, because in his analysis the Second Amendment was not in its origins about self-defense or even about federalism, but fundamentally about the right and the power to revolt against corrupt government. Williams rejects the notion that the founders and framers believed that they were creating a system of governance that could endure for all ages. In the back of their minds was the grim realization that every previous republic had failed.³⁵ Nor, says Williams, should we today complacently assume that over two centuries of constitutional success augurs eternal grace and infallibility. Tyranny is always possible, and woe unto a people that is without remedy. The Second Amendment, in this calculus, securing an armed populace acting communally in organized militia, was the last safety valve in the event the government should go over to otherwise irremediable oppression.³⁶

'Cause you can't stomp us out and you can't make us run,
 and we're them ole boys raised on shotguns.
 We say grace, we say mam,
 if you ain't into that we don't give a damn.
 We're from North California and South Alabam'
 and little towns all around this land.
 We can skin a buck, and run a trout line
 and a country boy can survive,
 country folks can survive

HANK WILLIAMS JR., *A Country Boy Can Survive*, on *THE PRESSURE IS ON* (Warner Brothers 1981).

³⁵ See WILLIAMS, *supra* note 1, at 22-26.

³⁶ See *id.* at 121-28.

The problem with this realization, as Williams emphasizes, is that the concept of a united American people, if ever there was one, is no longer tenable.³⁷ Modern society is hopelessly (or beneficially) pluralistic and factional. It is fragmented along regional, economic, and ethnic lines. Women and men, straight and gay, rural and urban, black and white, new immigrants and old, may form separate and at time irreconcilable interests. Each of those groups, in turn, is itself divided and subdivided. Visions of a single people, rising up against oppression, inform the Second Amendment, but today we do not see ourselves as a single people. And a rising by a part against the whole—even if the part views itself as the only legitimate claimant to true nationhood—is not a revolution against remote and oppressive government, but a factional revolt against the nation.³⁸ Williams can end only with a plea for understanding, love, and reconciliation. Can't we all get along? Let us not rise against each other, but watch over the government, so that we can rise together, as the Second Amendment intended, if ever our agents in Washington go over to wielding the powers of government to deliver unbearable oppression to the people they are charged to serve.³⁹

Williams' analysis is so interesting in part because it dwells on the right to revolution to the exclusion of all other considerations. But it is also one-sided. In our book, Richard Uviller and I may have understated the revolutionary purpose of the right to arms, but surely, David Williams overstates it in his. Williams and I would agree that the Amendment is not at its core about hunting, or defending the home against burglars, but about enabling the militia, and the individuals who comprise the militia. Williams, however, hones in only on the final purpose of the militia in the event all else fails and the constitutional order itself collapses, leaving no other

³⁷ *See id.* at 271-72.

³⁸ *See id.* at 57-58.

³⁹ *See id.* at 420-26.

remedies to an aggrieved people but to turn against the government. And doubtless there are, even today, eager souls attending watchfully for the fateful moment when just such a scenario comes true, so that they may strike a hero's pose in the final chapter of the American constitutional saga. But such was not the vision of the Philadelphia conventioners who wove our constitutional fabric.

To be sure, the founders saw the power to raise and maintain a standing army as a necessary evil, and this of all powers they would not leave unchecked.⁴⁰ Many of the founders, and more of the Anti-Federalists, who agitated for a Bill of Rights,⁴¹ preferred that the nation place its first reliance on local citizen militia rather than professional soldiery. What they stressed, and what Williams plays down, is that the very presence of a useful militia made tyranny less likely. With a militia available to provide initial defense, and the new nation protected by a vast ocean separating it from the major powers of the day, there was little reason to maintain a professional army large enough to tempt an aspiring tyrant in the capital into moving against the legislature, the states, or the people. And so long as the nation stayed out of the business of overseas empire building, there would likely never be a need to form so large an army.⁴²

⁴⁰ See UVILLER & MERKEL, *supra* note 12, at 76-78.

⁴¹ See *id.* at 78-91. Williams may lay too much stock in the utterances of Anti-Federalists as he assesses the original meaning of the Second Amendment. As Paul Finkelman insightfully argues, the Anti-Federalists were crushed in the elections for the First Congress under the Constitution. Thus, the Congress that proposed the Second Amendment, and to a very large degree the state legislatures that ratified it, did not share the views of the opponents of ratification. Madison's articulated rationale for the Bill of Rights – that it would win over well meaning and reasonable Anti-Federalists – can hardly be read as a concession that the new national government would fashion policy and amend to Constitution to secure the goals of the most hardened opponents of the newly established federal power. Finkelman, *supra* note 26, at 214-18.

⁴² See UVILLER & MERKEL, *supra* note 12, at 77-78, 109-24.

Armies, moreover, were dangerous not just because a hopelessly fallen executive might turn them on the people. They were dangerous in the first place because (unlike militias) they were expensive, and required taxes, placemen, and contractors to keep them up. Short of ultimate collapse into unconstitutional rule, it was deficit spending that made the military so potentially enervating on the body politic. There was a long, long slippery slope descending into a sea of horrors associated with abandonment of the militia in favor of an army, and, contra Williams, the numerous dreadful stopping points along that shore (taxes, deficits, corruption, centralization, empire, foreign wars, pressing and conscription) were as much feared as the ultimate abyss of dictatorship and attending revolution and civil war.⁴³ In fact, the horrible of horrors upon which Williams dwells often went unmentioned, for reasons not just of prudence, but because of faith that checks and balances and safety valves less drastic than armed revolution against the president would forestall constitutional crisis before the collapse of the constitutional order itself. Indeed, there is something faintly illogical about Williams' faith that if the constitutional system collapses into full-fledged extra-constitutional tyranny, a constitutionally specified mechanism will remain in place to afford a remedy.⁴⁴ For once the Constitution is dead, appeals will lie not to the Bill of Rights, but to natural law, and to Heaven.⁴⁵

From the time he first turned his attention to the Second Amendment, Williams has developed fascinating arguments concerning the difficulty and desirability of applying (and

⁴³ *See id.* at 56-58.

⁴⁴ To his credit, William admits as much himself, but argues that those values of the old order enshrined in the Second Amendment – nationhood, civic consciousness, preference for civilian rule to military dictatorship – would live on and help channel the behavior of well-meaning members of the new revolutionary order seeking to stabilize and legitimize a new constitutional state by reference to the most cherished values of the old. On a less rarefied plane, reference to the values of the Second Amendment might inform the process of justice against those who had precipitated the collapse of the old order, much as regard for Weimar legality helped shape proceedings against the Nazis after World War II. *See WILLIAMS, supra* note 1.

⁴⁵ *See UVILLER & MERKEL, supra* note 12, at 171-76.

grave danger of failing to apply) the civic-republican inspired text of the amendment in a decidedly post-virtuous, now indelibly liberal, and deeply divided society.⁴⁶ His main theme in *Mythic Meanings* is that reconstituting the people by forging a new consensus around core constitutional values will facilitate, if not unity, at least sufficient solidarity to allow the people to resist the government in case of grave oppression. And that moment, Williams is sure, will come and must come in the fullness of time.⁴⁷

There is however another strategy for reanimating the civic culture so much desired by the framers of the Second Amendment, and Williams hints at it in his coda and explores it more fully in his earlier writing. Militia-equivalent mandatory public service might not stave off tyranny, but it would engender popular engagement with common concerns, and this would foster a culture less likely to empower or tolerate political leaders likely to become usurpers.⁴⁸ But there is another, and perhaps more powerful, Second-Amendment-style remedy to the nation's arguable ills, and this plank of a civic restoration agenda Williams does not pursue. I have in mind forsaking what the framers of the Second Amendment viewed as the core evils to be contrasted with the republican militia. These baneful things include the overlarge standing army and all its corollary perils—the army contractors, the heavy taxes to pay them and support the soldiers, the deficit spending, the civilian officials too beholden to the army's bidding, the temptation to empire, glory, and overseas adventures, the officer corps eager to push the cause

⁴⁶ See Williams, *Civic Republicanism*, *supra* note 28; Williams, *Unitary Second Amendment*, *supra* note 28.

⁴⁷ See WILLIAMS, *supra* note 1, at 133.

⁴⁸ See *id.* at 310-12; Williams, *Civic Republicanism*, *supra* note 28; Williams, *The Unitary Second Amendment*, *supra* note 28.

for intervention and engagement.⁴⁹ To be overly enthusiastic about the Army (or an army, before we were reconciled to the Army)—and certainly to be inspired by the prospect of the Army’s overseas deployment—was once highly suspect, dare I say, conspiratorial, monarchical, un-Jeffersonian, almost un-American. Times have surely changed.

Ultimately, Williams and I both acknowledge that the passing of the culture of the framers makes this oddest of Amendments difficult to apply in modern times. But we profoundly differ over what it is that fundamentally differentiates our society from the culture that spawned the constitutional right to arms. Williams points to greater pluralism. I counter that the real difference is that today we are enamored of the standing army. As a people, we prefer power to virtue. We have grown to like military contractors and overseas military adventures and to live with high taxes and huge deficits. We want military bases in our neighborhoods. We fight to keep them from closing just as New Englanders of 1775 fought to shut them down. Williams and I concur only in so far as we both recognize that deep down, the Second Amendment speaks somehow to profound changes in this nation’s culture; we differ over what those relevant changes are, and over what remedies the second article of the Bill of Rights inspires.

To Jim Chen, the Second Amendment illustrates not so much that American culture on the whole has lost its moorings, but that legal academic culture is profoundly out of whack. We split into camps and reason in isolation, divorced from the social reality that the law reform we debate might one day shape. Writing as Gil Grantmore, Chen satirizes the Second Amendment

⁴⁹ See H. Richard Uviller & William G. Merkel, *The Authors’ Reply to Commentaries on, and Criticisms of The Militia and the Right to Arms, Or, How the Second Amendment Fell Silent*, 12 WM. & MARY BILL RTS. J., 357, 365-66 (2004).

disputes in the legal academy to brilliant effect in his article *The Phages of American Law*.⁵⁰ Apart from playing on Grant Gilmore's *Ages of American Law*,⁵¹ the cryptic title suggests that the Second Amendment is operating like a virus of illogic to eat up what remains of reason within the legal academy. His point is trenchant. It's also very funny, and quite humbling. This admittedly gullible writer worked his way two-thirds through the piece with mounting frustration, making copious notes in the margins attacking this point or that on grounds of alleged overstatement, before the veil dropped and I reconciled myself to the experience of a most enjoyable satire. But Chen writes not just to amuse; he raises at least two substantive issues about the Second Amendment that merit serious reflection here.⁵²

First, Chen emphasizes that gun enthusiasts champion the Second Amendment right to arms, often stressing the universal character of the militia. But in the process, he reminds us, they forget all about the militia powers—which could have sweeping effects, if gun rights ideology premised on the universality of the militia obligation were carried to its logical ends.⁵³ Under Article I Section 8 clause 15, Congress can make provision for the President to call on the services of militia members, and under Article I Section 8 clause 16, Congress regulate their conduct while they train and carry out their duty. Militia members, if called out to serve or train, would in turn become subject to martial discipline, and suffer grave restrictions of their Fourth, Fifth, and Sixth Amendment rights in the process.⁵⁴ Since even the *Emerson* Court allows that

⁵⁰ Grantmore, *supra* note 2.

⁵¹ GRANT GILMORE, *THE AGES OF AMERICAN LAW* (1977).

⁵² Chen developed other intriguing insights in his presentation at the Standard conference that I will not take up in detail in this comment. Perhaps most notable among them is the novel and ingenious argument that the Fourteenth Amendment not only does not incorporate a private right to arms, but that it pointedly and emphatically negates any claim to a right to revolution that may have inhered in the original Second Amendment. *See* Chen.

⁵³ U.S. CONST. Art. I, § 8, cl. 15-16; U.S. CONST. Art II., § 2 cl. 1.

⁵⁴ *See* Grantmore, *supra* note 2, at 465-72.

the Second Amendment right is subject to searching regulation,⁵⁵ the benefits attendant to a revitalization of the militia appear costly indeed, given the severe diminution in autonomy freedom-loving Americans would suffer in exchange for a limited right to own and carry firearms. “Minutemen” offering their services as self-appointed border vigilantes might accordingly wish to think twice before convincing congresspersons or state legislators that their labors really amount to militia duty contemplated in the rubric of the Second Amendment.⁵⁶

Second, Chen savages John Lott’s *More Guns, Less Crime*⁵⁷ hypothesis, by undertaking a detailed investigation of the comprehensive system of laws banning passengers from carrying firearms on commercial aircraft. These laws, Chen demonstrates, have made airplanes and airports statistically two of the safest places in the country, even after all the tragic deaths of September 11, 2001 are factored into the equation.⁵⁸ Randy Barnett of course is certain that we would be safer still on planes if the right to carry guns on board were vouched safe to the general militia—that is, in his reckoning, the entire population, or at least that large swath of the population Congress defines as members of the unorganized militia (on whose services it has not called since the Civil War).⁵⁹ As Chen suggests, this is debatable.⁶⁰

Indeed, there are probably a great many people who would not think of getting on a plane if commercial airliners became the gun culture’s Elysium. My own intuitions are that for every

⁵⁵ See *United States v. Emerson*, 279 F.3d 203, 261-64 (5th Cir. 2001).

⁵⁶ Relying heavily on War on Terror rhetoric, Texas Congressman John Culberson argued on MSNBC’s *Hardball* program aired August 19, 2005 that the entire non-mentally ill population should be deputized into militia to police the border with Mexico. Whether the entire non-mentally ill population would wish to come under military discipline as a result is one of many questions Culberson may not have considered. *Hardball* (MSNBC television broadcast Aug. 19, 2005).

⁵⁷ See JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* (1998).

⁵⁸ See Grantmore, *supra* note 2, at 478-80.

⁵⁹ See Barnett, *supra* note 2.

⁶⁰ See Grantmore, *supra* note 2, at 478-80.

would-be terrorist thwarted by decent red-blooded travelers, there would be hundreds if not thousands of random victims of high-strung, officious, air-born gun slingers. Every one of us would be at risk of becoming the next nervous Brazilian on the London Underground who overstaid his student visa and paid the ultimate price for society's frayed nerves.⁶¹ As a former insurance lawyer, I would certainly counsel against underwriting coverage for any South Asian or Arab-looking person seeking to fly if Professor Barnett's vision were implemented. And as a pragmatic objection to his proposed constitutionally mandated reform, there remains the technical problem illustrated by the unforgettable image of Goldfinger being sucked out the window of the plane he had just shot out with his gold-handled gun in the third Bond film.⁶² With pilots any less skilled than Pussy Galore at the helm, otherwise innocent libertarians who had defiantly unbuckled their seat belts might well suffer defenestration of truly Praguean moment just because the strapped militia man in the next row took exception to a fellow passenger of Muslim countenance.⁶³

Chen's lampoon of methodologies should be widely read for its salubrious effect on legal thinking. My encounter with Chen's wit caused me to revisit my objections to a peculiar species of speciousness long rife in the legal academic community, plain meaning style textualism. Few legal tropes escape Chen's incisive critique, but, in truth, he (like the ever charitable David Williams) goes far too easy on the casual, untenable history that underlies much Second

⁶¹ See CNN.com, <http://www.cnn.com/2005/WORLD/europe/07/23/london.tube/index.html> (last visited Mar. 9, 2006).

⁶² GOLDFINGER (MGM 1964).

⁶³ Having discussed this issue with physicist and engineering friends from my graduate school days, I have been reassured that the more likely hazards associated with the discharge of firearms onboard commercial airliners include (i) the uncontrolled combustion of airline fuel resulting in a catastrophic explosion, (ii) the rapid loss of cabin pressure causing suffocation (as opposed to defenestration), (iii) and sudden cooling leading to fatal hypothermia (as recently occurred in a disaster over Greece). Thus, my unscientific poll of (two) scientists suggested a solid consensus that use of firearms on passenger jets would be ill advised.

Amendment writing. The legal academy perhaps conditions its members to lay more stock on cleverness than empirical accuracy. And the cultural history now in fashion is by its nature less verifiable than document-based political or intellectual history. Still, much of the history that supplies the allegedly empirical basis for Second Amendment theorizing cannot be taken seriously on its own terms, and would be censured in any vigorous undergraduate program even in an educational milieu otherwise committed to positive reinforcement. Nowhere is this more true than in the case of textualist investigations which resort to historical materials wrested from context only to illustrate the “plain meaning” of isolated terms not adequately elucidated by Dr. Johnson or Noah Webster.⁶⁴

Granted, historical truth is non-ascertainable. And granted too that multiple perspectives have their validity. But demonstrable historical falsehood is a recognizable beast, and one of its favorite stomping grounds is textualist inspired Second Amendment theory. If originalism is to have a greater claim to legitimacy than the parlor game of naked textualism with its dictionaries and offhand references to the Federalist and Blackstone merits on its own,⁶⁵ if inquiry into meaning and purpose is more than a semantic exercise for arm chair (as opposed to laboring)⁶⁶ philosophers, if fidelity to constituted text involves some duty to attempt to come close to figuring out what the originators and ratifiers of that text actually thought they were doing, then there is a need to call out implausible and preposterous historical assertions premised

⁶⁴ For an inspired defense of this methodology, see SCALIA, *supra* note 8.

⁶⁵ *But see id.*, arguing that it really does not get any better than this.

⁶⁶ I have in the back of my mind the Monty Python sketch involving the football match between the German and Greek philosophers, which featured no action for eighty-nine minutes while members of both teams pondered whether they and/or the match actually existed, until in a fit of inspiration (prompted by the Germans’ insertion of substitute Karl Marx) Archimedes initiated an attack leading to Socrates’ winning goal in the ninetieth minute. *Monty Python’s Fliegender Zirkus* (Westdeutscher Rundfunk 1972).

on a-contextual and misinformed readings of documentary fragments by persons lacking any perspective and grounding in the thinking of the founding period.

I do not mean to imply hereby that it is necessarily a good thing to live under a two centuries old constitution, or that living under a constitution of that vintage, one must read it entirely in the light in which it was originally understood. My claim here is much narrower. It is simply that those who call themselves originalists (or even textualists), those who base the legitimacy of the interpretation they offer on its alleged fidelity to a past understanding, place themselves under an obligation to advance an account of that past understanding that is not demonstrably counter-factual, naive, or absurd, and that this holds whether one's perspective is essentially elitist (framer-focused) or popular (We the People focused). Holding originalists to a standard of accuracy (or non-inaccuracy, to be more precise) is very probably a task more suited to constitutional historians than theorists, which brings me to consideration of several intriguing paper presented at Fordham in 2004 by historians and others much concerned with the Second Amendment.

From Erwin Chemerinsky's keynote address through panels on historical, legal, public policy, and cultural perspectives, the Fordham symposium on the Second Amendment was dominated by consciousness of the cultural situation in which gun rights-related discourse has been articulated.⁶⁷ For constitutional historians working in history faculties, and constitutional theorists and doctrinalists working in law schools, this reflects a remarkable shift in emphasis

⁶⁷ Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective*, 73 *FORDHAM L. REV.* 477 (2004). The papers presented at Fordham were published in the *Fordham Law Review* under the title *Symposium: The Second Amendment and the Future of Gun Regulation: Historical, Legal, Policy, and Cultural Perspectives*, 74 *FORDHAM L. REV.* 474 (2004). My emphasis in this section is on the historical and legal papers, by scholars rooted in two disciplines which I am far more familiar than public policy, political science, and cultural studies, fields which contributed seven more intriguing papers to the forum.

from elite to popular perspectives that has radically transformed both professions in the last generation, and, more particularly, in the last decade. Yet this transition from elite-focused to popular and culturally inflected constitutional history should not serve as a license to invent narratives the record will not bear, at least as long as the root purpose of the inquiry remains a quest for legitimacy beginning in some form of original meaning and understanding. Unlike much Second Amendment literature, each of the three historical papers offered at Fordham—by Saul Cornell and Nathan DeDino, James A. Henretta, and David Thomas Konig (none of whom, to my knowledge, is a committed originalist)—demonstrate painstaking and admirable efforts to remain faithful to the past.

Cornell and DeDino took aim squarely at untenable and a-contextual historical assertions common in the Second Amendment writings of individual rights theorists including Randy Barnett and Don B. Kates, Eugene Volokh, Joyce Lee Malcolm, David I. Caplan, and David B. Kopel.⁶⁸ In endeavoring to resurrect the statutory context and cultural assumptions that enveloped the right to arms written into the Second Amendment, Cornell and DeDino stress the point that “the ideal of liberty at the root of militia was not part of a radical individualist and anti-statist ideology.”⁶⁹ Instead, the right to arms found expression in a world much more deeply committed to communal, civic obligations than our own, in which liberties and duties intertwined in a fashion difficult for adherents of postmodern radical individualism to accept. Cornell and DeDino pay close attention to the Pennsylvania Declaration of Rights of 1776, which contains the first American reference to the right to arms and is often cited by individualists to support a private rights interpretation. Article XIII of the Declaration provided

⁶⁸ See Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 74 *FORDHAM L. REV.* 487, 496, 498, 502-03 (2004).

⁶⁹ *Id.* at 494.

that “the people have a right to bear arms for defence of themselves and the state,” but adjoining passages in that Article and other passages in Article VIII illuminate the civic, corporate context in which this right was asserted. Not only was the language just quoted from Article XIII coupled to an admonition not to keep up standing armies and to maintain civilian supremacy over the military, but Article VIII also set out an obligation of civilian military service to the state and a conscientious objector proviso, pointedly stressing the connection between civic obligation and arms bearing.⁷⁰

One of the most intriguing points Cornell and Dedino made at Fordham concerns the pervasiveness of regulations pertaining to gun use and ownership in colonial, revolutionary, and early national periods. James Madison, principal draftsman of the Second Amendment, favored toughening Virginia’s game laws to increase penalties for using guns for nonmilitary purposes outside of ones own enclosed grounds.⁷¹ A popular founding-era guidebook for sheriffs, constables, and justices of the peace contained detailed procedures for disarming individuals who broke the peace.⁷² Militia regulations concerning arms were extensive, reaching confiscation of weapons belonging to persons who declined to take loyalty oaths to the new American governments.⁷³ Gun powder storage was closely policed in the eighteenth century, and by the early nineteenth century, local and state laws prohibited carrying concealed weapons.⁷⁴ Other laws of the early national period banned shooting in cities and along public roads.⁷⁵

To contemporaries and near contemporaries of the framers and ratifiers of the Second Amendment, the right to arms was thus not only more civic than privatistic, it also happily

⁷⁰ *Id.* at 495-96.

⁷¹ *Id.* at 500.

⁷² *Id.* at 501.

⁷³ *See id.* at 505-08.

⁷⁴ *See id.* at 510-15.

⁷⁵ *See id.* at 515-16.

existed alongside a wide array of regulations and restrictions pertaining to arms possession and use. But perhaps this is not the whole story, and it may be that Cornell and DeDino will not have the last word in this never-ending dispute. As Robert Churchill maintains in an upcoming article in *Law and History Review*, regulation is one thing, and prohibition—and especially prohibition reaching loyal, law-abiding white citizens—another.⁷⁶ And as James Henretta (anticipating Churchill) pointed out in rebuttal to Cornell and DeDino at Fordham, some voices celebrated a mixed private/public and perhaps in some cases purely private right to arms in the eighteenth century, and their chorus quickened (or so the argument goes) as the new nation expanded.⁷⁷ Then again, as David Thomas Konig trenchantly remarked closing out the historical discussion at Fordham, not every strain of radical, populist, agrarian, anti-statist, and indeed anti-legal thought that at various times gained currency on the eighteenth or nineteenth century American periphery ripened into accepted constitutional principle. Antinomian gun wielding was in fact not elevated to sanctity in higher law by good faith participants in the constitutional process, because they, like Locke and Jefferson, realized that those rare revolutionary reversions to the state of nature

⁷⁶ See Churchill, L. & HIST. REV (forthcoming 2007). In replies to be published along side Churchill's article, Cornell takes issue with the credibility of Churchill's evidence, Cornell, L. & HIST. REV. (forthcoming 2007), and I contest Churchill's emphasis and interpretation, Merkel, *Mandatory Gun Ownership, The Militia Consensus of 1806, and Background Assumptions Concerning the Early American Right to Arms: A Cautious Response to Robert Churchill*, L. & HIST. REV. (forthcoming 2007).

⁷⁷ See James A. Henretta, *Collective Responsibilities, Private Arms, and State Regulations: Toward the Original Understanding*, 74 FORDHAM L. REV. 529 (2004). Henretta concedes that the evidence he relies on is not unambiguous, but since his principal aim was to show that Cornell and DeDino did not rely on unambiguous evidence either (and since it is often the very same evidence they discuss), this concession is hardly fatal to Henretta's argument. Henretta also draws fairly heavily on failed legislation and unratified proposals to suggest a private rights valence, and while his overall assessment that arms related discourse in the founding period was at once civic and individualistic is thoughtful and measured, I think he lays too much stress on the private sounding voices.

brought on by extraordinary oppression must give way quickly to constituted and ordered liberty, and not become recipes for eternal, fatal disorder.⁷⁸

Another insightful perspective of the violence-inflected Second Amendment is Jonathan Simon's, which, since it was articulated as a brief comment reviewing a book by other authors, may not have attracted the attention it deserves.⁷⁹ Professor Simon looks not to the role of arms bearing at the time of the framing, but to fears of lawlessness and brutality in our own times. He believes with Bruce Ackerman that Article V does not offer an exclusive definition of means for amending the Constitution. For Ackerman and Simon, constitutional crisis, ratifying election, and judicial reinterpretation can legitimize changed meaning of constitutional language according to the paradigm established during the New Deal, when the Commerce Clause was reinterpreted to give Congress plenary authority to enact economic and social regulations. Since at least the 1960s, Simon argues, growing numbers of Americans have seen the militia rather differently than did their militia-focused ancestors. In large part, Simon suggests, this changed perception reflects the nation's contemporary fixation with the danger of violent crime, and the perceived need of citizens to defend themselves privately when and where the police cannot or will not do so. For many for whom these concerns loom most important, the Second Amendment has become a cherished icon of self-empowerment and liberty against violent attack. The militia-focused reading of the Amendment the Supreme Court issued in *United States v. Miller* in 1939⁸⁰ does not comport with their demand that the Constitution protect their right to self-defense by the means they deem necessary and most effective, and so they demand

⁷⁸ Konig, *supra* note 25.

⁷⁹ Simon, *supra* note 16.

⁸⁰ *United States v. Miller*, 307 U.S. 174.

that the Court revisit, correct, and clarify its understanding of the right to arms. In this reading, an Ackermanian moment is at hand, and a constitutional sea change is in the offing.

The Right to Arms and the Fourteenth Amendment

Of all the recent contributions to Second Amendment scholarship discussed so far, only those by Jim Chen (a.k.a. Gil Grantmore) and the team of Saul Cornell and Nathan DeDino have engaged in detail Akhil Amar's intriguing thesis that the framers of the Privileges and Immunities Clause of the Fourteenth Amendment viewed the right to arms as a fundamental right inherent in national citizenship that they and the ratifiers of the Amendment intended to apply against the states to facilitate self-defense of freemen and Southern Republicans threatened by the Ku Klux Klan. The right to arms, Amar has argued, was liberated from its textual linkage to the now discredited militia during Reconstruction, and reborn as a private, individual liberty.

Inspired in part by Robert Cottrol and Raymond Diamond's call for an Afro-centrist reconsideration of the right to arms,⁸¹ Amar first articulated his argument in two articles in the *Yale Law Journal* in the early 1990s,⁸² and then, in synthesized form in his book *The Bill of Rights: Creation and Reconstruction* in 1998. Richard Uviller (with some minor contributions from me) engaged Amar's central themes in our book, *The Militia and the Right to Arms*, in 2002.⁸³ I was not yet aware when we submitted our book manuscript that Professor Amar had offered up an even more refined version of Fourteenth Amendment take on the right to arms. In

⁸¹ Cottrol & Diamond, *supra* note 19.

⁸² Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) [hereinafter Amar, *Fourteenth Amendment*]; Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991) [hereinafter Amar, *Constitution*].

⁸³ UVILLER & MERKEL, *supra* note 12, at 202-209.

a lecture delivered in Salt Lake City and reprinted in the *Utah Law Review* in 2001,⁸⁴ Amar incorporated new angles and turns into his original theory which are at once fascinating and ingenious. But Amar's revised version of the refined right depends on three gigantic leaps of faith, all of which may be misguided, and only two of which have been tentatively embraced by jurists other than Justice Thomas and academicians other than Amar himself.

The first of these bold premises is that the framers and ratifiers intended total incorporation of the Bill of Rights via the Privileges and Immunities Clause. The second asserts that the framers and ratifiers also intended to sever the Second Amendment right to arms from its textual linkage to the militia in the process. The third is that the process of selective incorporation via the Due Process Clause slowly embraced by the Court through the twentieth century (well, beginning in 1897 actually)⁸⁵ was misguided and unwarranted, and should be disowned. Amar's case for all three propositions is essentially originalist. But he has little constitutional text to go on as he builds his argument—except the open ended Privileges and Immunities Clause itself—for the framers did not write into the Amendment “apply the first eight (or nine) amendments to the states, privatize the right to arms, and do so via privileges and immunities, not due process.” Therefore, he relies chiefly on evidence from the Congressional debates on the Amendment and other contemporary expression concerning the policies of Reconstruction.

The case he builds is the same case Justice Black asserted in favor of total incorporation in *Adamson* in the face of Justice Frankfurter's argument in favor of a go-slow approach, premised on a Due Process inquiry into what rights and principles were fundamental to ordered

⁸⁴ Amar, *supra* note 17.

⁸⁵ See *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U.S. 226 (1897) (incorporating the Takings Clause of the Fifth Amendment against the states).

liberty.⁸⁶ That is, it is almost the same argument. It lacks Black's normative claim that Frankfurter's formula was dressed-up natural law, and a recipe for judicial law making. It relies entirely on Black's originalism side of the argument, on the claim that total incorporation via Privileges and Immunities is what the framers of the Fourteenth Amendment (and I don't think Black was much concerned with the ratifiers) intended. The problem with this argument, as Charles Fairman showed nearly sixty years ago,⁸⁷ and as Raoul Berger demonstrated again and again until his 95th year,⁸⁸ is that it simply cannot accommodate a floodtide of countervailing evidence, notwithstanding the ingenious and alluring advocacy by luminaries like Justice Black, W.W. Crosskey, Michael Kent Curtis, Robert Cottrol, and Akhil Amar.⁸⁹ To be sure, they have ample evidence to support a claim that many members of Congress and the public were thinking along lines of selective incorporation via the Fourteenth Amendment as a whole or the Due Process Clause. However, let us not forget that is not their claim, but that of their opponents. Amar's central point is that there was a constitutional majority behind sub silentio total incorporation via the Privileges and Immunities Clause, and this the evidence will not bear.

Principal problems with Amar's major premise include these:

⁸⁶ See *Adamson v. California*, 332 U.S. 46 (1947) (Frankfurter, J., concurring) (Black, J., dissenting).

⁸⁷ See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bills of Rights?*, 2 STAN. L. REV. 5 (1949).

⁸⁸ RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (2d ed. 1997).

⁸⁹ See *id.* at 30-69, 155-89, disputing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1997); see also MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); Amar, *Fourteenth Amendment*, *supra* note 82; but see Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993); See also *Adamson*, 332 U.S. 46 (1947) (Black, J., dissenting); Cottrol & Diamond, *supra* note 19; William W. Crosskey & Charles Fairman, "Legislative History," and *the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

1. Even as they ratified the Fourteenth Amendment, several states implemented plans to initiate prosecution by information and abolish indictment by grand jury in criminal cases, or require grand jury indictments only for the most serious cases. No one noted an inconsistency or a budding constitutional problem respecting a provision that according to the incorporationists would have required grand jury indictment to initiate trial of any infamous crime.⁹⁰

2. The *Slaughter-House* Court parsimoniously construed the Privileges and Immunities Clause in 1873 to reach only a narrow class of rights attendant to national citizenship. Neither Justice Miller's opinion nor the dissents of Field and Bradley took up any claim that the Bill of Rights applied against the states, and it does not appear from the published opinions that plaintiffs' briefs made such a claim. Some commentators insist that the dissenting Justice Bradley, who heard the case as a lower federal judge before being elevated to the Supreme Court in 1870, had held for the lower court that the Fourteenth Amendment incorporated the Bill of Rights, but what he actually wrote is that it incorporated the Civil Rights Act. In any case, in the Supreme Court opinion, the putative right against monopolies does not appear conceptually linked to the Bill of Rights at all.⁹¹

3. In 1875, James G. Blaine of Maine (Speaker of the House, who had been a member of Congress in 1866 when the Fourteenth Amendment was debated and passed) proposed an amendment to bar state establishment of religion. No one rose to say "Blaine, we've already made the First Amendment applicable to the states via the Fourteenth." Instead,

⁹⁰ See Fairman, *supra* note 87, at 82-85, 97-99, 101, 103-06, 111.

⁹¹ See Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine Lived Cat*, 42 OHIO ST. L.J. 435, 441 (1981).

the house discussed anti-Catholicism—specifically the dangers of state support for Catholic schools—on its merits.⁹²

But perhaps I would merely beat a dead hobbyhorse. Whether anyone besides myself is interested in revisiting the fascinating, valuable, and intriguing Fairman/W.W. Crosskey debates is doubtful. Perhaps I should content myself with declaring victory on behalf of Fairman and Frankfurter and leaving the field in the hands of the routed but numerous, committed, and undaunted forces of the total incorporationists. With cultural scholarship of constitutional history fast supplanting (and possibly suppressing any interest in) an older, unabashedly elitist legal history intensely focused on documents generated by a privileged, out of touch, and powerful few, it perhaps matters very little that Fairman (by his own admission) devastated Crosskey or that Berger (so he assures us) demolished Curtis. Few now remember or care about the rules by which the empiricist constitutional doctrinalists played.

Amar's history of Reconstruction is more intriguing, more novel, more clever, more morally inviting, and more in tune with our times than Fairman's. And ultimately, Amar is hardly wrong that the job of living participants in our constitutional democracy is not to recapture Reconstruction as it was (or was intended to be), but to use it as a guide to applying the text the Reconstructionists bequeathed to problems they did not foresee or wish to resolve. And this is a task to which he turns with more logic, faith, and fidelity but no less concern for humane outcomes than Chief Justice Warren, who in *Brown v. Board of Education* chose to ignore the intent of the framers all together, because—so says the opinion—it was unfathomable, and

⁹² See *id.* at 464.

unascertainable, or—so we suspect—because the new Chief (rightly) deemed it unpalatable and unjust.⁹³

Professor Amar also relies on the assumption that individual self-defense was deemed more desirable than collective self-defense under color of law during Congressional Reconstruction, as Republicans looked southward from Washington and beheld the savagery of Klansmen and nascent Redeemers. Here, too, Amar has evidentiary problems he has not adequately accounted for. Saul Cornell and Nathan DeDino's effective critique of this component of the Amar thesis in the *Fordham Law Review* demonstrates the centrality of black and integrated, lawfully established militia to Republican rule in the South.⁹⁴ Conversely, disarmament and disbanding of black militia was a central—indeed the principal—aim of the Redeemers as they returned to (or shall we say usurped) power in the former Confederate states. Cornell and Dedino draw part of their evidence from Otis Singletary's classic and supremely relevant study *Negro Militia and Reconstruction*,⁹⁵ a dusty volume laden with rich insight concerning conflicts between rival black Republican and white Democratic militia during the struggle for state-level control in the South that ensued as Union troops withdrew.

Inspired by Singletary's forgotten history and Amar's intriguing suggestions regarding the relevance of the Second Amendment to police integration today, I would like to proffer my own modest proposal for recasting Reconstruction as it might (and should) have been. Like Amar, and more expressly like Cottrol and Diamond, my proposal is for an Afro-centric

⁹³ See also BORK, *supra* note 89, at 81-82 (arguing that the result, but not the opinion in *Brown* was readily reconcilable with original understanding); Akhil Reed Amar, *Intratextualism*, 112 HARVARD L. REV. 748, 766-73 (1999) (supporting *Bolling* by reading the Fifth Amendment Due Process Clause in light of the National Citizenship Clause of Section 1 of the Fourteenth Amendment).

⁹⁴ Cornell & DeDino, *supra* note 68, at 517-25.

⁹⁵ OTIS A. SINGELTARY, *NEGRO MILITIA AND RECONSTRUCTION* (1957).

reconsideration of the incorporationist possibilities of federal imposition of the right to bear arms on the states. In this respect, Cornell and DeDino (as well as Carole Emberton, in her engaging contribution to this symposium assessing “The Battle of Liberty Place” waged between white Democratic and black Republican militia for control of New Orleans in 1874)⁹⁶ have stolen some but not quite all of my thunder.

Cornell and DeDino analyze the South Carolina Ku Klux Klan trials of 1871-72, in which U.S. Attorney Daniel Corbin asserted Fourteenth Amendment claims (this was before the Civil Rights Cases of 1883 limited the Fourteenth Amendment’s prohibitions to state actors) against members of the Klan for violating black persons’ right to arms guaranteed by the Second Amendment.⁹⁷ This appears to buttress Amar’s claim that incorporation was in the air during Reconstruction (but I would counter by asking whether it was meant to be selective or total, to proceed by means of Due Process or Privileges or Immunities, and whether it was endorsed by a scattered few or a constitutional majority of ratifiers). Crucially however, as Cornell and DeDino stress, the disarmament in question was visited not on isolated individuals, but on militia members. The right the U.S. Attorney sought to vindicate through the Fourteenth Amendment was indeed the right to armed defense against the Klan, but it was a militia-focused right, not a private liberty. To these insights of Cornell and DeDino I’d like to add that this course—application of a right to bear arms in the militia—is perhaps the path not taken that would have changed Southern history immeasurably for the better. An enforceable (and there’s the rub) constitutional mandate to integrate the organs of state power—first militia, and then, in the years to come the state troopers of the South—would have put the breaks on Redemption, Jim Crow,

⁹⁶ See Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 STAN. L. & POL’Y REV. 615-34 (2006).

⁹⁷ Cornell & DeDino, *supra* note 68, at 522-25.

and Lynch Law, and made far more difficult the violent resistance to federal imposition of a new Civil Rights regime under the Second Reconstruction.

Amar's most intriguing points in his latest essay on the right to arms relate not to Reconstruction, but to modern times, and not to African Americans collectively, but to women, and to gays and lesbians. Advocating intratextualism (a far more appealing interpretive method than over rigid clause bound textualism, but one still susceptible to critique),⁹⁸ he links the right to arms (as modified and individualized by Reconstruction) to the Nineteenth Amendment's expansion of suffrage and, implicitly, full political citizenship, to advance a powerful argument for equal opportunity for women in the military. He draws also on the once obvious and still primary military meaning of bearing arms to argue that the Second Amendment should be read to demand gay and lesbian access and equality in the Armed Forces. This is an interpretation I too have suggested, and one which has such force from a plain meaning perspective, that I have often wondered why it is not a focal point of the legal effort to achieve gay and lesbian rights in the military.⁹⁹ That said, the rights' coupling to the militia suggests more immediate applicability to the National Guard and even Reserves than to the regular Armed Forces, but the relevance and command language are striking and forceful also respecting the full time federal forces.

One gay rights angle I have not seen discussed at all respecting the Second Amendment directly concerns individual, private liberty rather than military service. *Lawrence v. Texas* had its beginnings when the police in Harris County, Texas responded to a tip concerning a gun violation in an apartment in November, 1998. When the officers arrived on the scene they found

⁹⁸ See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 105 YALE L.J. 1225 (2000) (criticizing Amar's intratextualism as overly narrow).

⁹⁹ H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 509 n.429 (2000).

John Lawrence and Tyron Garner engaged in the very acts Justice Kennedy described with nearly lyric appreciation in the majority opinion of the Supreme Court.¹⁰⁰ Lawrence and Garner were arrested and spent a night in jail well before the Fifth Circuit recognized a private right to arms under the Second Amendment, but their appeal was still pending when *Emerson* was working its way up the federal Courts.¹⁰¹ By the time the Fifth Circuit panel announced its *Emerson* decision, the appellants in *Lawrence* therefore had a colorable claim that their sodomy bust was fruit of a violation of their federal right to arms! Perhaps the Supreme Court of the United States might have clarified the right to arms at the same time it recognized the right to same sex intimacy in *Lawrence*, but, alas, this greatest of cultural ironies was not to be.¹⁰²

Professor Amar's work focuses on the impact of the right to arms on historic outsiders, on African Americans, on women, on gays and lesbians. But those who are widely perceived as the most adamant champions of a vigorous, private right to arms are outsiders of a different stripe, rural white men, rustic individualists, disenchanted with elite America, with the mainstream, and for many years, with the federal government. For a generation, the NRA has been their voice, but now the NRA has a seat in government, and gun rights are no longer outside the mainstream, but part of the federal executive's agenda. One wonders whether the basic background assumptions behind David Williams' complex portrait of the cultural wars still hold. The Euro-centric, Atlantic elitist big government faction that America's modern militiamen so much loathe has, after all, to all appearances, been routed. So what will become of Williams'

¹⁰⁰ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003). It strikes me that there is something terribly "new romantic" about the phrase "When sexuality finds overt expression," as though it might have been a song title for The Smiths or Boy George in the 1980s.

¹⁰¹ The Supreme Court decided *Lawrence* on June 26, 2003, 543 U.S. at 558. The Fifth Circuit decided *Emerson* on October 16, 2001, 270 F.3d at 203.

¹⁰² Presumably, such a decision would have raised no retroactivity concerns since direct appeal was still pending (or, indeed, before the Supreme Court!) when the new constitutional right was announced.

long time outsiders, now that the NRA has friends in high places, and its old enemies stand on the sidelines lacking any clear sense of purpose? Will the rural militiamen still fear confiscation? Perhaps, emboldened now that more sympathetic minds hold the reins of power, they will focus less on their vaunted rights to possess their weapons, but rather will cast an eye towards reanimating their militia, and coming out of hiding. They may demand to return to duty, as minute men on the border, serving a government they no longer fear.

Meanwhile, old faithful disciples of the regulatory state, New Dealers and their progeny, long hopeful that their government would build them pathways from cradle to grave, and disarm the ruffians along the way, may grow to wish less fervently that a government no longer quite so indelibly theirs possess an absolute and unchallengeable monopoly on violence. Is role reversal in the great gun cultural wars in the cards? Perhaps. Perhaps it is even to be expected. The inevitability of revolution in the wheel of fortune was after all one reason the framers took the right to arms so seriously. But before the gun culture attains the victory it has so long sought, one last battle—and the most important battle at that—remains.

Conclusion

The gun cultural wars inform academic debate on the Second Amendment, and do a great deal to explain why so much is at stake in judicial exposition of the right to arms. But there is, I suspect, another powerful reason besides antipathy towards the coastal, cosmopolitan elite that explains why bedrock America covets a definitive Supreme Court reinterpretation of the right to arms. Religiously and politically, a great many Americans view this as a covenanted nation. This notion has a powerful pedigree running backwards in time through Lincoln's Gettysburg Address and the origins of the Republic, to John Winthrop's homily on the City on a Hill and the

origins of the nation. The Declaration of Independence, the Constitution, and the Bill of Rights (or at least the Free Exercise Clause, and the Second, Ninth, and Tenth Amendments, with the lesser elements of the first ten and perhaps all subsequent Amendments forming a disputed and dubious apocrypha) are sacred secular texts in this tradition. They express a bond between the originators of the American republic and future generations, and witness to an obligation the inheritors of constitutional liberty owe to the founders as a debt to their sacrifice.¹⁰³ In short, it is the secular equivalent of blasphemy—or perhaps, quite blasphemously, blasphemy itself—to denigrate, disobey, or ignore the precepts and commands that these texts enjoin. Nor does their inspired language, according to this covenant tradition, admit of interpretive freedom; the language is plain, and its commands exacting.

In this belief system, there are several non-negotiable articles of faith. These include that the Republic was born of violent resistance to oppression. This heroic resistance was carried out by uncompromising individualists, acting collectively for the greater good and for the future of individualism. By exercising their right to self-defense against tyranny, they established the constitutional tradition protecting our right to self-defense. This right they preserved for the ages in the Second Amendment. Thus, in a contemporary light, mere recognition that gun possession is safe because a popular or legislative majority favors it falls far from the constitutionally and covenantally required mark. Likewise, new state constitutional amendments or even a new

¹⁰³ Or, as Justice O'Connor wrote in *Planned Parenthood v. Casey*, 505 U.S. 833, 901 (1992), reaffirming the nineteen-year-old right to abortion, “[o]ur Constitution is a covenant running from the first generation of Americans to us and the to future generations. It is a coherent succession. Each generation must learn anew that the Constitution’s written terms embody ideas and aspirations that must survive more ages than one.” Justice O’Connor’s rhetoric could not have been more fitting in a Jeffersonian sense, for nineteen years is precisely the generational time frame Jefferson set for mandatory constitutional renewal. See HERBERT SLOAN, *PRINCIPLE AND INTEREST: THOMAS JEFFERSON AND THE PROBLEM OF DEBT*, 50-53 (1995).

federal amendment securing an unrestricted liberty to own and carry guns are neither needed nor desired (although the state amendment might be useful in the short term, pending recognition of incorporation in the great High Court opinion to come). Ultimately, nothing short of penitent confession that the eternal Second Amendment of 1789 has always and always shall guarantee a private right to arms in its original language will suffice to achieve the desired rebirth of American freedom. This conversion rite and no watered down substitute is what bedrock America demands that the Supreme Court perform.

Michael Dorf, while prognosticating that the social movement uniting gun rights enthusiasts in the call for Supreme Court acknowledgement that the Constitution recognizes a private right to arms will not succeed in its most cherished goal, allowed that a change in personnel on the High Court might prompt reconsideration of his prediction.¹⁰⁴ This autumn President Bush, with the advice and consent of the Senate, is in the process of appointing two new justices to the Court, including John Roberts, now confirmed as Chief Justice, and very likely Samuel Alito, whose confirmation hearings await as of this writing. Professor Dorf may have been overly pessimistic about the gun movement's prospects when he published *Identity Politics and the Second Amendment* in 2004; the new appointments, I suspect, now make it more likely, perhaps all but certain, that a definitive Supreme Court opinion guaranteeing a private right to arms under the Second Amendment will issue within a short few years.

As Erwin Chemerinsky, Calvin Massey, and others remarked at the Fordham symposium,¹⁰⁵ and as Adam Winkler especially has elucidated here,¹⁰⁶ perhaps the important practical question is not whether the right to arms extends to all individuals, but what existing or

¹⁰⁴ Michael C. Dorf, *Identity Politics and the Second Amendment*, 73 *FORDHAM L. REV.* 549, 571 (2004).

¹⁰⁵ Chemerinsky, *supra* note 3, at 484-85.

¹⁰⁶ See Adam Winkler's essay in this volume.

potential regulation is likely to fall if and when the right is reconstrued by the Court. The answer may well be that most politically feasible restrictions or controls on gun ownership or use would pass muster under inexacting scrutiny, as the challenged provision did in *Emerson*, when the Fifth Circuit became the first federal Court of Appeals since *Miller* to hold that the right does apply to private persons.¹⁰⁷

Perhaps then, there need be no sense of panic or imminent doom among persons and subcultures favoring tighter control of guns, even when the rapture comes. Still, the rapture likely will come, and come fairly soon. Jonathan Simon, I suspect, is wholly correct in his linkage of popular fear of crime to rising calls for a vigorous enforcement of a robust right to arms, and accurate also, to predict that, following Bruce Ackerman's paradigm, these demands will lead to a judicial reconceptualization of constitutional norms.¹⁰⁸ But the history of constitutional norms and doctrines ebbs and flows. Dual federalism, pronounced dead in the first edition of the *Oxford Companion to the Supreme Court* in 1992, is now alive and well.¹⁰⁹ The Marshall Court's vigorous construction of national powers, abandoned by the Courts of Taney, Fuller, White and Taft, experienced a rebirth under the Chief Justiceships of Stone, Warren, Burger, and even Rehnquist. If the right to arms is now about to uncouple from its textual linkage to the well regulated militia, the new learning may not endure for all time. That the champions of the decoupled right rely on palpably false history suggests they are not infallible. And if it is not infallible, perhaps even the NRA may not prove invincible in the long run. Maybe a lone dissenter, or the author of a dissent joined by a small band, will write in a few years time of a decision announcing a broad right to arms under the Second Amendment that "the judgment this

¹⁰⁷ *Emerson*, 270 F.3d at 261-64.

¹⁰⁸ Simon, *supra* note 16.

¹⁰⁹ THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 236 (Kermit Hall et al. eds., 1992).

day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case.”¹¹⁰ Perhaps, that lone voice, or minority voice, will prophesy accurately that the new learning will one day be disowned and forsaken.

¹¹⁰ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

CHAPTER FIVE

RAISING ARMIES

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Article I, section eight, clause twelve of the Constitution conveys to Congress the power “[t]o raise and support Armies,” provided that “no Appropriation of Money to that Use shall be for a longer Term than two Years.” The reference to “Armies” signals that this power exists in addition and distinction to concurrent Congressional/state powers over the militia recognized in Article I Section 8 clauses 15-16. Prior to the twentieth-century world wars, the bulk of the nation’s non-naval forces consisted of state militia or state units called into federal service, and to this day, the organized militia, in the form of the National Guard, continues to provide a substantial component of the armed forces. The Supreme Court’s decision *The Selective Draft Law Cases*¹ established unambiguously that congressional authority to raise armies includes the power to conscript civilians into national military service. For much of American history, however, Congress has relied principally or even exclusively on its ability to attract volunteers to the federal forces by appeals to patriotism and through the allure of pay packages, bonuses, and other tangible incentives including land grants and—in recent decades—job training.

During the Revolutionary War, the Continental Congress supplemented provincial recruitment by enlisting soldiers directly into the Continental line. Congress never asserted authority to conscript, and no such power was recognized under the Articles of Confederation, but the states possessed the undoubted ability to compel militia service through their militia laws. Apart from its own direct recruitment, Congress relied on state conscription powers to fill state recruitment quotas, even though Congress lacked any enforcement mechanism for ensuring

¹ *Selective Draft Law Cases*, 245 U.S. 366 (1917).

compliance with these theoretically binding military obligations to the Confederation.

Throughout the Revolutionary period, much political discussion focused on the dangers of standing armies to republican government, and pamphleteers and publishers made ready use of examples of military abuses in classical times, under the Stuarts, and during the English Civil War to remind their audiences that large professional armies might imperil liberty. In contrast, many future Federalists, including Washington, Hamilton, and Knox saw citizen militia as militarily inadequate, and credited the regulars with the eventual American victory during the War. In this context, the militia and army clauses of the Constitution reflect a balance between republican preferences for a virtuous citizen militia and the dictates of military necessity that favor a professional army. The Constitution allows construction of a federal army that can be raised directly by the federal government, but it also ensures civilian supremacy over the military, divides authority over the army between Congress and the president and requires that funding measures be reconsidered and reenacted at least every two years. Moreover, the militia clauses and the Second Amendment attest that many members of the founding generation hoped the nation would place principal defensive reliance on the citizen militia notwithstanding the newly minted federal army powers.

The regular army remained small through the nineteenth century, even during the Civil War, with full-time career soldiers in federal service seldom numbering more than 35,000. The exigencies of the War of 1812, including New England reluctance to furnish militia, caused the Madison administration to contemplate federal conscription, but legislation authorizing a draft stalled when fortunes turned in America's favor in late 1814. Refusal of New England militia units to cross the Canadian border during the second war with Britain highlighted the

constitutional restrictions against foreign deployment of the militia² and in this light the campaigns of the Mexican War of 1846-1848 were fought entirely by regulars and federal volunteers. While the Confederate states resorted to conscription early in the Civil War, the government of the United States did not pass its first conscription law until March 3, 1863. The Act required able-bodied male citizens of the United States between the ages of twenty and forty-five to enroll in the draft lists, but permitted persons actually drafted to hire a substitute or pay a \$300 commutation fee. Ultimately, President Lincoln issued four draft calls pursuant to the Act and its amendments, and some six percent of the 2.67 million men who served in the Union forces during the War were conscripted directly by the federal government (the remainder of the federal forces consisted of volunteer enlistees with either state militia or federal volunteer units). Commutation, substitution, and allegations of corruption sparked class and ethnic resistance to the draft, which manifested itself most prominently in the violent New York City draft riots of July, 1863, requiring suppression by federal troops hastily removed from the battlefields after the Union victory at Gettysburg. Partly owing to wartime suspension of the Writ of Habeas Corpus no challenges to the Civil War draft were decided in the federal courts, but after initially allowing injunctions to arrest execution of the draft, the Supreme Court of Pennsylvania rejected federal constitutional challenges to the draft in *Kneedler v. Lane*.³

The War with Spain in 1898, fought largely by state volunteer militia units whose members enlisted for federal service prior to disembarkation for Cuba or the Philippines, highlighted once more the dubious constitutionality of foreign deployment of militia. To forestall future constitutional difficulties on this front, Congress created the modern dual

² See U.S. CONST. Article I § 8, cl. 15.

³ *Kneedler v. Lane*, 45 Pa. St. 238 (1863).

enlistment system for the National Guard in the National Defense Act of 1916, which required guard members to take oaths to both the federal government and their states, and empowered the president to call up state militia units into federal army service for overseas deployment. With U.S. involvement in the Great War looming, Congress also authorized the second federal draft in the nation's history on May 18, 1917. This is the Act challenged in the *Selective Draft Law Cases*.⁴ The Supreme Court, in a unanimous opinion by Chief Justice White, reasoned that the power to raise and support armies included the power to compel service. For the Court, the Article I Section 10 clause 3 prohibition against state keeping up troops in times of peace without congressional consent made clear that the framers had transferred the whole power over armies (as opposed to militia) to the federal government, and this necessarily entailed the ability to conscript, recognized by universal practice among nations and by jurists and philosophers as a corollary obligation of citizenship. The Fourteenth Amendment's establishment of the primacy of national over state citizenship further strengthened federal claims on citizen's military duty. Finally, the Court rejected Thirteenth Amendment claims' that military service constituted involuntary servitude and establishment clause claims that recognition of conscientious objector status privileged favored religions. The Supreme Court has not revisited the question of whether Article I Section 8 clause 12 authorizes conscription since it decided the *Selective Draft Law Cases*, and has several times indicated that this issue is now beyond debate.⁵ Resistance to conscription was limited during World War II owing the perceived necessity of the war and the relative equity of drawing substantially all the military-aged men of the country into service, but conscripting only some of the military-eligible population for duty in Korea and Vietnam proved

⁴ 245 U.S. 366 (1917).

⁵ See *United States v. O'Brien*, 391 U.S. 367 (1968); *Rostker v. Goldberg*, 435 U.S. 57 (1981).

politically more volatile. For the time being at least, congressional repeal of the Selective Service Act and establishment of the all-volunteer armed forces in 1972 removes (or suspends) the most likely cause of future judicial challenges to the federal power to raise armies.⁶

⁶ On the power to raise armies, its power over the course of American constitutional history, and its relation to the Militia Powers, see generally RICHARD H. UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR HOW THE SECOND AMENDMENT FELL SILENT* (Duke University Press 2002); RUSSEL F. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY* (University Press 1984).

CHAPTER SIX
RESPONDING TO RANDY BARNETT'S CRITIQUE

Introduction

Several months before this issue of the *William and Mary Bill of Rights Journal* went to press, we received the comments submitted by Professors Barnett, Levinson, and Simon, and wrote our replies. Professor Barnett alone substantially revised his submission after reviewing our reply. Rather than commenting separately on our response, he incorporated his objections to our response into the revised version of his comment reprinted here. This practice is unorthodox, to say the least. It is not unlike competitors in an archery contest moving the targets once their rivals have let fly their arrows. We have not revised our reply to his original comment to reflect the fact that much contained in that comment did not in the end make it into this volume. Rather, we simply let stand our response to his original submission, and add a new afterword, that respond to his amended critique, and a conclusion.

It is difficult to know how to respond to the criticism of our most aggressive and persistent critic, Professor Randy Barnett. He seems to be bitterly disappointed that we did not write a book different from the one we wrote. He is particularly dismayed that we have not accorded him a label that would allow him to associate us with others, and, presumably, focus his fire. Are we “originalists”? And if so, do we belong among the original meaning set or the original intent group? Are we “textualists”? He seems to find it frustrating that he cannot readily categorize us or associate us with others who, he believes, reach their theoretical construction only in the service of their political objectives. Had we written the book he wishes we had, we would have clearly identified ourselves politically and described our theoretical methodology in a manner that would present a more gratifying target for his disagreement.

We also failed to write the book he would have wished in that we offer little original data. It may be true, as Professor Barnett says, that a reader should not pick up our book expecting to discover new evidence, but a careful reader will discover a few intriguing items that to our knowledge have previously been discussed only casually in print.¹ Still, we are glad that Barnett consoles us with the observation that, “There is nothing wrong, of course, with offering a new interpretation of previously discussed evidence.”²

Professor Barnett’s piece is the most difficult of the three to address succinctly. It contains much that is provocative, but also much that is simply unfounded. Preparing

¹ Attentive readers of *The Militia and the Rights to Arms* will encounter some new evidence, as well as analysis of documents not to our knowledge previously discussed in any detail in print. These include principally the Militia Censuses of the United States conducted between 1802 and 1830. Barnett chastises us for relying uncritically on Michael Bellesiles, but while we have joined others in expressing skepticism about Bellesile’s claims related to probate inventories, our own independent review of the Militia Censuses discussed in detail at UVILLER & MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* 285-285 n.78 (2002), suggests that Bellesiles’s assertions regarding the content of these censuses are substantially correct. We could not help but add that since these censuses cover hundreds of thousands of households—in theory the household of every militia-eligible citizen in the country—it is remarkable that so little is said about them, while so much is made of extrapolations based on the contents of a few thousand probate records, which, to a very large degree, must remain at least partly guesswork when projected onto the whole population. Evidence wholly new to the Second Amendment debate reported in our book includes newspaper articles related to the fears of slave-revolt in Virginia discussed in the context of Carl Bogus’ thesis that the Second Amendment was designed to protect the South against abolitionist inspired disarmament. *See id.* at 305 n.44. In writing this note, one of us discovered that a discussion of George Washington’s correspondence with his Fairfax neighbors about guns [not arms], dogs, and the hunt (including an interesting aside about lending champion dogs to slaves concerned about a raccoon problem) has mysteriously disappeared from the published version of the book, along with an analysis of a Washington letter to George Mason about arms and militia with which the guns letters were contrasted. This unauthorized deletion prevents adding Washington’s pre-Revolutionary correspondence about guns, dogs, and pest control on the one side, and arms and militia on the other, to the list of original evidence contributed to the Second Amendment debates through *The Militia and the Rights to Arms*. For more on Washington’s arms-related letters, see H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 *CHI.-KENT L. REV.* 403, 423-24 n.69 (2000).

² Randy E. Barnett, *Is the Right to Keep and Bear Arms Conditioned on a Militia?*, 12 *WM. & MARY BILL RTS. J.* __, __ (2004).

comprehensive replies to the many misleading and inaccurate assertions about our argument contained in his essay will prove a time consuming and laborious ordeal. We hope to do so on a future occasion. But for now, we reply to only three of the issues raised in his piece—two selected because they are premised on false or misleading representations of our work, and the third because of its great interest and patent absurdity.

Barnett charges that we present “little evidence of the public meaning of the words used [in the Second Amendment] and “no quantitative evidence by which to distinguish dominant from deviant meaning.”³ In fact, we discuss in detail such sources as George Washington’s war-time letter concerning the militia,⁴ Thomas Jefferson and James Madison’s correspondence relating to the desirability of a Bill of Rights and the advantages of militia over standing armies,⁵ selected Anti-Federalist tracts and a number essays in *The Federalist Papers* concerning the militia and the right to arms,⁶ the petitions of various state ratification committees in favor of bills of rights (including the proposals of New Hampshire and the Pennsylvania minority discussing a very private sounding right),⁷ the debates in the House of Representatives on the pending Bill of Rights,⁸ the Militia Act of 1792,⁹ and a great deal more documentary evidence related to the meaning of the right to arms in the United States Constitution.

In particular, we demonstrate that of the twelve members of the House of Representatives to speak concerning the text that become the Second Amendment, most concerned themselves with the very military issue of conscientious objection, and not one said anything that could be

³ *Id.* at __.

⁴ UVILLER & MERKEL, *supra* note 1, at 59-72.

⁵ *Id.* at 91-96.

⁶ *Id.* at 179-88.

⁷ *Id.* at 39, 81-85.

⁸ *Id.* at 181.

⁹ *Id.* at 77, 128, 132.

construed from context to concern a private right related to self-defense, hunting, or sport shooting.¹⁰ We point out that the proposals of New Hampshire and the Pennsylvania minority respecting a private right to arms were not echoed in the petitions of Virginia, North Carolina, New York, and a Maryland minority that favored a militia-focused right.¹¹ And we refer to Professor David Yassky’s research into the thirty congressional usages of the phrase “bear arms” and its cognates documented on the Library of Congress’ Century of Lawmaking website between 1774 and 1821, each one of which he reports occurred in an unambiguously military (i.e. not private) context.¹² We did not replicate his search, but we promise to do so in the future.

In a similarly misleading vein, Professor Barnett chastises us for relying uncritically on Garry Wills’ essay on the etymology of bearing arms published in the New York Times Book Review.¹³ He reports that we “do not scrutinize Wills’ evidence—nor present any new historical evidence of [our] own—but simply accept [Wills’] conclusions.”¹⁴ We refer Barnett to footnote seven at pages 296-97 to correct this misapprehension.¹⁵

¹⁰ *Id.* at 98-103.

¹¹ *Id.* at 81-85.

¹² *Id.* at 209-11.

¹³ Barnett, *supra* note 2, at ___.

¹⁴ *Id.* at ___.

¹⁵ There he might read the following:

Gary Wills’s provocation “To Keep and Bear Arms,” contains a thoughtful and learned passage on the meaning of “bearing arms,” which probably remains the most influential exegesis of the meaning of that phrase in the Second Amendment literature. Needless to say, standard modellers have their rejoinders, and even more staid members of the academe sometimes take Wills with a few caveats. While the respected and thoroughly dispassionate military historian Don Higginbotham has pointed out that Wills’s “analysis of to *bear*, *well-regulated* and *the people* is astute and helps rescue these terms from the distorted meanings ascribed to them by so many Standard Modellers,” he adds that “[i]n his examination of the term to *keep* . . . Will resorts to the same ‘linguistic tricks’ he repeatedly ascribes to Standard Modellers.” Still, it remains highly difficult to make a credible case for a pervasive non-military meaning of “bearing arms,” all the more so in the context of statutory or constitutional usage. As David Yassky remarks, “searching a Library of Congress database containing all official records of debates in the Continental and U.S. Congresses between 1774 and 1821 reveals thirty uses of the phrase “bear

Finally, we respond to Professor Barnett's ultimate point, the point that he might call the thirteenth chime of the clock; the signal that is not only dubious in itself, but calls into question all that have preceded it.

Barnett argues that our contention that there is no longer a militia, as used in the context of the Second Amendment, is wrong. To disprove our contention, Barnett argues that the citizen militia, in the old-fashioned, eighteenth-century sense of the term, is alive and well today in the action of the brave passengers on the fourth suicide mission of 9/11.¹⁶ It is surely no denigration of the heroism of those who brought that plane down, and saved the Capitol or the White house, to say that they were not acting as militia in doing so. It sounds very much as though Barnett would have us believe that any act of collective patriotic heroism, even the spontaneous response of desperate individuals who recognize their fate, is sanctioned by the Constitution. The Second Amendment does not require airlines to allow passengers to carry arms aboard so that they may stand ready, as a militia, to repel attack in flight. We think assertion of that point suffices to prove it.

arms" or "bearing arms" (other than in discussing the proposed Second Amendment); in every single one of these uses, the phrase has an unambiguously military meaning." *The Oxford English Dictionary* also attests unequivocally to the military implications of arms before in eighteenth century usage. In Yassky's words "*The Oxford English Dictionary* defines 'to bear arms' as meaning 'to serve as a soldier, do military service, fight.' It defines 'to bear arms against' as meaning to be engaged in hostilities with." As an exemplary use of the phrase in 1769, to *OED* gives 'An ample . . . pardon to all who had born arms against him," and the exemplary use of the phrase in 1609 is: "He bure armes, and made weir against the king.' . . . Indeed, the word 'arms' itself has a primarily military connotation. According to the *OED*, the oldest established meaning of 'arms' (other than the plural of 'arm,' meaning limb) is 'armour, mail.' The next oldest meaning is "[i]nstruments of offence used in war; weapons.' The *OED* quotes a 1794 dictionary; 'By arms, we understand those instruments of offence generally made use of in war; such as firearms, swords, etc. By *weapons*, we more particularly mean instruments of other kinds (exclusive of firearms), made use of as offensive on special occasions.'" UVILLER & MERKEL, *supra* note 1, at 296-97 n.7 (citations omitted).

¹⁶ Barnett, *supra* note 2, at ___.

To conceive of the spontaneous, desperate, efforts of a random group of passengers as the modern incarnation of the citizens' militia demonstrates its fallacy in the mere statement of the proposition. If Barnett means to argue that any time a citizen, cornered and desperate, draws a weapon and fires (regardless of the national peril), his access to the gun is a constitutional entitlement, we can only shrug and say that he has taken Second Amendment scholarship into the never-never land where anyone can argue anything.

Afterword on Professor Barnett's Amended Critique

In the most recent issue of the *American Historical Review*, Robert Shalhope has called *The Militia and the Right to Arms* the “most sound and sophisticated study yet to appear . . . [of] the historical origins of the Second Amendment,” and the “most closely reasoned and deeply researched study of the subject.”¹⁷ Randy Barnett, for one, clearly does not share this assessment. This, of course, is no bad thing—academic disputation is a large part of the driving engine of the scholarly profession. That he and we should disagree over interpretation is neither surprising nor discouraging. We object, however, to his repeated mischaracterization of our arguments, the evidence on which we rely, and the counter evidence that he adduces. A case in point is his treatment of our alleged failure to provide any support (his claim in the comment to which we replied above) or support he deems acceptable (his revised argument in the version printed in this volume) for our assertion that the military meaning of “bearing arms” and its cognates clearly predominated in political usage at the time of the framing.

In his initial version, Barnett ignored, among other things, our reliance on the Library of Congress database of recorded debates in the Continental Congress, Confederation Congress, and United States Congress between 1774-1821, which, as David Yassky reported, contained thirty occurrences of bearing arms, all of which are clearly military.¹⁸ In the version printed here, Barnett concedes that this is quantitative evidence of a sort, if not quite the kind he was

¹⁷ Robert Shalhope, *Book Review: H. Richard Uviller and William G. Merkel, The Militia and the Right to Bear Arms, Or, How the Second Amendment Fell Silent*, 108 *AM. HIST. REV.* 1442 (2003).

¹⁸ UVILLER & MERKEL, *supra* note 1, at 296-97 n.7 (discussing David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 *MICH. L. REV.* 588, 618 (2000) (citing a *Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates*, available at <http://memory.loc.gov/amen/amlaw/lawhome.html>)).

looking for.¹⁹ He even agrees that the recorded usages up until 1821 are uniformly military in tone and meaning.²⁰ But he then goes on to argue that the same database now extends through the Civil War and Reconstruction years, and that recorded usage by that era is no longer wholly, or even predominantly, military.²¹ In so doing, Barnett has pointed to interesting and valuable evidence that bearing arms carried both military and non-military meanings in political and legal usage during the Civil War years. This is an issue we might have treated in more detail in the book, and which at least one of us has on his research and writing agenda for the future. However, in examining the Library of Congress database, Barnett has done nothing but confirm our point that the military meaning of bearing arms dominated recorded political usage during the founding, federal, and Jeffersonian periods. It did so, in Congress at least, by a recorded margin of thirty to nil.

In order to support his claim that a private, non-military meaning of bearing arms was far from marginal when the Second Amendment was drafted and ratified, Barnett relies principally on the “Address and Reasons of Dissent of the Minority of the Pennsylvania Convention,” with its invocation of private as well as civic rights to arms, and even a right to hunt.²² But Barnett overstates this document’s significance. Published privately as a broadside after the Pennsylvania Convention has adjourned, the Dissent purported to speak on behalf of the twenty-three delegates who voted against ratification with no amendments at all.²³ This two-to-one split in favor of ratification without amendment at the Convention mirrored the sentiments of the

¹⁹ Barnett, *supra* note 2, at ___.

²⁰ *Id.* at ___.

²¹ *Id.* at ___.

²² *Id.* at ___.

²³ JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 188 (1997); Saul Cornell, *Beyond the Myth of Consensus: The Struggle to Define the Right to Bear Arms in the Early Republic*, in BEYOND THE FOUNDERS (forthcoming 2004) (manuscript on file with *The William and Mary Bill of Rights Journal*).

Keystone State's voters, who soundly rebuffed opponents of ratification during elections for the Convention, which were contested specifically over the issue of amendments.²⁴ Pennsylvania's first elections under the federal system a year later confirmed the voters' approval of these results, with Federalists winning a clean slate in the state's congressional contest.²⁵

Moreover, it is by no means clear that the Dissent compiled by Samuel Bryan actually reflected the sentiments of all the anti-federal Constitutionalist delegates to the Pennsylvania Convention, or that it was taken seriously at the time as evidence of the Constitution's meaning. In the 1796 House debates regarding the constitutionality of the Jay Treaty, William Findley, one of the leaders of the anti-federalists at the Pennsylvania Convention, acknowledged that he had himself been one of the dissenters in 1787, but insisted that the Pennsylvania Dissent had no relevance to questions concerning construction of the Constitution. Findley expressed his alarm that the Dissent, representing at best "the sentiments of a minority, acting under peculiar circumstance of irritation . . . would be quoted as good authority for the true sense of the Constitution on this occasion," and went on to argue that the House retained a role in foreign affairs notwithstanding anything the Dissent of the Minority had said to the contrary.²⁶

Only Delaware had already ratified when Pennsylvania voted on the Constitution and as Barnett rightly states, the Dissent of the Pennsylvania Minority enjoyed wide circulation throughout the nation while the remaining states deliberated.²⁷ But at least respecting private self-defense and hunting, Bryan's formulations failed to resonate. Indeed, no other state

²⁴ STEVEN R. BOYD, *THE POLITICS OF OPPOSITION: ANTIFEDERALIST AND THE ACCEPTANCE OF THE CONSTITUTION* 46-55 (1979); Jack N. Rakove, *The Second Amendment; The Highest State of Originalism*, 75 CHI.-KENT L. REV. 103, 134-36 (2000).

²⁵ Rakove, *supra* note 23, at 135-36.

²⁶ SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828*, 225 (1999) (citing 5 ANNALS OF CONG. 592).

²⁷ Barnett, *supra* note 2, at ___.

endorsed the Pennsylvania Dissent's unusual language respecting the right to arms. The Virginia, New York, and North Carolina Conventions formally proposed amendments that protected a clearly militia-linked right to arms; so too did Rhode Island in 1790, after Congress had already submitted amendments to the ratifying states.²⁸ Following their state's resolution in favor of ratification without amendment, a minority of Maryland delegates proposed that standing armies in time of peace should be allowed only upon two-third majority votes of each House, and that conscientious objectors not be compelled to serve.²⁹ A Massachusetts' minority proposed that Congress not be allowed to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defence of the United States, or some or more of them; but said nothing about hunting or private self-defense.³⁰ Even the New Hampshire Convention, which favored amending the Constitution to declare that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion" steered clear of the Pennsylvania Minority's formulation which would have allowed Congress to disarm individuals who posed "a real danger of public injury." Nor did New Hampshire say anything about private self-defense or hunting.³¹

More important to understanding the original meaning of the federal right to arms than any of the state conventions is the drafting history of the Second Amendment itself. We have already stressed that bearing arms carried only military connotations in Congressional usage up to at least 1821. This holds true for the debates about the Second Amendment. The Senate's debates were not yet the subject of public record, but twelve members of the House spoke during

²⁸ THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 181-83 (Neil H. Cogan ed., 1997).

²⁹ *Id.* at 181.

³⁰ *Id.*

³¹ *Id.*; see also Cornell, *supra* note 26.

floor debate concerning the proposed right to arms, sounding such themes as the danger of standing armies, the virtues of citizen militia, and the morality of conscientious objection. None of them mentioned private self-defense, hunting, or keeping weapons for any purpose other than performance of public duty under law.³² If the views of Samuel Bryan (or, for that matter, Randy Barnett) had advocates in the House of Representatives, they chose to hold their peace as the people's chamber set about the task of constitutionalizing the right to arms.³³

³² 1 ANNALS OF CONG. 778-80 (1834); *see also* UVILLER & MERKEL, *supra* note 1, at 98-103.

³³ Barnett's assessment of the significance and impact of the Address and Reasons of Dissent of the Minority of the Pennsylvania Convention is not shared by historians who specialize in late eighteenth-century political thought. Thus, Saul Cornell, the leading authority on Pennsylvania politics in the 1780s, likens Barnett's account to alternative history science fiction fantasy, little different from Harry Turtle Dove novels that imagine a world in which the American Revolution never happened or the South won the Civil War. Saul Cornell, *A New Paradigm for the Second Amendment*, 22 L. & HIST. REV. (forthcoming 2004). Cornell elaborates that "attention lavished on the Dissent of the Minority by modern second Amendment scholarship ultimately has little to do with a desire to understand the role of this text in the public debate over ratification of the Constitution, but owes far more to the appeal of Anti-Federalism to modern conservatives, particularly those of a libertarian bent." Cornell, *supra* note 26. Pulitzer Prize winner Jack Rakove, the leading expert on the creation and ratification of the Constitution, comments that "a number of qualifications make the probative value of these resolutions doubtful," noting that "[t]hey were the work of a distinct minority within the Pennsylvania convention," that the "Federalists swept the delegation that Pennsylvania sent to the new Congress" a year later, that the text of the Dissent that accompanied publication of the proposed amendments discussed only a militia-centered right to arms, and that Noah Webster (admittedly a Massachusetts Federalist) chose precisely the proposed amendment about hunting as a target for ridicule. Rakove, *supra* note 23, at 135-36. And Paul Finkelman, American legal history's most prolific encyclopedist, writes, "Had the proposals of the Pennsylvania Antifederalists on this issue been written into the Bill of Rights, the Second Amendment might be the least controversial of the first ten Amendments. It is of utmost significance, however, that unlike other aspects of the Pennsylvania proposals, which were incorporated into the Bill of Rights almost word-for-word, Madison and his colleagues in the First Congress emphatically rejected the goals and language of the Pennsylvania Antifederalists on these issues." Paul Finkelman, *"A Well Regulated Militia": The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 208 (2000).

Taking aim at our subtitle, Professor Barnett concluded his amended critique as he did his original comment, by warning that the Second Amendment “has never fallen silent.”³⁴ His point, we think, is that the right to arms endures, not just because it exists apart from and outside the context of militia service, but because we are wrong in our basic premise that the militia contemplated in the Amendment has disappeared. Barnett suggests that the unarmed passengers aboard United Flight 93 were performing militia duty when they overcame the terrorists who had hijacked the plane, because, as able-bodied males between seventeen and forty-five, the passengers were members of the unorganized militia defined in 10 U.S.C. § 311.³⁵ To Barnett, then, the militia of the Second Amendment is reconstituted every-time able-bodied men under forty-five take collective action, or, at least, collective action (armed or unarmed) of a defensive nature.³⁶ The debates in the First Congress about the Second Amendment and in the Second

³⁴ Barnett, *supra* note 2, at ___.

³⁵ 10 U.S.C. § 311 (2002).

³⁶ Barnett seems to have a fondness for far-fetched claims about the common militia in our own times. On another occasion, Barnett and co-author Don B. Kates argued that the militia of the Second Amendment was still alive, because “[s]everal Florida countries ha[d] gone so far as to declare that their entire populations constitute their militias, and thus are exempt from the federal ‘assault weapon’ ban.” Randy Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1233 n.438 (1996). When we tracked down the edition of the *St. Petersburg Times* on which this assertion relied, we encountered no evidence that state or local legislatures had passed laws or ordinances to reconstitute the general militia, but only a story about private citizens who had formed their own militias on their own authority. The particular organization studied in the article did not bear the imprimatur of the state government, and the local sheriff expressed considerable skepticism about the sui generis armed band’s self-proclaimed role in law enforcement. See Larry Dougherty, *Taking Up Arms: Militias Attract Hundreds in Florida*, ST. PETERSBURG TIMES (Florida), Apr. 30, 1995 at 1A. Regarding allegedly reconstituted general militias, Barnett and Kates also made reference to Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737, 1755 n.55 (1995), but there Kates and Reynolds actually question the legitimacy of alleged local ordinances reestablishing general militia without the sanction of the state government. For evidence that such legally dubious ordinances exist, Kates and Reynolds relied wholly on Mike Tharp, *The Rise of Citizen Militias*, U.S. NEWS & WORLD REPORT, Aug. 15, 1995 at 34, but that article discusses only self-proclaimed militia, and makes no mention of any general militia reconstituted under the color of state or local law. Thus,

Congress about the Militia Act do not support this reading. Rather, they focus on duty, command, compulsion, system, fines, conscientious objection, equipment, training, pay, regulation, and standardized arms³⁷—all absent from Barnett’s minimalist conception of the modern militia. The unorganized militia may live on in the statute books, but membership therein is not at all onerous. In fact, it is wholly illusory. No one now alive has ever been summoned by its command or fined for failure to attend when summoned; few even know of its paper existence. The general militia of 1789 is long gone, and the right to arms written into the Bill of Rights went with it.

Conclusion

Perhaps the salient theme joining the comments and rejoinders of this forum and the participants’ earlier presentations at the William and Mary Conference of February, 2003 concerns the Second Amendment’s continuing, altered, or abated relevance in the modern world. Jonathon Simon has argued that fear of crime and loss of faith in law enforcement lent the right to arms renewed meaning in the last years of the twentieth century. For Sanford Levinson, the passage of the Fourteenth Amendment altered the character of the right to arms, rendering what was once a civic entitlement much more liberal and individualistic. To Randy Barnett, the constitutional right to arms has always had a private dimension, and in that capacity, the right endures to this very day. In *The Militia and the Right to Arms* and in our remarks here, we have

Barnett based his assertion that there exist in the United States actually functioning general militia established under law not on legislative acts, but on news articles he, or the authorities he cited, misrepresented. Even more importantly, he failed to address the larger question of whether localities might derive the alleged power to make militia law in contravention of federal and state statutes defining the militia pursuant to authority vested by the state and federal constitutions.

³⁷ UVILLER & MERKEL, *supra* note 1, at 94-106, 110-15.

argued that the disappearance of the well-regulated militia envisioned by the framers and memorialized in the Second Amendment has sapped the right to arms of meaning and application—at least until such time as state or federal governments restore a militia bearing some of the defining attributes of the militia known to the framers: qualities such as universal rather than selective membership, compulsory rather than voluntary service, the availability of sanction to enforce participation and compliance with regulation, individual responsibility (perhaps with government assistance) for equipment and arms, and an identity clearly distinct from that of the regular Army.

While the constitutional right to arms has become, in our analysis, inoperative, there is another sense in which we think the values behind the Second Amendment retain a curious and vital currency. The anti-federalists who lobbied so hard to preserve the citizen militias as a bulwark against a dangerous standing army were animated by republican principles. Their most extreme fear was that a federal army, answerable to a Caesarist president, would dissolve Congress and the state governments and institute dictatorial rule. But the republicans had many palpable worries that stopped short of so grave a perversion of constitutional governance. They—and many moderates in the First Congress—feared that access to a massive federal army would tempt governments to empire building. They feared that entanglement in overseas wars would be expensive, that it would lead to profiteering, deficit spending, and to creeping debt that would drain the exchequer and enfeeble the nation. They feared that the resulting system of debt-serving financed by borrowing and taxation would lead to corruption, to government dependency on wrongheaded men and measures. They feared that irresponsible leaders with access to armies would be tempted to bid for glory by starting wars that did not serve legitimate defensive ends. They feared that a Congress full of placemen and dependent members would yield up their

powers too readily to the President, and place no obstacles in the path of his martial dreams. And they feared that unchecked federal control over the citizen soldiery would lead to coerced deployment in oppressive campaigns far from family and community. Historians have long debated whether these republicans were paranoid or prescient. For a decade at least, the historical pendulum has swung against the soundness of the republican vision, but in recent months, the republicans' misgivings have lost some of their former quaintness.

CHAPTER SEVEN

BOOK REVIEW: SAUL CORNELL, *A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA*

In May 1954, Chief Justice Earl Warren announced the Supreme Court's unanimous decision in *Brown v. Board of Education*, following extensive argument the previous autumn respecting the original meaning of the Equal Protection Clause of the Fourteenth Amendment. Warren explained that the discussion had "cast some light" but that this illumination, such as it was, was "not enough to resolve the problem with which we are faced." Original meaning was neither ascertainable nor dispositive, Warren explained, not for the last time during his career. He then decided the most significant constitutional question of the twentieth century on grounds of justice and public policy, touching off a firestorm of critique focused on activism, subjective values, and legislating from the bench that continued unabated. Ultimately, the reaction against *Brown* ripened into the "originalism" of Justices William Rehnquist, Antonin Scalia, and Clarence Thomas, holding out original understanding as a supposed recipe for judicial neutrality, premised on historically ascertainable objective meaning.

For some enthusiasts and detractors, the meaning of the Second Amendment right to arms (perhaps as reconfigured by the Fourteenth Amendment during Reconstruction) presents a similarly pressing question of constitutional interpretation, a question whose resolution (like that of Equal Protection before it) has been too long deferred. And as the debate over Second Amendment and gun control has heated up in recent decades, partisans of all stripes have invoked originalism—now the dominant constitutional philosophy—to legitimize their answers to questions focused on the permissibility of gun regulation or prohibition. Much writing by advocates and by pedigreed academics has probed the original meaning of the Second

Amendment, with monographs of relatively fresh vintage exploring the problem from the standpoint of cultural theory and constitutional values¹, constitutional doctrine and theory², seventeenth-century English roots³, and alleged nineteenth-century transformations⁴. Saul Cornell's new book synthesizes his decade-long research and writing in the field and develops a sophisticated and insightful new perspective that shuns monocausal explanation in favor of nuance and appreciation of complexity. In the process, Cornell has crafted what may well be the most balanced and informed account of the Second Amendment's shifting popular and judicial interpretations over the two plus centuries since its ratification.

In other venues, Cornell has not been shy about his views on the politics of gun control, but this is not a teleological or instrumental history. Indeed, only in the short concluding chapter does Cornell address the current political and jurisprudential setting at all. Most of his fast-paced book is narrative rather than argumentative in style, and a reader might well come away with the impression that Cornell wrote not so much for the sake of joining a debate as for the challenge and joy of exploring and explaining his subject. His overarching theme is that there have been during various periods of American history at least four major interpretative spins to the right to arms, each of which has been embraced in different contexts and eras by elite jurists and by populists alike. During the founding period, a civic reading, stressing an individual right conterminous with the duty to serve in the lawfully established militia, appeared self-evident and sensible to Federalists and moderate Anti-Federalists alike, and informed James Madison's

¹ DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* (2003).

² H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002).

³ JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (Harvard University Press 1996).

⁴ STEPHEN P. HALBROOK, *FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876* (1998).

drafting of the amendment during the First Congress. Cornell draws heavily on his expertise respecting radical Anti-Federal thought in the 1780s and 1790s to trace the origins of a second strain of gun rights rhetoric, presenting itself as the far more localistic, antistatist, and at time individualistic claim to arms among the Carlisle rioters, Shaysites, and Whiskey rebels.

Also in play even before the Constitution and then the Bill of Rights were ratified was a third variant of Second Amendment thought, a state focused interpretation that viewed control of the militia as the ultimate check on federal tyranny, and in some cases blended into the compact theory of the constitution that in extreme form saw secession and revolution as legitimate responses to national usurpation or state authority. But as Cornell explains things, the fourth version of the Second Amendment right—the familiar modern view celebrating a personal right to hold weapons for individual self-defense against aggressors (including perhaps government agents)—did not emerge until the Jacksonian era, did not acquire mainstream support until Reconstruction, and did not threaten to supplant a judicial consensus in favor of the civic model until our own time.

Cornell is careful to distinguish between the right to self-defense long asserted on a sub-constitutional level in gun-related cases and the Second Amendment-based claim to constitutional immunity against gun regulation that has come into its own in the late twentieth century. This analytic precision yields rich rewards in recapturing popular as well as elite approaches to many semi-famous and some previously obscure gun-related controversies that Cornell elucidates in fascinating detail. His account of Reconstruction, in particular, weaves together new, old, forgotten, and original scholarship concerning the “Negro Militia,” the Ku Klux Klan, and the contested Fourteenth Amendment to present a fuller picture and more

theoretically cogent explanation of the ton tested and transformed right to arms than I have seen before.

Cornell's history of gun rights and gun control in the United States is accessible and lively, but the engaging style belies an impressive seriousness of purpose and approach. The rich annotations make clear that Cornell has read and accounted for vast swaths of the expansive body of evidence, scholarship, and polemic in the field. It is hard to imagine that anyone else has read more about the history of gun rights in America; the notes themselves are of no inconsiderable value and interest. The passionate nature of the subject makes it unlikely that any book—even one as well qualified as this—will dominate the field. Other scholars will offer other (I suspect less informed and less balanced) spins. In the meantime, Cornell's conflicted, constantly turning, frequently ironic tale will make sane constitutionalists inside and outside academia and the judiciary despair of discovering one definitive, immutable meaning to the right to arms. It might even cause some fair-minded readers to abandon any pretence that either in 1789-1791 or 1866-1868 a constitutional majority of Americans embraced a wholly privatistic notion of the constitutional right to arms. But Warren's style of pragmatism has long since ceased to command a consensus on the Supreme Court, and should the High Court choose finally to expound on the right to arms, hopes that an informed, nuanced, subtle, and well-rounded history might contribute to a humanized and humbled originalist approach to Second Amendment interpretation might prove unduly sanguine. It is sadly just as likely that bad history written by a less stable scholar than Cornell will provide a pretext for value-laden, results-oriented, activist legislation from the bench.

CHAPTER EIGHT

BOOK REVIEW: STEPHEN P. HALBROOK,
THE FOUNDERS SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS

Stephen P. Halbrook's new book represents the most careful and well-thought-out study yet in support of the politically ascendant claim that the Second Amendment, as originally intended and understood, protects a right to own guns for purposes other than service in the lawful militia. It far surpasses Justice Antonin Scalia's historically naïve analysis in *District of Columbia v. Heller*, the 2008 Supreme Court decision that first recognized a constitutional right to weapons possession for hunting and self-defense. Halbrook's latest work is exhaustive in scope. He reviews dozens of documents (many of them previously ignored) that can quite plausibly be read to support an original understanding of a right that extends far beyond what was required to ensure the people's capacity to serve in the militia. At the same time, however, Halbrook ignores, truncates, glosses, slants, and misconstrues hundreds more documents that not only demonstrate the primacy of the anti-standing-army and pro-militia trope in the framers' minds but also leave no reason to believe self-defense or hunting figured in the creation of the Second Amendment at all.

Halbrook has clearly immersed himself deeply in the primary record of the constitution making process on the state and federal levels. His analysis of Justice James Wilson's law lectures in Philadelphia, St. George Tucker's *Blackstone's Commentaries*, and post-ratification state constitutional reform in the early 1790s do support (but not irrefutably so) the claim that for some contemporary readers, more was at stake in the Second Amendment than preservation of the militia. But for all its utility as a compendium of relevant material, and the cogency of its

unexpected insights, there is an insurmountable and overarching oddness to this book that ultimately saps its credibility.

To begin with, there is Halbrook's endless exegesis of block quotes concerning the utility of a militia composed of an armed populace that simply do not support his claim that the Second Amendment also protects a right to have guns for hunting and shooting burglars, suggestive adornments notwithstanding. Next there is the issue of Halbrook's unbridled jingoism. For Halbrook, the American Revolution was fought and won by an armed populace who defeated evil invaders. The Continental Army is barely mentioned; the French Army is not mentioned at all. We are simply told that the defeat of British regulars was inevitable because the American militia comprised a population that was armed to the teeth. Paradoxically, there is much discussion of the supposedly well-armed revolutionaries' desperation to import arms and powder, but we are not told why these well-armed and invincible patriots took seven years to win the war. Nor are readers given pause to reflect that the conflict amounted to a civil war, in which at least a fifth of the white population supported the British crown and in which at least that many tried to stay neutral, and that if black and Indian opinion were taken into account, the American Revolutionary cause reduces to a violent minority movement that used terrorist means to impose a disfavored solution on a reluctant populace.

Halbrook's analysis of the constitutional crisis that followed the Revolutionary War is, like his account of the war itself, monocausal, indeed, monomaniacal. Not only was the war fought to vindicate the right to arms, but the Constitution was also authored to vindicate that same right. And the Bill of Rights was added to remove threats to the right to arms that the Constitution created. To be sure, there are other, lesser elements to the Bill of Rights that accompany the Second Amendment, and they merit some mention. But they are instrumental

rights, useful chiefly to the extent that they provide auxiliary protections for the right to own weapons. Guns cease in Halbrook's analysis to be tools, but become the *summa bona* of American political eschatology. In a near inversion of Immanuel Kant's celebrated categorical imperative that no person is a mere means to a greater end, people and constitutionalism in Halbrook's account become devices whose merit lies in the service they offer to the right to arms.

Halbrook works hard, but he has a tremendous evidentiary burden to overcome, starting with the First Federal Congress, who gave us the text “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” Twelve members of the House of Representatives spoke when the Second Amendment was under consideration, and not one mentioned hunting or private self-defense. They discussed only service in the militia, and the question of conscientious objection. The debates of the Senate were conducted in secret until 1796, so they can offer us no guidance here. But we can turn to uses of the pivotal phrase “bear arms” in legislative, political, and journalistic contexts of the times. According to Nathan Kozuskanich, well over ninety percent of the usages of bear arms and its cognates preserved in the journals of the Continental and United States Congresses between 1775 and 1791, Charles Evans *American Bibliography* (books and pamphlets from 1690–1800), and in *Early American Newspapers* (1690 to 1800) unambiguously relate to service in the army or militia, not self-defense or hunting.

Halbrook concedes much more than other gun rights advocates respecting the meaning of the right to arms. He acknowledges that the principal evil that the framers of the Second Amendment aimed to prevent was the disarming of the militia that would invite creation of a standing army. He even allows that the militia of the framers has long since gone away. In *The Militia and the Right to Arms, Or, How the Second Amendment Fell Silent* (2002), Richard

Uviller and I contend that the consequence of this disappearance of the militia was that the right to arms lapsed, pending recreation of something approximating the lawful, universal (or at least general), obligatory militia of the framers. This, of course, Halbrook will not accept. Bearing arms for Halbrook, as for Justice Scalia, means carrying weapons for any lawful purpose. Not only does the right extend to hunting and protection against criminals, but it endures also as the ultimate check on government tyranny. As Halbrook concludes, “the experiences of the American Revolution proved the right to keep and bear arms serves as the ultimate check that the founders hoped would dissuade persons at the helm of state from seeking to establish tyranny. In hindsight, it would be difficult to quarrel with the success of the founders' vision” (p. 338). It seems to me one could quarrel with the success of that vision on at least two levels. Realizing that the American War was fought as much over taxes as over guns, one might ask whether objections to readily affordable taxes on tea imposed by a government whose legitimacy nobody had questioned until a decade before justified a resort to arms, seven years of war, 40,000 dead, and 100,000 refugees. One could also argue that precisely those dangers which animated the framers of the Second Amendment have now been willingly embraced by the governmental agents of the American people, and that we confront the very ruin the framers prophesized. We have an enormous standing army we cannot afford, and with it foreign military adventures and two wars looking suspiciously like wars of imperialism. We have lost our virtue, and become slaves to deficit spending and heavy taxes, and a client dependant on foreign interests to finance our martial folly. To the framers of the Second Amendment, these would have been grounds for lamentation, not celebration.

CHAPTER NINE

DISTRICT OF COLUMBIA V. HELLER (2008)
FROM GUN IN AMERICAN SOCIETY:
AN ENCYCLOPEDIA OF HISTORY, POLITICS,
CULTURE, AND THE LAW

Summary

The watershed *District of Columbia v. Heller* decision of June 26, 2008 marked the first time the United States Supreme Court enforced a claim of any description under the Second Amendment, and the first time the Court clearly acknowledged a Second Amendment right independent of service in the lawfully established militia and delinked from possession of weapons held for militia service. As proposed by Congress in 1789, and ratified by the requisite ninth state in 1791, the Second Amendment proclaims “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” Writing for a sharply divided 5-4 Court in *Heller*, Justice Antonin Scalia relied heavily on his signature jurisprudential theories of plain meaning textualism and original public understanding to hold unconstitutional both the District of Columbia’s ban on handgun possession in the home and the requirement that permissible weapons kept in the home be disassembled or fitted with trigger locks. For Justice Scalia and the majority, the District’s strict gun control regime vitiated a right of personal self-defense, and particularly a right to defend the home, that rests at the core of the Second Amendment. In separate dissents authored by Justices Breyer and Stevens, the Court’s four dissenters maintained the Amendment could not be fairly construed to say anything about weapons possession unrelated to militia service. For the dissenters, regulation of weapons possession unconnected to militia service is consistent with

founding era practice and should remain a matter of discretion for the politically accountable branches of local, state, and national government.

Precedent

Prior to deciding *Heller*, the Supreme Court had addressed Second Amendment claims on only four prior occasions. The decisions, *United States v. Cruikshank* (1876), *Presser v. Illinois* (1886), *Miller v. Texas* (1894), and *United States v. Miller* (1939) were old, in three cases arguably obsolete, and in the fourth allegedly ambiguous. The first three of these cases involved claims raised against state and local governmental actors and individuals alleged to be acting under color of state law in an era when Bill of Rights guarantees were not yet enforced against the states by the federal judiciary. The particular issue of enforcing the Second Amendment against the states was not implicated by *Heller*'s claim since it arose in the District of Columbia. Moreover, since the Supreme Court did not enforce non-economic liberties guaranteed in the Bill of Rights against state actors through the Due Process Clause of the Fourteenth Amendment until well into the Twentieth Century, the continuing precedential value of Nineteenth Century decisions holding that the Second Amendment did not speak to state infringement of the right to arms was subject to question by the time *Heller* was argued. (Indeed, two years after *Heller*, in *McDonald v. City of Chicago*, the Supreme Court held that the Second Amendment right to arms was incorporated against the states through the Due Process Clause of the Fourteenth Amendment, even though the Court had held in *Cruikshank*, *Presser*, and *Miller v. Texas* that the Privileges or Immunities Clause of the Fourteenth Amendment did not require application of the right to arms against the states). The fourth pre-*Heller* case, *United States v. Miller*, was the most significant respecting the substantive scope of the constitutional right to arms. The case reversed a decision of the Federal District Court for the Western District of Arkansas quashing

an indictment of two Depression era gangsters for transporting a sawed-off shotgun across state lines in violation of the National Firearms Act of 1934. The Federal District Court had sustained a demurrer on the grounds that the conduct for which the defendants were indicted was protected by the Second Amendment. Writing for the Court, Justice McReynolds stressed “[c]ertainly it is not with judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.” Thus, the weapon at issue was not protected by the Second Amendment and application of the National Firearms Act to punish its possession was not constitutionally infirm. Perhaps Justice McReynolds’s opinion did not set out with crystalline clarity a test for distinguishing weapons protected by the Second Amendment from those subject to governmental regulation and prohibition. In any case, the opinion has been subject to radically different readings by subsequent commentators, with one group wishing to exempt from Second Amendment protection all weapons not actually carried in service in the lawfully established militia, and another wanting to subject to Second Amendment protection any weapon that might be of a class that conceivably has some utility for military or paramilitary purposes. Federal Courts of Appeals uniformly read *Miller* as a severe limitation on the scope of the constitutional right to arms for many decades, but the Fifth Circuit’s decision in *United States v. Emerson* (2001) and the D.C. Circuit’s decision in *Parker v. District of Columbia* (2007) (the case that became *Heller* upon appeal to the Supreme Court) recognized a Second Amendment right unrelated to militia service and created a split in the Circuits suggesting that the Second Amendment was ripe for reconsideration in the Supreme Court.

Lower Court Litigation

Dick Heller was one of six District of Columbia residents to challenge various aspects of the city's strict gun control regime in *Parker v. District of Columbia* (decided 2004 in the Federal District Court, and in 2007 in the United States Court of Appeals for the District of Columbia). In his capacity as a special police officer, Heller was authorized under the D.C. law to carry a handgun while on duty at the Federal Judicial Center, but he was not permitted to register or obtain a license to keep a handgun at home. The *Parker* plaintiffs argued unsuccessfully in Federal District Court that the city's bar on registration and licensure of handguns for home protection violated the Second Amendment. Heller was the only one of the *Parker* litigants who had actually applied for a registration certificate to keep a handgun, and since his claim focused on the concrete harm allegedly flowing from denial of that application, he alone could claim to have suffered adverse governmental action as a consequence of the District's laws. According to Judge Silberman writing for a split three judge panel of the D.C. Circuit in 2007, Heller was therefore the only *Parker* plaintiff to satisfy standing requirements, and the only one allowed to challenge the unfavorable federal trial court decision in the Court of Appeals. Judge Silberman embraced an individualistic reading of the Second Amendment and held for Heller on the merits, ruling that the District's prohibition on registering handguns for home protection was unconstitutional. In justifying his decision, Judge Silberman relied principally on the Fifth Circuit's *Emerson* opinion, which in turn drew heavily on the self-proclaimed "standard model" of the Second Amendment, a revisionist interpretation of the constitutional right to arms that won favor among gun rights advocates and law professors committed to libertarian principles in the last decades of the twentieth century. The "standard model," which Justice Scalia went on to endorse in *Heller*, depends on textual exegesis and the weight of often isolated historical quotations to buttress a private rights reading of the Second

Amendment even as it rejects more contextualized accounts favored by academic historians. Thus, while most historians writing on the original meaning of the Second Amendment focus on the role of the militia in late eighteenth century Anglo-American political discourse, standard modelers, Judge Silberman, and eventually Justice Scalia have zeroed in on the image of the individual rights bearer defending home and hearth against all enemies (including potentially governmental ones) as the archetypal embodiment of Second Amendment freedoms.

Justice Scalia's Analysis

The District of Columbia appealed the D.C. Circuit's adverse decision to the Supreme Court in hopes of preserving what was effectively a total handgun ban. The District maintained that the Second Amendment did not concern weapons possession unrelated to service in the lawfully established militia, and, in the alternative, that even if the Court chose to recognize a private right to self-defense disconnected from militia service, such a right was not violated by the District's gun control laws because they left open the possibility of defending the home by other means. Justice Scalia rejected both arguments and endorsed a broader reading of the Second Amendment that embraces at its core a purely private right to self-defense, particularly of the home. That right, the majority reasoned, could not tolerate restrictions as severe as those imposed by the District. For the majority, the time required to assemble, unlock and aim a more cumbersome weapon than a handgun imposed unacceptable burdens on Heller's right to defend himself against intruders into his own home.

Justice Scalia's began his analysis by dividing the text of the Amendment into a "prefatory clause" concerning the militia and an "operative clause" concerning the right to arms. This division of the text implies a hierarchical ordering that proved outcome-determinative in the

Court's analysis. For the majority, the purpose of preserving the militia announced in the so-called prefatory clause did not limit the meaning of the text labeled operational. Indeed, the Court went so far as to assert that preservation of the militia was but one of many purposes behind the Amendment, and likely not the most important. Both during oral argument and in the Opinion of the Court, the majority celebrated a private right to self-defense assumed to rest at the core of the Amendment. The Court played down evidence respecting original intent such as the fact that none of the reported commentary during the House of Representatives debates on the proposed Amendment in 1789 touched on a private right to arms, while twelve members went on record to discuss a right related to militia service. (Since the Senate debated behind closed doors until 1794, only House of Representatives debates were reported—and even these were only partially reported—during the First Congress). Rather, the Court focused on original public understanding, that is, the alleged meaning attached to the text by the general public participating in the ratification process that gave life to the new constitutional text. The Court stressed the Amendment's reference to a "right of the people," which for the Court implied individualist liberties analogous in application to rights belonging to "the people" described in the Fourth Amendment. Perhaps more controversially, the Court proceeded to endorse a non-military sense of "keep and bear Arms," which it supported by citations to various dictionaries of the times, in the face of countervailing evidence respecting standard usage cited by the dissenters. The Court acknowledged that bearing arms at least sometimes means rendering military service, but this usage according to the majority was "idiomatic" rather than "natural." According to the Court the orthodox construction of the Amendment's operational language, and the one enshrined in the Constitution, guarantees not a narrow right to carry weapons in military or militia service, but "the individual right to possess and carry weapons in case of confrontation."

While five justices signed off on this meaning, oral argument also suggested differences among the majority respecting the scope of the constitutional right to arms, and these differences led to Justice Scalia crafting a narrower opinion than his own comments and questions indicated he might have wished to pursue. Alan Gura, counsel for *Heller*, urged an extremely potent version of the right to arms for purposes of self-defense, and Justice Scalia made clear during oral argument that he felt government action impacting an individual's ability to engage in armed self-defense should be permitted only if it could withstand strict scrutiny, that is, only if the government measures served a compelling interest and employed means necessary to achieving that interest. Chief Justice Roberts, in contrast, expressed reticence about subjecting gun control legislation to a heightened form of judicial scrutiny, and in the end, the Court left open the question of what standard lower courts should apply in reviewing gun laws in the future. Justice Kennedy, for his part, expressed great skepticism about *United States v. Miller* during argument in *Heller*, and made clear that he did not think gun possession unrelated to militia service was protected under the *Miller* interpretation of the Second Amendment. Kennedy was willing to overturn *Miller*, but the greater reluctance of other justices including Chief Justice Roberts to lay aside precedent pushed the majority towards a strained reading of *Miller* rather than forthright confrontation with that decision's severely skeptical approach to private rights claims under the Second Amendment. Meanwhile, the law and order sensibilities of the justices comprising the *Heller* majority militated against the potentially boundless version of the right to self-defense urged by Gura and in some libertarian leaning *amici curiae* briefs. Thus, Justice Scalia readily conceded that some gun control measures might not run afoul of the Amendment, writing "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms

in sensitive places such as schools or government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” In addition, Justice Scalia limited the right to “weapons in common use” thereby excluding “dangerous and unusual weapons.” The opinion strongly suggests, and oral argument made entirely clear, that Justice Scalia concedes the constitutionality of federal prohibitions on machine guns precisely because they are “dangerous and unusual” and not “in common use” among the population. This allowance gives rise to a paradox, namely that in the Court’s reading of the Second Amendment, arms particularly suitable for militia service such as M-16 rifles are not constitutionally protected, while weapons of very little military utility, such as target shooting pistols, are constitutionally secured against government confiscation.

Dissents

Justices Stevens and Breyer developed different lines of objection to the Court’s opinion in their separate dissents, each of which was joined by all four dissenting justices. Both Stevens and Breyer took issue with Justice Scalia’s focus on original public understanding, in each instance both because they disagreed that Justice Scalia had accurately and faithfully rendered the original public understanding of the Amendment, and also because they disagreed as a jurisprudential matter whether original public understanding should be the dominant consideration in constitutional questions. For Justice Stevens, the majority’s claim that the Amendment was originally understood to focus on private self-defense unrelated to militia service was simply wrong as a matter of text and history. Stevens highlighted studies raised by amici demonstrating that contrary to the majority’s assertions, bearing arms had an overwhelmingly military meaning in the late Eighteenth Century. Stevens considered also

broader questions of original intention, and these allowed him to focus on debates in Congress and scholarship on late Eighteenth Century American political ideology that undermined the majority's reasoning. For his part, Justice Breyer expressed agreement that Justice Stevens had demonstrated the absence of a private rights dimension to the Second Amendment, but accepted for the sake of argument the Court's determination that the Amendment does include the right to self-defense. Even if the constitutional text did encompass the right to defend the home against intruders, Breyer then argued, the District's measures were consistent with founding era practice, including many municipal laws severely restricting the ability to use guns in urban settings in the late colonial and early national periods. Justice Breyer also strongly objected to the Court's decision on grounds of localism and democratic legitimacy. Since in his view the text of the Constitution provided no solid basis for judicial intervention, the people of the District of Columbia should be free to choose strict gun control even if their preferences do not harmonize with those in other regions of the country or of a bare Supreme Court majority.

Reaction

Heller was hailed by gun rights enthusiasts as a major landmark in the Supreme Court's checkered history of rights enforcement and as vindication of popular support for a robust, individualistic Second Amendment. Popular constitutionalists favoring traditional values associated with the founding era were not alone in singing *Heller's* praises. Prominent constitutional scholars Randy Barnett and Eugene Volokh who champion the theory that judicial reliance on original public meaning of constitutional text can minimize the dangers of judges' personal political preferences infecting judicial review celebrated Justice Scalia's opinion as the high water mark of originalist constitutional interpretation. But noted constitutional historians

including Jack Rakove and Saul Cornell responded that Justice Scalia's version of the historical understanding of the Amendment was objectively untenable, and their suspicions of *Heller's* jurisprudential *bona fides* were echoed by jurists with otherwise unimpeachable conservative credentials such as Richard Posner and Harvey Wilkinson, who labeled the decision activist and insufficiently supported by the Constitutional text.

Significance

Heller left open for future consideration at least four broad questions about the right to armed self-defense. One of these questions—whether the constitutional right to arms would be applied against the states and municipalities—was answered affirmatively two years later in *McDonald v. City of Chicago*. A second question, whether there is a constitutional right to weapons possession for purposes other than self-defense or militia service, has not been addressed at all by the Supreme Court. Two other broad classes of questions adumbrated in *Heller* and *McDonald* remain, and burgeoning litigation in the lower courts will likely bring them before the Supreme Court in the coming years. These concern the standard of judicial review, and permissible classes of gun regulation. In *Heller*, the Court deliberately shied away from announcing that a particular level of scrutiny would automatically be triggered by Second Amendment claims, and given the Chief Justice's skepticism respecting tiered scrutiny and the skepticism of four justices regarding a personal right to arms, it is likely that the current Court will address Second Amendment claims on a case by case basis, carving out doctrinal niceties incrementally as the justices did in the Fourth, Fifth, and Sixth Amendment arenas during the Warren, Burger, and Rehnquist years. The permissible reasonable limitations on the right to arms endorsed by the Court in *Heller* were recited once more in *McDonald*, but since issues such

as carrying guns in schools or prohibiting the mentally ill from acquiring arms were not litigated in either *Heller* or *McDonald*, it might be tempting for gun rights enthusiasts to argue that the Court's endorsement of restrictions amount to mere *obiter dicta* and are not part of the holdings of the cases that form binding precedent. For their part, government attorneys defending gun control regulations and statutes will almost certainly argue that the exceptions listed in *Heller* do not form a complete class, and that other analogous or conceptually related limitations on the right to arms should also be tolerated under the Second Amendment. The future of course remains unwritten, but gun rights litigation, for the first time in the nation's history, has solid (if not impregnable) constitutional underpinnings. Civil litigation challenging licensing regimes has increased apace since *Heller*, although the *Heller* Court took for granted that licensing was not in itself unreasonable. Perhaps more dramatically, Second Amendment claims are rapidly becoming part of the criminal defense attorney's arsenal to be deployed alongside Fourth, Fifth, Sixth, and Eighth Amendment claims in gun cases. In the longer term, it is possible that *Heller* may be confined to its facts, standing for the important but limited principle that the government may not render impossible armed defense against home invaders. As of this writing, however, the scope of the right to armed self-defense of the home and the applicability of the right to armed defense to spaces outside the home remain very much in play, and criminal defense counsel, private litigants, lobbyists and action groups, and the judicial and legislative branches of local, state and national government are all poised to participate in determining the metes and bounds of these rights.

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Symposium: District of Columbia v. Heller. Syracuse Law Review (59, 2), 2008. (Accessed June 6, 2011).

CHAPTER TEN

THE *DISTRICT OF COLUMBIA V. HELLER* AND
ANTONIN SCALIA'S PERVERSE SENSE OF ORIGINALISM

“I am not so naïve (nor do I think our forbears were) as to be unaware that judges a real sense ‘make’ law. But they make it *as judges make it*, which is to say *as though* they were ‘finding it.’”¹

“[E]ven though the Justice is not naïve enough . . . to be unaware that judges in a real sense ‘make law, he suggests that judges (in an unreal sense, I suppose) should never concede that they do and must claim that they do no more than discover it, hence suggesting that there are citizens who are naïve enough to believe them.”²

Heller and the Second Amendment Right to Arms

For many years following the Supreme Court’s 1939 decision in *United States v. Miller*, academics and federal appeals courts alike adhered consistently to the opinion that the Second Amendment to the United States Constitution did not protect possession of firearms unrelated to service in the lawfully established militia.³ But in the 1980s and ‘90s, a phalanx of gun rights advocates, single-topic academics, and contrarian and clever constitutional theorists, including Sandy Levinson, Akhil Amar, Larry Tribe and Randy Barnett, emerged to challenge the old understanding on originalist grounds related to both the Second and Fourteenth Amendments.⁴

¹ James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 548-49 (1991) (Scalia, J., concurring).

² *Id.* at 546 (White, J., concurring).

³ *United States v. Miller*, 307 U.S. 174, 178 (1939); *Gillespie v. City of Indianapolis*, 185 F. 3d 693, 711 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *Cases v. United States*, 131 F.2d. 916, 923 (1st Cir. 1942). *See also* Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349 (2000) (cataloguing and classifying law review pieces on the Second Amendment through 2000).

⁴ *See* Spitzer, *supra* note 3 (cataloguing and classifying law review pieces on the Second Amendment); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637

Claims and appeals challenging gun control laws under the newly emerging individual reading of the Second Amendment increased apace. The once dominant view of the militia-focused right prevailed in Judge Reinhardt's opinion for the Ninth Circuit in *Silveira v. Lockyer* in 2003, but the self-proclaimed standard model favoring a purely private right to arms won out in the Fifth Circuit's *Emerson* opinion in 2002 and in the D.C. Circuit's *Parker* decision in 2007.⁵ In June 2008, the United States Supreme Court resolved the split in the circuits and endorsed a private rights reading of the Second Amendment by upholding the D.C. Circuit's decision *sub nomine* *District of Columbia v. Heller*.⁶ Writing for five justices on a sharply divided Court, Justice Scalia based his decision on fidelity to the alleged original public understanding of the Second Amendment over sharply worded dissents by Justices Stevens and Breyer.

There may be sound reasons for recognizing a federal constitutional right to own firearms for private purposes wholly unconnected to militia service. Two potentially convincing rationales spring readily to mind: in the United States, a majority of the population probably favors such a right, and a majority of the population understands that right to be rooted in constitutional text and tradition.⁷ But in writing for a majority of the Supreme Court in *Heller*,

(1989); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 216-23 (1998); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 47-70 (West 1999); Randy E. Barnett & Don B. Kates, Jr., *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996); Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237 (2004).

⁵ See *Silveira v. Lockyer*, 312 F.3d 1052, 1060-61 (9th Cir. 2003); *United States v. Emerson*, 270 F.3d 203, 395 (5th Cir. 2001); *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007), *aff'd sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

⁶ 128 S. Ct. 2783, 2822-23 (2008), *aff'g* *Parker*, 478 F.3d 370.

⁷ JAMES B. JACOBS, *CAN GUN CONTROL WORK?* 38-43, 52-53 (2002) (studying public opinion regarding gun rights). Over the last decade, popular constitutionalism, essentially rejecting the teachings of *Cooper v. Aaron*, 358 U.S. 1 (1958), and the cultish following of *Marbury v. Madison*, 1 Cranch. 137 (1803), in favor of the Jeffersonian belief that that the living demos is the ultimate arbitrator of constitutional values, has been embraced by several leading constitutional theorists. See Sanford Levinson, *Why I do not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553 (2003); LARRY D.

Justice Scalia did not openly embrace popular constitutionalism (although he has done so before, most famously in his dissent in *Lawrence v. Texas*).⁸ Instead, he claimed to rely on textualism and originalism, and, in the process, produced a decidedly disingenuous and unprincipled opinion. From the standpoint of an academically trained historian, Justice Scalia's reasoning in *Heller* is objectively untenable, in that it privileges the current Court's fixation with libertarian individualism over the framers' civic republican focus on the organized militia as a preferred alternative to a dangerous standing army and military establishment.⁹ But leading academic specialists of founding era constitutional thought such as Jack Rakove and Saul Cornell are hardly alone in condemning Justice Scalia's decision in *Heller*.¹⁰ The majority opinion in *Heller* has also been savaged as results-oriented historical fiction by Judges Harvey Wilkinson and Richard Posner, two of the nation's foremost conservative jurists, who in other contexts are

KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Jeremy Waldron, Essay, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2006) (going even further, and arguing that judicial enforcement of constitutional rights against the policy choices of representative legislatures is entirely illegitimate in a healthy, functional democratic society). Waldron hints strongly that the American preference for judicial rights enforcement is idiosyncratic and insular, but given the fact that the German-speaking countries, post-Soviet states, and all of Southern Europe including as of this summer France have also embraced judicial rights enforcement, Waldron's claim appears exaggerated. Cite Dorsen et al. and *Le Monde*.

⁸ See *Lawrence v. Texas*, 539 U.S. 558, 594-598 (2003) (Scalia, J., dissenting) (arguing that the textually unspecified right to same sex intimacy recognized by the majority was not deeply rooted in American history and tradition, and therefore not a legitimate basis for judicial invalidation of a statutory prohibition).

⁹ See generally H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2003) (describing in great detail the classical republican conceptual framework that animated founding era discourse on the right to arms).

¹⁰ See *Q&A: Jack Rakove on Heller and History*, *NEW YORK TIMES TOPIC BLOG*, June 26, 2008, <http://topics.blogs.nytimes.com/2008/06/26/qa-jack-rakove-on-heller-and-history/>; Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 *Ohio St. L.J.* (forthcoming 2008).

entirely sympathetic to claims premised on gun rights, autonomy, and self-defense.¹¹ Indeed, Judge Wilkinson has gone so far as to liken *Heller* to *Roe v. Wade*, the famous abortion decision long held in contempt by conservative thinkers skeptical of judge-made law and judicial veto of democratically-sanctioned criminal statutes where no constitutional text demands judicial intervention.¹²

In *Heller*, Justice Scalia contorted the original public understanding of the Second Amendment's textual command into something neither the framers nor ratifiers would have recognized as their own handiwork. The contested text proclaims, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."¹³ According to Justice Scalia and the *Heller* majority, the language about the militia and the State is prefatory and non-operative, while the plain meaning of the operational text respecting the right to bear arms, as understood at the time of its creation, is that the Constitution protects a personal right to carry commonly held weapons for purposes of confrontation.¹⁴ The historical record proves otherwise. Not only was discussion of the right to bear arms almost invariably linked to discussion of the virtues of the militia and the dangers of standing armies in the late eighteenth century, but the "operative" phrase *bear arms* carried an overwhelmingly martial meaning. Twelve members of the House of Representatives spoke when the Amendment was under consideration in 1789; all discussed militia- and military-

¹¹ J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265118; Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, THE NEW REPUBLIC, Aug. 27 2008, at 32-35, available at <http://www.tnr.com/booksarts/story.html?id=d2f38db8-3c8a-477e-bd0a-5bd56de0e7c0&p=1>.

¹² Wilkinson, *supra* note 11, at 1; see also Cass. R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 121 HARV. L. REV. 246, 254-55 (2008).

¹³ U.S. CONST. amend. II.

¹⁴ *District of Columbia v. Heller*, 128 S.Ct. 2783, 2797 (2008).

related issues, principally conscientious objection. Not one mentioned private self-defense, hunting, or gun collecting.¹⁵ Senate debates were not recorded until 1796, but an electronic search of the Library of Congress database containing all extant official records of debates in the Continental and U.S. Congresses between 1774 and 1821 reveals thirty additional uses of the phrase “bear arms” or “bearing arms” in contexts other than discussion of the proposed Bill of Rights, and in all but four instances the use is unambiguously military and collective.¹⁶ Similarly, as reported by careful historical scholar Nathan Kozuskanich, an electronic search of Charles Evans *American Bibliography*, a comprehensive collection of surviving books and pamphlets in the colonies and United States from 1639-1800, yields 210 hits for *bearing arms* and its cognates other than those contained in reprints of the Bill of Rights and other government papers.¹⁷ According to Kozuskanich, 202 of these 210 uses (96.2%) are unambiguously military and collective, not private.¹⁸ The same search on *Early American Newspapers*, a database of 120 American newspapers from 1690 to 1800, yields 143 hits, all but three of which (97.9%) Kozuskanich describes as clearly related to rendering military service or performing militia

¹⁵ 1 ANNALS OF CONGRESS, 778-796 (Joseph Gales ed., 1834); UVILLER & MERKEL, *supra* note 9, at 97-103 (discussing some of the debate on the conscientious objector clause and the purpose of the amendment as a militia-based protection against standing armies).

¹⁶ Nathaniel Kozuskanich, *Originalism, History and the Second Amendment: What Did Bearing Arms Really Mean to the Founders*, 10 U. PA. J. CONST. L. 413, 416 (2008) (a preliminary form of the argument which will appear in *Journal of the Early Republic*) [hereinafter *Originalism, History and the Second Amendment*]. Kozuskanich, a graduate student in history at Ohio State, was inspired in part by David Yassky, a law professor turned Brooklyn politician, whose article *The Second Amendment: Structure, History and Constitutional Change*, 99 MICH. L. REV. 588, 618 (2000), counted and analyzed surviving uses of “bear arms” in the leading electronic database of early Congressional debates. All the numbers here are from the Kozuskanich tabulations.

¹⁷ Nathaniel Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms*, J. EARLY REP. (forthcoming) (manuscript at 2, on file with author) (containing systematic tabulation and classification of all surviving uses of “bear arms” and related constructs).

¹⁸ *Id.*

duty.¹⁹ In ignoring this record, cited by several amicus,²⁰ Justice Scalia thus elevated what was in the late eighteenth century a decidedly eccentric and outlying meaning (*bearing arms* as carrying weapons for non-military purposes) to the summit of constitutional orthodoxy.²¹

The decision's historically unsupportable appeal to interpretive fidelity marks a significant victory for results-oriented jurisprudence even as it points to the shallowness of originalist claims to neutrality. It also lays bare interesting philosophical tensions between the intent-based originalism that animates the Stevens and Breyer dissents and the original public understanding method of originalism expounded by Justice Scalia in his 1997 manifesto *A Matter of Interpretation* and applied to telling effect in the majority's *Heller* opinion. The older intent-focused version of originalism, long associated with Edward Meese and Robert Bork, focuses on justifying judicial invalidation of democratically enacted legislation by invocation of the higher authority of constitutional compact.²² Justices Stevens and Breyer in their dissents

¹⁹ *Id.*

²⁰ Brief for Jack N. Rakove, et al. as Amici Curiae Supporting Petitioners, *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008) (No. 07-290), 2008 WL 157183, 11-13 [hereinafter *Historians' Brief*]; Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D., & Jeffery P. Kaplan, Ph.D. as Amici Curiae Supporting Petitioners, *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008) (No. 07-290), 2008 WL 157194, 14-15 [hereinafter *Linguists' Brief*].

²¹ Scalia justifies this move in two fashions, first, by strained and exaggerated readings of the relatively small number of late eighteenth-century utterances that might plausibly support his interpretation, and second, by invoking numerous nineteenth-century examples that are in some instances consistent with his interpretation of the right. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2791-94, 2804-12 (2008). The latter actually demonstrates that popular conceptions of the right to arms were changing in the nineteenth century, rather than that the right was understood as individualistic and privatistic at the time the Bill of Rights was ratified. See SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA passim* (2006).

²² Edwin Meese III, *Interpreting the Constitution*, in *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* 13-21 (Jack N. Rakove ed. 1990); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990). Indeed, this argument is as old as judicial review itself, and was famously advanced by Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and again in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The logic is perhaps less compelling today than in Marshall's time.

look to the original intent of the framers and ratifiers of the Amendment, find strong evidence of concern with militia-related questions and little evidence of concern with private self-defense, and vote to let the D.C. handgun ban stand as they saw no constitutional warrant for judicial intervention.²³ In contrast, Justice Scalia no longer seems concerned with the question of the validity *vel non* of legislating negatively, i.e. vetoing legislation from the bench. His version of plain meaning originalism is focused only on ensuring that when judicial invalidation of legislation occurs, it proceeds according to neutral—not subjective—principles.²⁴ However, plain meaning textualism could achieve this goal only if the constitutional text admitted but one single meaning when it was created; as *Heller* painfully illustrates, even in the rare instances when this is true, clever results-oriented jurists are quite capable of ignoring the overwhelming weight of the evidence in order to justify striking down legislation based on a constitutional understanding that did not exist when the constitutional text was ratified.²⁵

Rather than original meaning, the Court's embrace of an individual right to own guns for purely private purposes reflects the larger symbolic significance of the right to arms in popular

Marshall reasoned that the ratifying supermajority acted directly, and their authority trumped that of mere representative agents elected to make statutes. But those who voted to ratify the Constitution are long since dead. The ratifiers of 1787-88 (original seven articles), or 1789-91 (Bill of Rights), or 1866-68 (Fourteenth Amendment) were never appointed agents by members of the now existing polity of the United States. The best that could be said respecting their authority and the binding character of their actions is that they have been implicitly ratified after the fact by those now living. But those now living have expressly (not implicitly) voted into office legislative agents, and it is hardly self-evident that their commission carries lower authority than the Supreme Court's self-proclaimed power to strike down legislation in the name of a Constitution that nowhere expressly conveys that power.

²³ *Heller*, 128 S. Ct. at 2824-31, 2847 (Stevens, J., dissenting); *see also* Cornell, *supra* note 10, at 626.

²⁴ ANTON SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 14-15, 23-29, 37-41, 44-47 (Amy Gutmann ed., 1997) (discussing the need for a science of statutory interpretation, textualism and canons of construction, interpreting the Constitution, and the dangers of lacking guiding principles in judicial review); *Heller*, 128 S. Ct. at 2788-90 (discussing constitutional interpretation and the Second Amendment).

²⁵ *See* critiques of Scalia's textualism in Cornell, *supra* note 10, at 625; Sunstein, *supra* note 12, at 247-48; Wilkinson, *supra* note 11, at 13-24; Posner, *supra* note 11, at 32-35.

constitutional culture during later periods of American history and in our own times, and the long-range tendency of that evolving popular culture to affect the jurisprudence of the Court, principally by influencing the politics of appointment.²⁶ The image of the gun as a central icon of American liberty taps into a powerful national obsession mythologizing the revolutionary generation as supposed originators of libertarian norms few of the framers actually would have recognized as their own.²⁷ That mythology clearly swayed the all important “swing voter” Justice Kennedy in *Heller*, who at least five times during oral argument interjected at seemingly irrelevant occasions words to the effect that: *surely the framers must have had frontiersmen in mind, and must have wished to constitutionalize their need for guns to defend themselves against animals and Indians.*²⁸ Nothing in the case file or historical record supports Kennedy’s

²⁶ See generally DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT* (2003); CORNELL, *supra* note 22; William G. Merkel, *A Cultural Turn: Reflections Recent Legal and Historical Writings on the Second Amendment*, 17 STAN. L. & POL’Y REV. 671, 672 (2006) (all of these discuss the changing cultural significance of gun ownership through the course of American history); on popular political preferences and Supreme Court appointments, see LEE EPSTEIN AND JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENT* (2005); John Massaro, *SUPREME POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS* (1990), LORI J. OWENS, *ORIGINAL INTENT AND THE STRUGGLE FOR THE SUPREME COURT: THE POLITICS OF JUDICIAL APPOINTMENTS* (2005).

²⁷ On the symbolic significance of guns and gun ownership in American history, see Williams, *supra* note 26 and Cornell, *supra* note 21. On the attitudes of the founding generation towards guns, see Cornell, *supra* note 21, at 13-18.

²⁸ Transcript of Oral Argument at 8, *District of Columbia v. Heller*, 128 S. Ct. 2783 (No. 07-290) (where Kennedy asks, “It [the Second Amendment] had nothing to do with the concerns of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that?”); *id.* at 30 (where Kennedy asks General Clement, “So in your view this amendment has nothing to do with the right of people living in the wilderness to protect themselves, despite maybe an attempt by the Federal Government, which is what the Second Amendment applies to, to take away their weapons?”); *id.* at 30-31 (where Kennedy states, “I agree that *Miller* is consistent with what you’ve just said, but it seems to me *Miller*... is just insufficient to subscribe—to describe the interests that must have been foremost in the framers’ minds when they were concerned about guns being taken away from the people who needed them for their defense.”); *id.* at 57-58 (where Kennedy asks Mr. Gura, “I’m—I want to know whether or not, in your view, the operative clause of the amendment protects, or was designed to protect in an earlier time, the settler in the wilderness and his right to

assumption. But in *Heller*, he voted with his colleagues Scalia, Thomas, Alito, and Chief Justice Roberts to recognize a private right to guns for defense against burglars and other human and animal threats.

The eight speaking justices' historically-inflected readings of the Second Amendment revealed during oral argument in *Heller* make fascinating studies. In the case of the five justices who voted for a private right to arms, they highlight the inevitable failure of originalism to live up to its neutral pretensions. And yet *Heller* is no garden variety case of originalism *manqué*. Typically, originalism fails because there was no single agreed or dominant understanding of constitutional text at the time of its creation. Generally, there were two or more mainstream understandings of constitutional principle reflected in newly-created constitutional text, and the judicial act of recovering and applying the meaning of that text requires judges faithfully committed to originalism to choose from among those meanings at play when the language came into being.²⁹ In such cases, originalism cannot elevate constitutional judging above the contentious plane of politics, because the meaning of the constitutional text was hotly, bitterly, and ideologically contested at the time it was created. But the question of whether the Second

have a gun against some conceivable Federal enactment which would prohibit him from having any guns?").

²⁹ The fallacy that constitutional meaning was noncontentious in the Revolutionary and early national period cannot withstand serious reflection about the bitter partisan struggles over constitutional meaning that did so much to define the politics of the times. See e.g., JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 7-8 (1996) (discussing the disputes over meaning of the proposed text at the Convention); 1 *THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION* (Bernhard Bailyn ed., 1993) (discussing disputes between Federalists and Anti-Federalists over the Constitution's meaning during the ratification struggle); STANLY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM passim* (1993) (discussing disputes between Jefferson's Democratic-Republicans and Hamilton's Federalists during the 1790s regarding the Constitution's application); LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY passim* (1978) (also discussing the battle between the Democratic-Republicans and the Federalists over Constitutional interpretation).

Amendment protects a right to weapons possession outside the context of service in the lawfully-established militia does not present this type of dilemma for a selector of judicial options. The documentary record is clear, and opinion among historians (as opposed to litigators, polemicists, and bellettrists) specializing in late eighteenth-century American political thought is overwhelmingly against Scalia: debates surrounding the future Second Amendment focused on one concern, and one concern only—the desire to ensure the preservation of the local militia as the preferred option to a politically dangerous standing army, and for that purpose, and that purpose only, preserve the right of individuals to remain armed so that they could fulfill their civic duty in that militia.³⁰

In short, the Second Amendment presents the rare case where originalism, honestly and faithfully applied, could afford an unambiguous answer. The proposers, drafters, and ratifiers of the constitutional right to arms were not at all concerned with rights to gun possession for

³⁰ Among scholars who have written on the Second Amendment, historians specializing in late eighteenth-century American political thought who reject Scalia's reading include Saul Cornell, David Konig, Paul Finkelman, myself, Peter Onuf, Jack Rakove, and Robert Shalhope. Those who come closer to Scalia's interpretation are Robert Churchill, perhaps James Henretta, and the eccentric Leonard Levy, who came to the issue only in retirement. See *Historians' Brief*, *supra* note 20, signed by Jack N. Rakove, Saul Cornell, David T. Konig, William J. Novak, and Lois G. Schworer, which dismantles the private rights reading of the Second Amendment. The brief was also signed by—among others—Fred Anderson, Carol Berkin, R. Don Higginbotham, Stanley N. Katz, Pauline Maier, Peter S. Onuf, Robert Shalhope, John Shy and Alan Taylor, each a noted specialist in late eighteenth century U.S. political history. Monographs and articles critical of the private rights reading of the Second Amendment written or co-authored by specialists in late eighteenth century U.S. political thought include: Cornell, *supra* note 21; Paul Finkelman, "A Well-Regulated Militia": *The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195 (2000); David Thomas Konig, *Arms and the Man; What Did the Right to "Keep" Arms Mean in the Early Republic*, 25 LAW & HIST. REV. 177 n.1 (2007); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000); and Uviller & Merkel, *supra* note 9. But for arguments consistent with Scalia's view written by scholars with historical credentials focused on late eighteenth century North America, see Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 143 (2007); James A. Henretta, *Collective Responsibilities, Private Arms, and State Regulations: Toward the Original Understanding*, 73 FORDHAM L. REV. 529 (2004); and LEONARD LEVY, *ORIGINS OF THE BILL OF RIGHTS* 133-49 (Yale University Press 2001) (1999).

purposes such as self-defense or hunting.³¹ This result, of course, is unacceptable to gun enthusiasts inside and outside the Court. Equally unacceptable, from their perspective, is abandonment of the obsession with foundation mythology that has dovetailed with originalism since its beginnings as a reaction against the Warren Court's novel project of taking seriously the textual commands of Equal Protection and of the Fourth, Fifth, and Sixth Amendments. The problem then becomes squaring the commands of policy preference (broad access to guns) and jurisprudential theory (historical fidelity). There are only two obvious solutions to this problem, both of which members of the *Heller* majority embraced quite eagerly. The first is elevation of outlying, eccentric, discredited and largely ignored voices from the founding period regarding private self-defense into a privileged position as evidence of mainstream understanding. The second tack, which is either more cautious or more outrageous than the first depending on the brazenness of the justice in question, is to assume on faith that there must have existed a consensus in favor of a constitutional right to guns for private purposes, and that the existence of this assumption need not be proved. This course, it should be plain, blends quite readily into self-deception, deception of the public, and ultimately, to embrace the label applied by Chief Justice Burger to the NRA's now completed project of re-conceptualizing the right to arms—outright fraud.³²

³¹ This point is self-evident not just to historians critical of originalism premised on fallacious historical assertions, but to Judges Posner and Wilkinson as well. See Posner, *supra* note 11, at 32; Wilkinson, *supra* note 11, at 3-4; see also Sunstein, *supra* note 12, at 255-56.

³² In a PBS television interview in 1991 marking the two hundredth anniversary of ratification of the Bill of Rights, Burger commented: "If I were writing the Bill of Rights now there wouldn't be any such thing as the Second Amendment . . . This has been the subject of one of the greatest pieces of fraud, I repeat the word 'fraud,' on the American public by special interest groups that I have ever seen in my lifetime. Now just look at those words. There are only three lines to that amendment. A well regulated militia—if the militia, which was going to be the state army, was going to be well regulated, why shouldn't 16 and 17 and 18 or any other age persons be regulated in the use of arms the way an automobile is regulated? It's got to be registered, that you can't just deal with at will. . . . I don't want to get sued for slander, but I

Oral Argument

Oral argument in *Heller* took place on March 18, 2008, running an hour and thirty-seven minutes.³³ The justices heard from Walter Dellinger on behalf of the District of Columbia, Solicitor General Paul Clement as amicus nominally supporting the District, and Alan Gura for the respondent, Dick Heller, the only one of six original plaintiffs held to have standing and granted relief in *Parker*.³⁴ The comments of the four speaking justices who together with Justice Thomas formed a majority in favor of a private right to arms are analyzed in the following paragraphs.

Chief Justice Roberts' questioning was not dogmatically originalist, but he drew heavily on history, and assumptions about history, as he sought to clarify the litigants' positions. The Chief Justice left no doubt that he believes private firearms possession falls within the constitutional guarantee, even if the weapons in question have no direct relation to militia service or militia preparedness.³⁵ Interestingly, the Chief Justice also expressed hostility to expanding the judicially created construct of tiered scrutiny to areas not already burdened thereby, and urged that the right to arms is subject to reasonable regulation.³⁶ In considering whether any

repeat that they [the NRA] . . . have had far too much influence on the Congress of the United States than as a citizen I would like to see—and I am a gun man. I have guns. I have been a hunter ever since I was a boy.” *MacNeil/Lehrer NewsHour*: Interview by Charlayne Hunter-Gault with Warren Burger (PBS television broadcast, Dec. 16, 1991) (Monday transcript # 4226), available at <http://www.lexisnexis.com> (News Library, NewsHour with Jim Lehrer File) (quoted in Uviller & Merkel, *supra* note 9, at 13).

³³ Transcript of Oral Argument, *supra* note 28, at 1, 91 (stating argument began at 10:06 a.m. and ended at 11:43 a.m.).

³⁴ *Id.* at 3, 28, 48; *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007); *aff'd sub nom. District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

³⁵ Transcript, *supra* note 28, at 12 (showing Chief Justice Roberts' disbelief that the Second Amendment right would belong solely to the militia and not be in the militia clause itself); *id.* at 54 (discussing whether a conscientious objector has a potential right under the Second Amendment to hunt deer); *id.* at 85 (asking whether it makes sense to make a distinction between handguns and rifles for self-defense purposes).

³⁶ *Id.* at 44.

restrictions on gun possession might be constitutionally permissible (and hinting that they were to Blackstone, and hence continue to be today), Roberts made clear his skepticism of the District's total ban on possession of handguns, but suggested strongly that a total ban on machine guns (as exists under federal law) is reasonable (dodging the argument that automatic rifles clearly have a far closer relation to service in the lawfully established militia than do handguns).³⁷ He also pressed respondent on the question of what restrictions and regulations would be reasonable (suggesting that lineal descendants of those existing in 1791 would be), with respondent urging that the right extends only to weapons commonly in civilian use (a point that resonated in particular with Justice Scalia).³⁸ During petitioner's rebuttal, the Chief Justice expressed strong concern that requiring cumbersome trigger locks might vitiate the right to self-defense.³⁹

Justice Scalia, eventual author of the majority opinion, left little doubt that the Second Amendment right to arms should trigger strict scrutiny. Scalia believes that militia service is only one (and perhaps not even the most important) purpose behind the Second Amendment. With multiple colleagues on the bench (perhaps including even *Heller* dissenters) he assumes that even though no member of Congress discussed self-defense while the constitutional right to arms was under debate, the desire to protect private self-defense must have been prominent if not

³⁷ *Id.* at 23 (discussing how if a ban on machine guns comes to the court they may find it reasonable); *id.* at 46 (where Chief Justice Roberts asked about distinguishing a ban on machine guns); *id.* at 61 (where Roberts asks, "Is there any parallel at the time that the amendment was adopted to the machine gun?" In response, Mr. Gura says, "[I]t's hard to imagine how a machine gun could be a 'lineal descendent,' to use the D.C. Circuit's wording, of anything that existed back in 1791, if we want to look to the framing era.").

³⁸ *Id.* at 71 (asking whether the modern trigger lock provisions are similar to the gunpowder storage restrictions in place at the time of the Second Amendment's drafting); *id.* at 76 (asking whether age limits would be reasonable); *id.* at 77 (asking whether reasonableness should be determined in light of restrictions in place at the time of the Second Amendment's adoption).

³⁹ *Id.* at 82-85.

paramount in the minds of the ratifiers. But there is little evidence to support this inference, and while Scalia refers to “three states” petitioning in favor of a private right to arms, apart from the New Hampshire’s Ratification Report, there are only two dissenting instruments that bolster Scalia’s claim: that of the Minority of the Pennsylvania Ratifying Convention and a failed western Massachusetts proposal to amend that state’s constitution.⁴⁰ While Scalia assumes that self-defense is an important purpose behind the Second Amendment, he urged inconsistently that only individually held firearms that are in common use and might be useful respecting militia preparedness fall within the terms of the Amendment. Thus, automatic weapons, even if standard issue in the National Guard, fall outside the Amendment because they are not in common private use.

Confused as it is, Justice Scalia’s understanding of the Second Amendment is inextricably entwined with his famous sense of historical fantasy. That said, Justice Scalia’s understanding of the Second Amendment is in no sense a product of the “originalism” he advocated as an academic before he came to the Bench or in his manifesto *A Matter of Interpretation*.⁴¹ In his classical mode, Justice Scalia favored judicial restraint and deference to legislatures. Constitutional text, he argued, needed to be narrowly construed according to its original understanding in order to forestall legislating from the Bench.⁴² In the context of the Second Amendment, however, Justice Scalia embraces a wide, latitudinarian vision of the right to arms decoupled from the militia predicate of the constitutional text. He takes as an article of faith that the Second Amendment was inspired by a desire to protect the right of private self-defense, even though this represents a strained reading of the text unsupported by the

⁴⁰ District of Columbia v. Heller, 128 S. Ct. 2783, 2803-4 (2008).

⁴¹ Scalia, *supra* note 24.

⁴² See RALPH A. ROSSUM, ANTONIN SCALIA’S JURISPRUDENCE: TEXT AND TRADITION 5 (University Press of Kansas 2006).

documentary record. Relying heavily on Joyce Lee Malcolm's *Anglo-American Origins of the Right to Arms*, a book endorsed by virtually no commentators holding Ph.D.s in American history,⁴³ Scalia made numerous historical assertions during oral arguments, all of which turn out to be false, and many of which would be of very dubious relevance even if true. These include:

1. The militia that resisted the British was not state controlled. (In truth, the militia units on the revolutionary side refused to answer to royal governors, but they were very much creatures of statutory law passed by the colonial legislatures going back to the period of first settlement).⁴⁴
2. Well-regulated meant well trained, rather than subject to rules and regulations. (A quick look at the *Oxford English Dictionary* reveals that, rather unsurprisingly, and contra Malcolm, in the eighteenth century regulated actually meant regulated, much as it does today. It did not mean trained).⁴⁵

⁴³ JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGIN OF AN ANGLO-AMERICAN RIGHT* (1994); *but see* Lois G. Schworer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27, 28 (2000) (critiquing Malcolm's thesis).

⁴⁴ Transcript of Oral Argument, *supra* note 28, at 7. Populists attempted to challenge elites for control of the state militia during the revolutionary period, but the militia system remained under the control of state legislatures. *See, e.g.*, Don Higgenbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WM. & M. Q. 39, 43 (1998); MICHAEL McDONNELL, *THE POLITICS OF WAR: RACE, CLASS, AND CONFLICT IN REVOLUTIONARY VIRGINIA* 37 (2007).

⁴⁵ Transcript, *supra* note 28, at 26; 13 THE OXFORD ENGLISH DICTIONARY 524 (2d ed. 1989) (defining "regulated" as, "Governed by rule, properly controlled or directed, adjusted to some standard, etc." and stating that it is also frequently combined with "well" to form "well-regulated."). The OED offers the following examples of eighteenth and early nineteenth century usage: "a1704 T. BROWN *Satire Antients* Wks. 1730 I. 16 These [verses]..had regulated forms, that is regular dances and musick. 1766 *Compl. Farmer s.v. Surveying*, Then may you measure all the whole chains by your regulated chain. a1790 ADAM SMITH *W.N. v. i. III. i.* (Bohn) II. 253 When those companies..are obliged to admit any person, properly qualified, . . . they are called regulated companies. 1828 SPEARMAN *Brit. Gunner* (ed. 2) 336 They are fired with a regulated charge of powder and shot. 1848 ALISON *Hist. Europe* ii. §23 I. 121 Regulated freedom is the greatest blessing in life." It then offers the following obsolete usage: "b. Of troops: Properly disciplined. *Obs. rare*¹. 1690 *Lond. Gaz.* No. 2568/3 We hear likewise that the French are in a great Allarm in Dauphine and Bresse, not having at present 1500 Men of regulated Troops on that side." *Id.* Note that Justice Scalia did not pursue the point that well-regulated means well trained rather than subject to rule in the written opinion.

3. Blackstone thought a private right to arms was rooted in natural law and was thus immune from Parliamentary control (he thought nothing of the kind).⁴⁶
4. The framers revered Blackstone (in truth, many of them detested Blackstone's high Tory politics and his departures from Coke's Whiggish view of the law. It is perhaps worth remembering—or instructing those not in the know—that as an M.P., Blackstone voted to use the most forceful measures to suppress North American grievances about Parliamentary tax policy. He was no friend to America, and no libertarian.)⁴⁷
5. Joseph Story thought the Second Amendment was a personal guarantee unrelated to the militia (this is patently false, and can only be explained on grounds of obstinate ignorance or deliberate falsehood. Story's discussion of the Second Amendment in his *Commentaries* is focused exclusively on the militia dependency of the right, and the perils confronting the right on account of rising apathy respecting militia duty).⁴⁸
6. The federal government could disband the state militia by failing to arm them, a position that Kennedy, Roberts, and Alito also embrace (presumably, the purpose of the assertion is to show that the Amendment could not possibly concern a state right as opposed to a private right, seeing as Congress had plenary authority to abolish the militia by disarming them. But this claim is certainly false—John Marshall and James Madison made clear at the Virginia Ratifying Convention that the states retained concurrent authority to arm the militia, and were perfectly at liberty to arm their units to the extent the federal

⁴⁶ Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237, 252 (2000).

⁴⁷ Transcript, *supra* note 28, at 8; Stanley N. Katz, *Introduction to WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND* xii (Univ. of Chicago Press 1979) (1765).

⁴⁸ Transcript, *supra* note 28, at 8-9; JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 265 (1856) (“[T]hough . . . the importance of a well regulated militia would seem so undeniable, it cannot be disguised that, among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How it is practicable to keep the people duly armed, without some organization, it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt, and thus gradually undermine all the protection intended by this clause of our National Bill of Rights.”).

government neglected to do so.⁴⁹ The states did just that, until the militia began to disappear in the decades after the War of 1812).⁵⁰

7. Scalia insisted on at least two occasions during oral argument that legislation disarming Highlanders and Catholics in eighteenth century Britain spoke of arms, meaning that arms means any weapons, not just weapons in military service (as David Konig has elucidated in great detail, Parliament's concern was very much to suppress disloyal militia, particularly after the two Jacobite risings of 1715 and 1745).⁵¹
8. Scalia argues also that any weapon in common use is protected by the Second Amendment, in part because in 1791 when the Amendment was ratified Americans were expected to bring their own arms to militia muster (but this position is impossible to square with the Militia Act of 1792, which required all privates enrolled in the militia to acquire either a regulation musket or rifle meeting particular standards, implying that other weapons were irrelevant for purposes of militia preparedness).⁵²

In short, no justice made more patently false historical claims during oral argument in *Heller* than the Court's self-anointed originalist savior. But Justice Scalia had plenty of support. Justice Alito, for his part, expressed skepticism that the purpose of the Second Amendment was to prevent disarmament of the militia. The basis for Alito's incredulity was his assumption that Congress has plenary power to disarm the militia. As explained above, and as elucidated in more detail by James Madison and John Marshall at the Virginia Convention, this objection carries little weight, given the concurrent authority of the states to arm the militia absent Congressional

⁴⁹ Transcript, *supra* note 28, at 11; UVILLER & MERKEL, *supra* note 9, at 85; 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, 382-83, 421 (photo. Reprint 1941) (Jonathan Elliot, ed., 2d ed., 1891) [hereinafter ELLIOT DEBATES].

⁵⁰ William G. Merkel, Comment, *Mandatory Gun Ownership, The Militia Census of 1806, and Background Assumptions Concerning the Early American Right to Arms: A Cautious Response to Robert Churchill*, 25 LAW & HIST. REV. 187, 189-90 (2007).

⁵¹ Transcript, *supra* note 28, at 17-18, 37-38; David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "The Right of the People to Keep and Bear Arms,"* 22 LAW & HIST. REV. 119, 128 (2004).

⁵² Transcript, *supra* note 28, at 21-22, 45, 47; Militia Act of 1792, ch. 33, § 1, 1 Stat. 271, 271 (1792), *repealed by* Militia Act of 1903 (Dick Act), ch. 196, 32 Stat. 775; UVILLER & MERKEL, *supra* note 9, at 126-27, 143, 280 n.28.

attention to its responsibility to arm.⁵³ For Justice Alito, but not for the framers, clearly the real purpose of the Second Amendment is to secure the right of self-defense in the home, and here the D.C. statute becomes highly problematic, given that it prohibits handguns and requires rifles and shotguns to be kept locked or unloaded, making them impractical tools for repelling home invaders.⁵⁴

The fourth member of the *Heller* majority, Justice Thomas, has famously declined to speak on the bench in well over two years, and true to form, did not speak during oral arguments. Indeed, Thomas was the only member of the Court not to speak in *Heller*. Justice Thomas's views on the Second Amendment are, however, no mystery. They were suggested in his concurrence in *Printz v. United States*, the case striking down provisions of the Brady handgun control act on anti-commandeering grounds under the Tenth Amendment.⁵⁵ There, Justice Thomas endorsed a private rights reading of the Second Amendment, and cited the standard canon of tendentious literature that does the same.⁵⁶ (It is perhaps worth noting that *Printz* itself cannot be squared with foundation era precedent. The Federal Militia Census, first conducted in 1806, was carried out by state militia officials, ordered, i.e. commandeered, by

⁵³ ELLIOT DEBATES, *supra* note 49, at 392-83, 421.

⁵⁴ Transcript, *supra* note 28, at 24 (where Alito asks, "But even if you have—even if you have a rifle or a shotgun in your home, doesn't the code prevent you from loading it and unlocking it except when it's being used for lawful, recreational purposes within the District of Columbia? So even if you have the gun, under this code provision it doesn't seem as if you could use it for the defense of your home."); *id.* at 41-42 (asking how any outright ban can be upheld under any standard of review if the Second Amendment in part protects an individual right to self-defense); *id.* at 85 (asking whether the D.C. council considered self-defense when enacted the provision at issue).

⁵⁵ *Printz v. United States*, 521 U.S. 898, 936 (1997) (Thomas, J., concurring).

⁵⁶ *Id.* at 937-39 (Thomas, J., concurring).

President Jefferson to go door to door in their districts and count militia-eligible residents and guns in every household).⁵⁷

The final vote needed to create a majority in favor of a historically-rooted private right to arms came from Justice Kennedy. The Court's so-called "swing voter" made clear during oral argument in *Heller* that he viewed the two clauses of the Second Amendment as logically independent, meaning that the right to arms exists independently of the constitutional preference for the militia. For Kennedy, the heart of the matter is that the "operative clause" (in contrast, one supposes, to "inoperative clause" on which the "operative clause" is syntactically dependent) relates to something other than the militia, namely "the concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that[.]"⁵⁸ This concern becomes a hobbyhorse for Kennedy, who returns repeatedly during oral arguments to the issue of a right to arms in rural, western settings, and frequently pleads that the framers of the Amendment must have been concerned to protect frontiersmen against federal disarmament. Even more than in the case of Justice Scalia, Justice Kennedy's history is a matter of faith rather than study or fact, and Kennedy offers no evidence whatsoever to bolster the view that he urged on the petitioner. In an oral argument with Alan Gura, counsel for *Heller*, and Solicitor General Clement, Kennedy urged that *United States v. Miller* was "deficient," because it fails to address "the interests that must have been foremost in the framers' minds when they were concerned about guns being taken away from the people who needed them for their defense."⁵⁹ Again, this is the language of faith, not empirical history.

⁵⁷ Merkel, *supra* note 50, at 188-92; *cf. Printz*, 521 U.S. at 898 (Scalia opinion for the Court, announcing anti-commandeering principle).

⁵⁸ Transcript, *supra* note 28, at 8.

⁵⁹ *Id.* at 30-31, 61-62.

Kennedy would not “allow[] the militia clause to make no sense of the operative clause.”⁶⁰ Since the Second Amendment for Kennedy is about the rights of homeowners and western rustics, the fact that automatic weapons are useful to the National Guard is irrelevant—they are outside the terms of the Second Amendment because the Second Amendment must be about hunting and home defense, and because, after all, that must be what the framers were really concerned with, even if they said otherwise in the clause that Kennedy labels “inoperative.”⁶¹ Justice Kennedy also raised the issue of the English Bill of Rights of 1689 (implying that he, like Scalia, has fallen under the thrall of Malcolm’s odd and error-prone book on the same subject). Kennedy implies that the English Bill of Rights recognized a right independent of militia service, and that the U.S. Bill of Rights therefore likely does the same.⁶² He did not mention that the English Bill of Rights concerned liberties against the Crown not against the legislature, and that the 1689 right to arms was expressly subject to law (meaning statute) and limited by class and religion.⁶³

Kennedy’s vote brought the number of justices in favor of a non-militia linked right to five, meaning Justice Scalia, clearly the most enthused and invested in the project, had his majority. But it left open at least three questions (apart from incorporation, not before the Court in a claim arising out of the District): what would become of the *Miller* precedent, what limitations would the right tolerate, and what level of scrutiny would the right trigger? On this last issue at least, Justice Scalia lacked a majority, for the Chief Justice had been clear in oral argument that he did not favor strict scrutiny in this context or indeed in any other where precedent did not already command its application. Justice Kennedy had signaled his desire to

⁶⁰ *Id.* at 62.

⁶¹ *Id.* at 8 (where Kennedy labels the second clause of the Amendment the “operative clause,” implying that the introductory clause is somehow “inoperative.”).

⁶² Schwoerer, *supra* note 43, at 57.

⁶³ LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS, 1689*, AT 74 (1981).

overturn *Miller*, but the Court ultimately chose to reread that precedent creatively instead of casting it aside as bad law. Perhaps Kennedy's greater intellectual honesty respecting the teaching of *Miller* unsuited him to write for the five justice majority, but in any case, for reasons the are not self-evident to outsiders, Chief Justice Roberts elected Antonin Scalia to write for the Court, assuring in the process that originalism (and commitment to the desired result) rather than pragmatism would drive the opinion. As he wrote for the five justice majority, Justice Scalia felt compelled not only to define at least the initial scope of the private right to gun possession and to answer provisionally the question about what restrictions that right could bear, but also to engage the vigorous dissenters.⁶⁴ As he made clear in oral argument, Justice Stevens supported the view that the right to arms was originally understood as militia-dependent, a view shared by Justices Ginsburg, Souter and Breyer—the latter of whom was particularly struck by the founding-era right's peaceful co-existence along side numerous city and town regulations severely restricting gun possession, even in states with constitutional provisions analogous to the federal Second Amendment.⁶⁵

The Scalia Opinion

Justice Scalia begins his analysis of the Second Amendment right in *Heller* with a pivotal *ipsi dixit* assertion: “The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause.”⁶⁶ This is a crucial step for Justice Scalia, as it allows him to uncouple the right to arms from the militia. The late Professor Uviller and I made a different argument in our book, *The Militia and the Right to Arms*, where we relied on syntax, the debates in the first Congress, and historical context to make the claim that the two parts of the

⁶⁴ District of Columbia v. Heller, 128 S. Ct. 2783, 2795-97 (2008).

⁶⁵ Transcript, *supra* note 28, at 54, 56, 63-64.

⁶⁶ *Heller*, 128 S. Ct. at 2789.

Amendment were logically and linguistically dependent.⁶⁷ Our position is shared by amicus Historians and Professors of Linguistics.⁶⁸ While Scalia cites no authority for his proposition that the Second Amendment's militia language is merely prefatory, that argument was prefigured by Eugene Volokh in an influential article called *The Commonplace Second Amendment*.⁶⁹ There, Professor Volokh concedes that the structure of the Second Amendment (linking the right to arms to a purpose clause) was unique in the federal Bill of Rights, but then points out that purpose clauses occurred more commonly in state constitutions and bills of rights.⁷⁰ Volokh argues further that purpose clauses did not determine meaning of the rights to which they attached, and this assertion becomes a major premise in Scalia's exegesis of the Second Amendment right.⁷¹ Volokh's claim is essentially anachronistic. While several nineteenth-century treatises on interpretation support his devaluation of prefaces or prologues, orthodox late eighteenth-century learning, reflected by Blackstone among others, was that they were pivotal to ascertaining meaning, and indeed that purpose clauses were largely outcome determinative respecting textual interpretation.⁷² Thus, Scalia's devaluation of the militia clause, calculated as it is to lead to the result he prefers, is arbitrary and unfounded.

⁶⁷ UVILLER & MERKEL, *supra* note 9, at 148-59.

⁶⁸ Historians' Brief, *supra* note 20, *passim*; Linguists' Brief, *supra* note 20, at 5-14.

⁶⁹ Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

⁷⁰ *Id.* at 793-95, 802. It should be noted that Volokh uses the term "justification clause" instead of "purpose clause."

⁷¹ *Id.* at 801-807; *Heller*, 128 S. Ct. at 2788-90.

⁷² Cornell, *supra* note 10, at 632-35. It is interesting to note that the two treatises Scalia cites to support subordinating purpose clauses were published in 1871 and 1874, eighty some years after ratification. *Heller*, 128 S.Ct. at 2789 (citing FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES: THEIR RULES OF CONSTRUCTION, AND THE PROPER BOUNDARIES OF LEGISLATION AND OF JUDICIAL INTERPRETATION 268-69 (Platt Potter ed., 1871) and THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 42-45 (John Norton Pomeroy ed., 2d ed. 1874)).

Justice Scalia's next move is to urge the importance of the phrase "right of the people" in support of his case for a right unrelated to service in the militia. Of course, the identity of those holding the right does not determine the nature of the right, and it is hardly as obvious, as Justice Scalia assumes, that a right of the people must be privatistic in character rather than civic in scope. Indeed, the powers of the people retained in the Tenth Amendment are certainly collective in character, the unenumerated rights reserved to the people by the Ninth Amendment could just as well be corporate and civic as wholly private (democratic self-governance comes to mind, as does freedom of association), and the First Amendment right of the people to assemble and petition Congress for redress of grievances would be nonsensical if conceived of as atomistic as opposed to corporate and civic in nature. The Preamble speaks of the people coming together to form a more perfect union, not coming apart to create more perfect anarchy. Article I, Section 2 says, "the People of the several States" shall choose the members of the House of Representatives.⁷³ This act is both collective and private in character, although voting in the founding era was not always done privately and secretly as it is today.⁷⁴ That statement respecting elections to the House of Representatives is the only use of the term people in the original seven articles (apart from the Preamble), and the framers thereafter abandoned this locution in favor of "person" or "persons," terms they used no fewer than nineteen times in Article I through VII when they wanted to describe acts performed individually or list purely personal disabilities, liberties, and responsibilities.

Building on his *a priori* assumption that the Second Amendment's militia language is subordinate and his strained reading of right of the people to mean a private, personal right, Justice Scalia next moves to interpreting the phrase "keep and bear arms." Justice Scalia's

⁷³ U.S. CONST. art. I, § 2, cl. 1.

⁷⁴ RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA, 1740-1790*, at 110-14 (1982).

willful blindness respecting the obvious and overwhelmingly military connotation of bear arms was discussed in some detail in the first section of this Essay. In the written opinion, he cites two prominent late eighteenth-century dictionary entries that seem to favor his construction, but as amicus Professors of Linguistics demonstrated in a far more exhaustive survey of dictionaries of the times, *bearing arms* most commonly was defined with clear military resonance and illustrated by quotations military in character throughout the eighteenth century.⁷⁵ Justice Scalia also lays great stock in the fact that the word “keep,” standing alone, does not convey a collective or military meaning. However as Justice Stevens reminds us in his dissent, the Second Amendment does not speak of a right to keep arms, but of “the right of the people to keep and bear Arms.”⁷⁶ The text describes one right, coupled syntactically to the militia and to the security of a free State, and that right is to “keep and bear Arms”—not own guns and carry weapons. Justice Scalia and fellow travelers in the original public meaning school abhor consideration of historical context,⁷⁷ but canons of legal interpretation in the late eighteenth century stressed the importance of focusing on the evil a law was designed to remedy.⁷⁸ In the case of the Second Amendment, there is no doubt that the evil in question was disarmament of the citizen militia, leading inevitably to over-reliance on a dangerous standing army.⁷⁹ Since the civic right to arms aims at preserving the citizen militia against disarmament, it is self-evident that the right must extend to protecting possession of arms to be carried in militia duty as well as to the actual carrying of those weapons when called to service. Disarmament of the militia,

⁷⁵ Linguists’ Brief, *supra* note 20, at 4; 1 THE OXFORD ENGLISH DICTIONARY 634 (2d ed. 1989) (defining “to bear arms” as, “to serve as a soldier, do military service, fight,” and citing numerous eighteenth-century references using this phrase in military contexts).

⁷⁶ *Heller*, 128 S. Ct. at 2824-31 (Stevens, J., dissenting).

⁷⁷ Scalia, *supra* note 24, at 16-18, 29-37 (condemning the use of legislative intent and legislative history).

⁷⁸ H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 894-902 (1985).

⁷⁹ See UVILLER & MERKEL, *supra* note 9, at 2-3.

when attempted and achieved by British authorities during the Revolutionary period, targeted the arms used by militiamen both when they were kept in private homes and stored in public arsenals.⁸⁰ The concern for keeping arms was therefore as closely tied to preservation of the militia as was concern for bearing arms. In short, Justice Scalia places far more weight on the word “keep” than it will bear in any but the most abstract and a-contextual analysis.

Having opted to ignore context in the interest of theoretical purity (original public meaning devotees insist on this ploy),⁸¹ to treat “the right of the people to keep and bear Arms” as two distinct entitlements, and to discount the military implications of bearing arms, Justice Scalia did not settle for redefining *arms bearing* to mean carrying weapons for any purpose (which would at least be supported by some outlying and eccentric uses) but instead seized on the arbitrary and largely unfounded construct of carrying weapons for confrontation as the new meaning of the pivotal “operative” phrase of the Second Amendment. To be fair, Scalia’s assertion is not entirely *ipsi dixit*. It is Ginsburg dixit, having originated in a dissenting opinion by Justice Ginsburg in *Muscarello v. United States* in 1998, a case in which the justices addressed the meaning of a federal statute proscribing heightened penalties for crimes committed while a person “carries a firearm.”⁸² There, Justice Ginsburg was concerned to spare a convicted

⁸⁰ Cornell, *supra* note 21, at 14.

⁸¹ *Heller*, 128 S.Ct. at 2788 (stating, “In interpreting this text [the Second Amendment], we are guided by the principles that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning’ Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.” (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931), alteration in original); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620-21 (1999) (quoting Robert Bork and Antonin Scalia saying that original meaning can only be determined through the meaning of the words in the statute or Constitution).

⁸² *Heller*, 128 S.Ct. at 2793 (where Scalia quotes Ginsburg’s dissent in *Muscarello v. United States* saying, “[s]urely a most familiar meaning is, as the Constitution’s Second Amendment . . . indicate[s]: ‘wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case

criminal who had not actually brandished or employed a gun during the course of the crime from enhanced sentencing requirements.⁸³ She was clearly not interested in defining the scope of the constitutional right to arms possession. And even if she were, Justice Scalia is on very shaky originalist grounds when the only authority he cites in support of his newly hatched interpretation of the meaning of bearing arms in the Second Amendment—passed in 1789 and ratified in 1791—is a somewhat ill-thought aside of a dissenting Supreme Court justice regarding an unrelated matter uttered in 1998. Is this originalism based on neutral principles?⁸⁴ Machine-like law finding, in the fashion of Montesquieu’s *la bouche qui prononce les paroles de la loi*?⁸⁵ Reliance on an algorithm guaranteed to purge subjectivity from interpretative process?⁸⁶ Or is this a case of window-dressing a policy choice made on the bench, and imposed upon a polity whose legislature had selected another option?

While the *Heller* opinion is in many respects disingenuous, Justice Scalia invests some limited energy in putting on appearances of reasonableness, or at least acknowledging that there is some quantum of evidence that cuts against his analysis. Thus, after labeling carrying weapons for purposes of confrontation the “natural meaning” of bearing arms, he does admit that the “phrase ‘bear Arms’ also had at the time of the founding an ‘idiomatic meaning’ that was significantly different from its natural meaning: ‘to serve as a soldier, to do military service’”⁸⁷ So for Scalia, the meaning that the phrase bear arms carried in over ninety-five percent of

of conflict with another person.”) (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

⁸³ *Muscarello*, 524 U.S. at 139-150 (Ginsburg, J., dissenting).

⁸⁴ Cf. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, in *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* 197-226 (Jack N. Rakove ed. 1990).

⁸⁵ BARON DE MONTESQUIEU, 1 *THE SPIRIT OF THE LAWS* 151-53 (Thomas Nugent trans., 1900).

⁸⁶ Scalia, *supra* note 24, at 94.

⁸⁷ *District of Columbia v. Heller*, 128 S.Ct. 2783, 2794 (2008).

its surviving eighteenth-century uses in British North America and the United States is not natural but idiomatic. And, presumably based on his locution, also entirely out of fashion in our own times—after all, bear arms had that quirky idiomatic meaning “at the time of the founding,” as opposed to here and now. But *bear arms*, according to Scalia, carried this idiomatic meaning only when the phrase was expanded into the three word construct *bear arms against*. Since the Second Amendment speaks of the right to keep and bear arms, not the right to bear arms against enemies of the state, the idiomatic meaning (which, it bears repeating, the phrase carried over ninety-five percent of the time) can be discarded. Justice Scalia seized on this useful contrivance thanks to the radical libertarian blogger Clayton Cramer, who, in a piece co-authored with Joseph Edward Olson but not yet published at the time the *Heller* decision was announced, first made the claim regarding the difference between *bearing arms against* and simply *bearing arms*.⁸⁸ Some convenient sleight of hand was absolutely essential for purposes of propping up the originalist case for a private right to arms against the obvious challenge that *bear arms* almost always carried a military meaning when uttered during the founding period, and that it did so uniformly during Congressional debates on the Amendment. Cramer’s move had the added advantage of not appearing in print in time to be refuted prior to publication of the *Heller* decision. Unfortunately for Scalia, Cramer’s claim is unmasked as absurd in a forthcoming piece in the *Journal of the Early Republic* by Nathan Kozuskanich who has laboriously catalogued every surviving use of the phrase bear arms available in electronic collections of colonial and founding era writings, and counted up hundreds of instances where the phrases *bear arms* or

⁸⁸ Clayton E. Cramer & Joseph Edward Olson, *What Did “Bear Arms” Mean in the Second Amendment?*, 6 GEO. J.L. & PUB. POL’Y 511, 520 (2008).

bearing arms is used without the qualifier against to mean rendering service in the army or militia.⁸⁹

Philological and syntactical exegesis rather than historical context determines meaning for devotees of original public meaning constitutionalism,⁹⁰ but the meaning of the Second Amendment Justice Scalia divines from those processes is not, he assures us, out of harmony with historically inflected meaning.⁹¹ Indeed, that “meaning is strongly confirmed by the historical background of the Second Amendment,” which, it turns out, is relevant “because it has always been widely understood that the Second Amendment, like the First and the Fourth Amendments, codified a *pre-existing* right.”⁹² Implicitly then, history is not material when considering constitutional rights newly minted by drafters and ratifiers, because judicial interpreters contemplation of historical sources would shade into original intent based inquiries disfavored by members of the original public meaning school. In contrast, history is relevant when considering the meaning of more venerable rights merely codified by drafters and ratifiers, because then those making the inquiries are not probing the intentions of the constitution makers. But why are interpreters not probing those intentions—or at least the received meaning of their expressed language—in precisely the same way interpreters approach relevant considerations concerning rights newly created by the Constitution? After all, it is still the ratifiers who gave the old common law right constitutional status. Consequently, I see no material differences respecting the relevance of history when it comes to attempting to figure out the meaning of text codifying old rights and text recognizing new ones. Whatever differences there may be, Justice Scalia assures us that because the right to bear arms is a common law right predating the Bill of

⁸⁹ Kozuskanich, *supra* note 17, at *2.

⁹⁰ Scalia, *supra* note 24, at 45- 46; Barnett, *supra* note 79, at 621.

⁹¹ *Heller*, 128 S. Ct. at 2797.

⁹² *Id.* (italics in original).

Rights, it is not “in any manner dependent upon that instrument [the Second Amendment] for its existence.”⁹³ So constitutional text tells the whole the story, but the right under analysis in *Heller* we suddenly learn does not depend on text in any manner? This is a very odd—and perhaps too telling—concession, seeing as the first third of Justice Scalia’s opinion was devoted entirely to a-historical textual analysis leading to a historically implausible reading of the text under analysis. Justice Scalia never explains the basis for his distinction between rights with pre-constitutional pedigree and those without, leaving the reader to wonder why history not relevant for the first part of the opinion, when Justice Scalia determined the meaning of constitutional text. This question is vexatious, but on the terms of the opinion, perhaps unfathomable. In any case, the history Justice Scalia deploys after abruptly and unexpectedly conceding history’s relevance turns out to be tendentious and wrong and sometimes irrelevant.

To keep *Heller*’s odd relation with history in perspective, recall that for Scalia, the debates in the United States House of Representatives in 1789, concerning the meaning of the proposed amendment guaranteeing the right of the people to keep and bear arms, are irrelevant to the judicial task of giving meaning to the constitutional text that Congress forwarded to the states for ratification. Of much greater relevance for Justice Scalia is the alleged meaning of Section 7 of the English Bill of Rights of 1689, as glossed by Joyce Lee Malcolm in our own time, or as glossed by William Blackstone in the 1760s, or as glossed at two levels removed by Professor Malcolm’s glossing Blackstone’s gloss of the original.⁹⁴ Now, it is not entirely clear that the English statutory language “That the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law,”⁹⁵ means remotely the same thing as

⁹³ *Id.*

⁹⁴ See Schwoerer, *supra* note 43, at 48-50; Heyman, *supra* note 46, at 253.

⁹⁵ Schwoerer, *supra* note 55, at 290-91; IAN LOVELAND, CONSTITUTIONAL LAW, 19-28 (2000).

the American constitutional text, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”⁹⁶ The English Bill of Rights was concerned to recognize limits on executive authority that William and Mary accepted as conditions for being offered the crown abdicated when James II fled the country.⁹⁷ Except in so far as the Crown prerogatives were concerned, the English text took for granted legislative omnipotence.⁹⁸ In contrast, the United States Bill of Rights was concerned to mark out limits to federal legislative authority.⁹⁹ The English right described an immunity against the Crown that could be waived as Parliament saw fit; the American right described a right against Congress that left state regulatory authority untouched. The question of what sort of governmental actors were estopped and which were not blends into substance, for in both instances, legislators—Parliamentary in one case, state in the other—remained fully licensed by the terms of the social compact to regulate gun possession. The scope of the textually protected right differs between the 1689 and 1789 Bills of Rights as well in that the English right is limited to Protestants, dependant on conditions, and subject to statutory allowance, while the right secured in the United States is syntactically linked to the existence of a well-regulated militia. Neither right is boundless and unlimited, and neither represents an atomistic liberty characteristic of a pre-social, lawless state of being. But the limits to which the English and American rights are subject are different because the two texts specify different limits, and in that context, Justice Scalia’s claim that Blackstone, when analyzing the English Bill of Rights, did not have militia dependency in mind rather misses the mark, for Blackstone was not discussing the American

⁹⁶ U.S. CONST. amend. II.

⁹⁷ Schwoerer, *supra* note 63 at 290-91; IAN LOVELAND, CONSTITUTIONAL LAW, ADMINISTRATIVE LAW, AND HUMAN RIGHTS: A CRITICAL INTRODUCTION 19-28 (4th ed. 2006).

⁹⁸ LOVELAND, *supra* note 97, at 22-28.

⁹⁹ *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833); BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 193 (1977).

right with its textual commitment to a well-regulated militia. Blackstone did, as Scalia claims, link Section 7 of the English Bill of Rights to “the natural right of resistance and self-preservation” and “the right of having and using arms for self-preservation and defence,”¹⁰⁰ but it is not at all clear that he was interested in doing anymore than making the orthodox Lockean move of retroactively justifying the show of force that ushered in the bloodless or Glorious Revolution.¹⁰¹

One of the principal hazards of originalism is that modern American jurists are relatively inexpert in the history of late eighteenth-century American constitutional thought.¹⁰² They tend to know even less about seventeenth and eighteenth century English constitutional thought. Bearing this in mind, I shall offer a radical proposition, not at all in harmony with Justice Scalia’s interpretive scheme: since neither the framers of the English Bill of Rights nor William Blackstone lived to see the Second Amendment to the United States Constitution, arguing over what spin they placed on the textually different Section Seven of the English Bill of Rights is not guaranteed to yield unambiguous and neutral answers respecting the contested meaning of that American constitutional text they never saw. Figuring out what the materially different American language meant to everyday, intelligent language users on the streets and fields of the new republic—if that is to be our task—requires consultation of other sources. And if constitutional language has meaning that depends on more than the isolated (and themselves frequently ambiguous) meanings of the words that make up that constitutional text, why not consult the works of commentators from the immediate post-constitutional period, all the more

¹⁰⁰ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 136, 139-40 (1765).

¹⁰¹ The quotes are from Scalia’s opinion, which cites Blackstone’s *Commentaries on the Laws of England*, but the language appears to be Scalia’s gloss rather than verbatim Blackstone. Cf. *Heller*, 128 S. Ct. at 2798; see Heyman, *supra* note 46, at 257.

¹⁰² Rakove, *supra* note 30, at 105-06; Saul Cornell, “Don’t Know Much About History” *The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 666 (2002).

so when they purport to explain what that text means (and not what it ought to mean) as a coherent and integrated whole?¹⁰³

Now, to be fair, Justice Scalia does reference and on occasion excerpt treatise writers of the late eighteenth and early nineteenth centuries.¹⁰⁴ One could argue easily—and Saul Cornell does so masterfully—that he excerpts them tendentiously, and that when he does so he blends analysis of the common law right of self-defense into the Second Amendment when in reality jurists of the times viewed the right to self-defense and the right to arms as distinct and separate constructs.¹⁰⁵ But my point here is another one. When Justice Scalia cites treatise writers in *Heller*, he cites them not to establish the meaning of the Second Amendment, but only to confirm the putative meaning of the text he had already cobbled together from his a-historical and anachronistic musings respecting the Second Amendment’s various words and phrases pondered as isolated phonemes rather than as parts of an integrated whole. In contradistinction to Scalia, I am proposing reliance on the meaning treatise writers ascribe to the text of the Second Amendment as a complete and coherent ensemble. Accepting, at least arguendo (well, to be honest, perhaps only arguendo), Justice Scalia’s preference for original public meaning, there is

¹⁰³ By comparison, the standard interpretive maxim of international law holds that learned treatises are authoritative evidence of what the law is, but only in so far as the treatise writers wrote to explain what the law is as it actually exists and not to argue what the law should become, has been consistently followed by the Supreme Court since the beginning. *See, e.g.*, *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163-64 (1820) (Justice Story looking to treatises on the law of nations to interpret the Congressional power to define the crime of piracy under Art. I sec. 8 cl. 10, and finding that Congress acted within that power by simply incorporating customary international law into the Statutes at Large); *The Paquete Habana*, 175 U.S. 677, 701-709 (1900) (Justice Grey consulting treatises to discover a customary rule against seizure of enemy fishing vessels during war time).

¹⁰⁴ *Heller*, 128 S. Ct. at 2789-2807 (J. Tiffany at 2789, F. Durrant at 2789, T. Sedgwick at 2789, J. Bishop at 2789, S. Johnson at 2791, T. Cunningham at 2791, N. Webster at 2791, J. Trusler at 2791, W. Blackstone at 2792, Hawkins at 2792, T. Sheridan at 2793, T. Walker at 2793, T. Clarkson at 2796, Lord Richmond at 2797, J. Story at 2798, G. Sharp at 2798, J. de Lolme at 2798, St. George Tucker at 2799, W. Duer at 2799, J. Eliot at 2804, W. Rawle at 2805-2806, B. Oliver at 2807).

¹⁰⁵ Cornell, *supra* note 10, at 633-36.

no reason not to focus on the meaning of whole provisions as originally received, rather than on the component parts of a text that early Americans read as a whole. While original public meaning advocates generally eschew historical context, it is hardly clear that individual words have plain meaning while complete texts communicate only ambiguous purposes and shady intentions. To read a text as a complete entity is no more inherently likely to slide into non-interpretive intent-focused methods than focusing on individual words, unless of course the authors of the completed text succeeded in integrating their intended meaning into the text, which would surely make our reliance on that intended meaning legitimate so long as we understand it as the ratifiers did. Let us try the holistic approach then, or rather check in with a treatise writer who pursued a holistic approach to explaining the Second Amendment's meaning in those halcyon days so long ago, before activists ascended to the Bench and made war on behalf of rights social conservatives do not like, and against right that they do.

The treatise writer I have in mind is Joseph Story, Justice of the Supreme Court, Harvard College professor, and along with New York's Chancellor James Kent, the most influential scholar of constitutional law during the early national period. Story published the first edition of his *Commentaries on the Constitution of the United States* in 1833,¹⁰⁶ some twenty years after being appointed to the Supreme Court and more than forty years after the Bill of Rights was ratified. But Story was around to take in the received meaning of the Bill of Rights in 1789-91, having been born in Marblehead, Massachusetts in 1779.¹⁰⁷ Story's father, a medical doctor, served with George Washington in the Continental Army, and Story grew up in politically-aware

¹⁰⁶ 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION* (De Capo Press 1970) (1833).

¹⁰⁷ R. KENT NEWMAYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC*, 5 (University of North Carolina Press 1985).

circles in Marblehead, Massachusetts.¹⁰⁸ He did not start reading law until he graduated from Harvard in 1798, so when he first encountered the proposed Bill of Rights as a student at Marblehead Academy in 1789, Story understood it as an intelligent school boy, not as a doctrinaire lawyer.¹⁰⁹ When he came to write the Commentaries in the early 1830s, he wrote not with a view to new-modeling a visionary understanding of the Constitution of his youth, but to preserving the orthodox views of the Age of Federalism against the newly emerging anti-statist, anti-corporatist, profoundly individualistic views of the Age of Jackson.¹¹⁰ (It is telling, incidentally, that Scalia, the alleged originalist, cites more Jacksonian authorities on the meaning of the Second Amendment than he does Federalist or Jeffersonian authorities).¹¹¹ This is Story's entry concerning the Second Amendment and the federal constitutional right to arms:

The importance of this article will scarcely be doubted by any persons, who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.¹¹²

¹⁰⁸ *Id.* at 10.

¹⁰⁹ *Id.* at 20-21, 36.

¹¹⁰ *Id.* at 192-95.

¹¹¹ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789-2807 (2008). See Cornell, *supra* note 10, at 631-36 (noting the treatise writers cited by Justice Scalia relied on nineteenth-century discussions of constitutional interpretation).

¹¹² STORY, *supra* note 106, at 746-47.

Story's right to arms does not concern hunting, or defense of the home against burglars, or the joys of collecting. It concerns service in the militia, the preferred alternative to the standing army, bulwark of civic republicanism, and shield against tyranny. Story's entry on the Second Amendment laments the passing of the New England militia of his youth and the abandonment of the communal tradition of obligatory service in local units comprising a universal army of the people and of the Constitution. The late Richard Uviller and I chronicled the demise of the citizen militia of the framers in our book *The Militia and the Right to Arms*, in which we described rising popular disaffection for compulsory militia duty in the post-revolutionary years which lead to the disappearance of the old militia during the Age of Jackson, and its replacement by volunteer companies of select militia, who no longer represented the undifferentiated communities of the Republic, but only selected parts, composing small segments of the population who banded together for reasons such as ethnic pride, social ostentation, or desire for status and for glory.¹¹³ This process took longer in New England than the rest of the country, but by 1830s it was well underway even in Massachusetts, and Justice Story needed no special sense of prescience to foretell the ultimate demise of the army of the people.¹¹⁴ Crucially, for present purposes, the end of the common militia signaled for Story the evisceration of the constitutional right to arms. "There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights." All the protection, says Justice Story, intended by the Second Amendment, will be eviscerated by the passing of the militia system. This can only be because all the protection intended by the Second Amendment was linked to the militia

¹¹³ UVILLER & MERKEL, *supra* note 9, at 109-24.

¹¹⁴ *Id.* at 30-31, 109-24.

system, and because the framers successfully imbedded that intention in the language they chose to constitutionalize the right.

Justice Scalia, who was not born in Marblehead, Massachusetts in 1779, but in Trenton, New Jersey in 1936, sees things differently.¹¹⁵ According to Justice Scalia “[t]he prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.”¹¹⁶ This is the crux of Scalia’s analysis, and it is a claim for which he does not cite and cannot cite any authority whatsoever. It is a leap of faith, not a logical surmise or plain deduction from the text that pointedly links the right to the militia and not to hunting or to defense of the person or home. It is an assertion based on beliefs which, if they existed from 1789-1791, were none the less omitted from the language selected to codify the right to arms. Justice Scalia’s right to arms may be based on natural law, common law, the Ninth Amendment, or historical fiction, but it is not plainly enshrined in the Second Amendment.

This Essay began with the observation that there were at least two plausible reasons to recognize a private right to weapons possession under the United States Constitution, i.e. fealty to persistent, popular and super-majoritarian demands for such a right, and the popular belief that a right to have guns is in fact rooted in the Second Amendment as originally understood. There may well be other ways to articulate the right, more in harmony with mainstream American judicial traditions of rights enforcement than appeals to popular sovereignty as the source of concrete unwritten norms. One could, without forsaking the Supreme Court’s extra-textual claim of *Marbury v. Madison*¹¹⁷ and *Cooper v. Aaron*¹¹⁸ to have the dispositive and final say in matters

¹¹⁵ Rossum, *supra* note 42, at 3.

¹¹⁶ *Heller*, 128 S.Ct. at 2801.

¹¹⁷ 5 U.S. (1 Cranch) 137 (1803).

¹¹⁸ 358 U.S. 1 (1958).

of constitutional interpretation (a claim with which the people out of doors, even popular constitutionalists among them, have largely acquiesced, even if Professors Tushnet, Levinson and Kramer do not join them in so doing), find a basis for a judicially minted right to arms in the penumbra of various elements of the Bill of Rights, in common law constitutional traditions, in substantive due process, in firmly rooted history and traditions of the American people, or in the Ninth Amendment. Indeed, in his forthcoming piece in the *Harvard Law Review*, Cass Sunstein accuses Justice Scalia of performing precisely this operation.¹¹⁹ The great irony, as developed by Chief Judge Harvey Wilkinson of the Fourth Circuit in his comment in the *Virginia Law Review*,¹²⁰ is that Justice Scalia came to prominence as a self-avowed principled opponent of judicial recognition of textually unspecified rights—at least those not firmly rooted in American history and tradition. And Justice Scalia’s claim that there is in fact a deeply entrenched history of immunity against gun control regulations in the United States is patently false, as ably demonstrated respecting colonial times by Justice Breyer in dissent,¹²¹ and respecting the early national period and the twentieth century by Professor Saul Cornell.¹²² Indeed, even Professor Robert Churchill, the most careful and sophisticated historical scholar to endorse a private right to arms on originalist grounds, concedes that gun regulation (but not prohibition) was commonplace in the early national period.¹²³ One could perhaps say in Justice Scalia’s favor that Justice Douglas took a longer and more convoluted path in *Griswold* from the emanations of the First, Third, Fourth and Fifth Amendments to the right to sexual privacy than Justice Scalia took in *Heller* from the arms related language of the Second Amendment to his newly forged private right to arms. But that is rather like the claim made on behalf of Lochner-era substantive due

¹¹⁹ Sunstein, *supra* note 12, at 249.

¹²⁰ Wilkinson, *supra* note 11, at 4.

¹²¹ *Heller*, 128 S. Ct. at 2848.

¹²² CORNELL, *supra* note 21, at 26-30.

¹²³ Churchill, *supra* note 30, at 143.

process that at least there is language in the Constitution about contract. To be sure there is, but it addresses impairment of the obligations of existing contracts, not the right to be free of government interference when entering into any contractual work arrangement no matter how onerous and coercive the terms. Indeed there is arms related language in the Constitution, but without making Justice Scalia's leap of faith, one cannot tie that language to hunting or shooting home intruders.

The sense of boot-strapping, artifice, and judicial innovation that *Heller* conveys does not enhance the decision or the Court's legitimacy. Yet bad history and manufactured immunities are perhaps not *Heller*'s greatest failings. There is also something profoundly anti-democratic, and anti-localist about Justice Scalia's holding in *Heller*, that rather undermines his populist claims. The case, after all, does not hold that the good people of Montana may legislate to allow guns free of interference by do-gooders and know-it-alls in Washington, or that the legislative agents serving the teaming elite masses of New York and California should keep their hands off Mississippians. Rather, with the *Heller* decision Justice Scalia annulled crime control measures embraced by the legislative agents of the people of the District of Columbia, who deemed them urgently necessary to curb an epidemic of violent crime in the 1970s, and who to this day consider the measures effective in having partially mitigated the problems of homicide and assault in the District. It does not help the Court's pretence at legitimacy to reflect that home rule came very late to the District, that the District is majority black and was long ruled directly by a lily white Congress, that the victims of violent crime in urban areas are disproportionately black, and that the Supreme Court is overwhelmingly non-black. When all is said and done, *Heller* allows officious individual residents of the District who disagree with popularly enacted local policies to veto those policies by obtaining a one vote majority among the appointed

justices of the national Supreme Court whose policy preferences happen to be out of harmony with those of the majority of the District's residents. And this profoundly anti-democratic act relies for authority on nothing more than historical fantasy and imagination.

Failure, Fraud, and Originalism

For the legal process theorists who dominated American jurisprudence from the New Deal to the 1970s, judges were meant to stick to what they were good at most of the time, which is to say judging particular controversies under existing law as opposed to legislating proposed resolutions of broader problems by making new law. In *Carolene Products*, Justice Stone described three classes of exceptions to this general rule, in which judicial intervention was warranted to make or undue legislatively determined policy to uphold larger constitutional values.¹²⁴ Stone had in mind situations involving legislative violations of express constitutional prohibitions, cases in which the normal channels of democratic redress through the legislature had malfunctioned or been blocked off, and matters adversely impacting discreet and insular minorities who could not hope for remedies through the same majoritarian process that had embraced oppressive policies in the first place.¹²⁵

¹²⁴ See *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

¹²⁵ *Id.* at 153 n.4 (“There may be narrow scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced with the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious or national or racial minorities[;] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry” (internal citations omitted)); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW passim* (1980).

For at least thirty years, process theory was ascendant in the Supreme Court. Process theory and the three *Carolene* exceptions explain much of the Court's post-War jurisprudence on civil rights, desegregation, criminal procedure, and voting. But beginning in the 1970s, originalist critics of the Warren and early Burger Courts mounted a counter-offensive. For Bork, Scalia, and Meese, process theory was an excuse for judicial subjectivity. Allowing judges to occasionally violate the norm against judicial legislation impermissibly introduced judges' personal preferences into the judicial process resulting in usurpation of the lawmaking function. In essence, the originalists argued judges should stick to what they were good at—judging controversies under the law—not just most of the time, but all of the time. While constitutional text might warrant occasional judicial invalidation of legislation, it could never authorize active lawmaking by unelected judges. Originalism's assertion of legitimacy by virtue of neutrality built on compact theories of the Constitution to argue that that the Court could validly undue the acts of a democratic majority only when those acts were prohibited in the fundamental law originally ratified by the higher authority of a constitutional supermajority.

Other auxiliary claims are not always stated but require assertion and resolution to complete the originalists' argument and cement their method's alleged legitimacy. Any given originalist must decide what aspect of original meaning tests her claim to be in harmony with the constitutional design as it existed when the language at issue became part of the constitutional compact to which she claims fidelity. Is it the original intent of the framers? But the framers did not all share the same understanding of contested text. Debates dragged on over four months at the Constitutional Convention, and the Bill of Rights was on the floor of the House for three months. Had the members been in harmony, they surely would have spared themselves these long weeks of disputation. Respecting the Bill of Rights and all other contested provisions of

our constitutional text (and that would be all the provisions that matter, and nearly all the provisions we have), some who participated in the framing process wished to scuttle, others to modify, still others to water down, others still to pass as is in expectation the language would ratchet itself up over time. Search for unified understanding among the drafters will very likely prove futile (or delusional). Perhaps then it is not collective or individual intention of the legislators who created text, but the understanding of the ratifiers who gave the text life that should guide the modern interpreter. And yet the national polity has never been any less fissured than national or state representative assemblies.

Adherents of the original public meaning school of plain meaning textualism maintain there is a way out of this conundrum. They assert that the subjective understanding of several tens of thousands of ratifiers need not concern us because we can safely recreate their understanding by objective consultation with dictionaries of the times. Note we are by now several steps removed from the comparatively straight-forward argument that a modern legislature (say one consisting of the elected representatives of the three-hundred million individuals making up the national population) must yield to the voices of a majority in each of the nine states required for ratification under Article VII in 1787-89 when fewer than a half million persons—all of them long since dead—were entitled to vote. We have added assumptions that those barely half million or so permitted to participate in 1787-89 all shared exactly the understanding of the originalist jurist in our time, or that the understanding two hundred years ago does not matter, since it, or something just as useful, can be surmised from a straight-forward consultation with a dictionary written by Johnson or Webster (one a hidebound Tory, the other a fanatical High Federalist). Either way, the claim that a supermajority of the late eighteenth century trumps the majority of today is not unmediated or direct. It may not be

nonsense, but whatever it is, it stands on stilts, and very big ones at that. We are left with the assertion that only one reading matters, and it is the one original public meaning adherents offer up for our consumption. It is, they proudly avow in attestation of its principled neutrality, a meaning unburdened by context or history, a meaning that follows mechanically from consulting with dictionaries. That this proffered meaning—divorced as it purports itself to be from the nuanced history that gave it life—has some title based on super-majoritarian democracy is anything but self-evident.

In my view, just as Scalia and company flatter themselves respecting their ability to divine unambiguous historical truth from mystic séances with the spirits of 1787, so Barnett and partners significantly overestimate their skill at deriving unambiguous meaning of text by casual perusal of lexicographers' entries for individual terms in dictionaries. To the limited extent that historical truth and historical meaning is ascertainable, much work is required to acquire sufficient perspective to discern the probable and plausible from the facile and fallacious. The originalists' jurisprudential *oeuvre* gives no reason to believe that they (Manning, Rosen and some few others excepted)¹²⁶ have laid the perspectival foundations to support their bold, confident, historical, and linguistic assertions. This holds for the majority's mistake-ridden efforts in *Heller*. Perhaps Justices Scalia, Roberts, Thomas, and Alito possess special gifts that particularly suit them to performing the legislative function, and perhaps, in a common law culture in which constitutional law has always developed at least in part in a common law way,¹²⁷ these gifts make them fit candidates to "legislate from the bench." There is however

¹²⁶ See, e.g., the historically informed and nuanced arguments in John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337 (1998) and JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* (2006).

¹²⁷ See generally Thomas Grey, *Do We Have an Unwritten Constitution?* 27 STAN. L. REV. 703 (1975); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88

absolutely no evidence to support the proposition that any of them has arrived at a sufficiently accurate understanding of late eighteenth-century American constitutional history to be able to read “neutrally” and without recourse to other internal or external values the original meaning of the Second Amendment. It is past time for judges and jurists with political agendas (something they share in common with most of humanity) and marginal senses of historical literacy to abandon disingenuous claims of principled neutrality based on little more than glib assumptions that the framers, ratifiers and dictionary writers of the 1780s and 90s must have harbored political sensibilities similar to their own. There is in fact nothing neutral about this self-indulgent leap of faith. When judges say we are faithful to our ancestors because they looked like us, they do not engage in self-abnegation. When jurists imagine that these ancestors made constitutional laws that look like laws we would wish to have, they compound their error. And when they imagine it to be a judicial duty to enforce those imagined laws, they are making law, with no more democratic legitimacy and great deal less candor, than the process theorists during the days of Harlan Stone and Earl Warren. In our age of originalism, the nation worships and the Court reifies what never before existed, and fidelity to false history elevates an imaginary constitutionalism of the past into a new modeled higher law of the present.¹²⁸ The driving engine of this revolution, and of Justice Scalia’s *Heller* decision, is the predictable capacity of the imagined past to harmonize with the normative vision of those inside and outside the judiciary and academy who are most active in imagining that fictive past into existence. As a consequence of this triumph of imaginary history, the originalist project first celebrated by Robert Bork,

COLUM. L. REV. 723 (1988), David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

¹²⁸ See Gordon S. Wood, Comment, Laurence H. Tribe, Comment, Mary Ann Glendon, Comment, & Ronald Dworkin, Comment *in* SCALIA, *supra* note 24, at 49-127 (on the inability of originalism to confine judges to neutral—as opposed to subjective—values in constitutional and statutory interpretation).

Edwin Meese, and Antonin Scalia as a means of restoring neutral principles to constitutional adjudication and supplanting the value-laden judging of the process theorists and living constitutionalists has failed—and failed colossally—to remain true to its own creed.¹²⁹

¹²⁹ See BORK, *supra* note 22, at 153-55 (discussing the classic arguments for originalism as a neutral principle of interpretation); SCALIA, *supra* note 24, at 3-47. See generally Bork, *supra* note 84; Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 989 (1987) (arguing that the original meaning of the constitutional provisions and statutes provides the only reliable guide for judgment).

CHAPTER ELEVEN

*HELLER AS HUBRIS, AND HOW
MCDONALD v. CITY OF CHICAGO MAY WELL CHANGE THE
CONSTITUTIONAL WORLD AS WE KNOW IT*

Introduction

Supreme Court prognostication is famously tricky business. As would be landmark cases loom on the horizon, doctrinal revolutions are sometimes imagined into existence by the most informed Supreme Court watchers, only to fail to materialize once the justices speak and their opinions are published. *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Dickerson v. United States* come readily to mind as the most famous recent instances of constitutional revolutions that never were.¹ But *District Columbia v. Heller*,² in which the Supreme Court for the first time announced that the Second Amendment protected a right to weapons possession unconnected to service in the lawfully established militia, did not disappoint those who anticipated momentous doctrinal change. The burden of this comment is that *Heller* was not, as Cass Sunstein³ and others⁴ would have it, an act of humility on the part of Justice Scalia, or a case of judicial minimalism. Indeed, claims by some gun rights enthusiasts that *Heller* did not change or expand beyond recognition the doctrine pronounced sixty years ago in

¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Dickerson v. United States*, 530 U.S. 428 (2000).

² *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

³ See Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246 (2008).

⁴ See, e.g., Mark Tushnet, *Permissible Gun Regulation After Heller: Speculation About Methods and Outcomes*, 56 UCLA L. REV. 1425 (2009); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, ILL. PUB. L. & LEGAL RES. PAPER SERIES, FEB. 9, 2009, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1241655.

*United States v. Miller*⁵ are hard to accept at face value, given that under *Miller*, it was all but impossible to plead that arms possession of any sort merited judicially enforceable constitutional protection.⁶

Heller changed the constitutional landscape boldly and significantly. The majority decision and the opinion that supports it were, in my view, acts of hubris, and the right they created—I do not say recognized—threatens to become absolutist rather than limited in its application once it is incorporated against the states as it almost certainly will be in *McDonald v. City of Chicago*. Notwithstanding Justice Scalia’s famous disclaimers in *Heller*, which were perhaps inserted solely for the purpose of bringing Justice Kennedy on board to create a majority, the case is likely to spawn progeny that substantially undermines the gun control and anti-crime policies now embraced by the democratically elected legislatures and councils of numerous urban and suburban jurisdictions throughout the land.⁷ This process will begin when *McDonald* is decided, likely on the last day of the 2010 term.

⁵ *United States v. Miller*, 307 U.S. 174 (1939).

⁶ Justice Scalia endorses this claim in *Heller*, 128 S. Ct. at 2813-16, maintaining that the *Miller* Court’s decision to deny Second Amendment protection to an unregistered short-barrel shotgun depended on that weapon’s lack of any reasonable relationship to the preservation or efficiency of well regulated militia, rather than the fact that the two individuals possessing the weapon were neither doing militia duty nor active members of the militia. Thus, for Justice Scalia, *Miller* was entirely consistent with affording Second Amendment protection to weapons not actually used in militia service. Because he believed *Miller* has been misapplied by the numerous federal appellate courts that had uniformly rejected Second Amendment challenges over the seven decades prior to the D.C. Circuit’s decision in *Parker v. District of Columbia*, 478 F.3d 370 (2007), it was therefore not necessary for Justice Scalia to overturn *Miller* in order to uphold the D.C. Circuit’s decision in *Parker* by holding in favor of *Heller* and against the District of Columbia. In dissent, Justice Stevens vigorously disagreed respecting the meaning of *Miller*, *Heller* at 2844-46. Justice Scalia’s argument that *Miller* is consistent with constitutional protection for weapons not used in militia service and held by persons not serving in the militia echoes the claims of commentators such as Nelson Lund, *The Second Amendment, Political Liberty, and the Right of Self Preservation*, 39 ALA. L. REV. 103, 109 (1987), and Brannon P. Denning & Glenn H. Reynolds, *Telling Miller’s Tale: A Reply to David Yassky*, LAW & CONTEMP. PROBS., Spring 2002, at 113, 114 (2002).

⁷ According to Justice Scalia:

Writing for a 5-4 Court over strongly worded and passionate dissents by Justices Breyer and Stevens, Justice Scalia claimed to rely on originalism of the original public meaning stripe as he read a private right to arms into the Second Amendment.⁸ His alleged reliance on originalism paid homage—in name, if not in fact—to the celebrated faith in neutral principles of judging that Scalia most famously articulated in his 1997 manifesto, *A Matter of Interpretation*.⁹ There he embraced the position that by cleaving to the original public meaning of constitutional text, judges could review and invalidate legislative and executive acts at odds with constitutional precepts based on a wholly objective standard that did not require, in Alexander Hamilton's famous phrase from *Federalist No. 78*, substituting will for judgment.¹⁰ Some commentators¹¹

Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons or the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons."

Heller, 128 S.Ct. at 2816-17 (citations omitted). On Justice Kennedy's posture in *Heller* (reflected in his comments during oral argument), see William G. Merkel, *The District of Columbia v. Heller and Antonin Scalia's Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV., 349, 364-65 (2009).

⁸ *Heller*, 128 S. Ct. at 2788.

⁹ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997).

¹⁰ Justice Scalia explained his rejection of original intent in favor of original meaning during a speech at Catholic University the year before he published *A Matter of Interpretation*:

The theory of originalism treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated. You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent, because as I say I am first of all a textualist, and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they

and a very small number of historians¹² have expressed sympathy or even admiration for original public meaning focused jurisprudence, but the more common practice among historians expert in the founding and Reconstruction eras is to lampoon the practitioners of original public meaning jurisprudence as historically naïve, politically calculating, and results oriented.¹³ This has certainly been the case respecting historians who have commented on *Heller*, and while Justice Scalia's opinion has its fans in the gun rights advocacy community and among libertarian leaning

were promulgated to the people of the United States, and what is the fairly understood meaning of those words.

Justice Antonin Scalia, Remarks at The Catholic University of America: A Theory of Constitution Interpretation (Oct. 18, 1996). On the difference between intent-focused originalism and original public meaning focused originalism, see also Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV., 611, 621 (1999). In *The Federalist*, Hamilton wrote:

It can be of no weight to say that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

THE FEDERALIST NO. 78, at 487 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888).

¹¹ See, e.g., Barnett, *supra* note 10, at 613; Vasav Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 299 (2004).

¹² See, e.g., David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295 (2009). While highly critical of *Heller*'s application of history, Konig accepts, at least for the sake of argument, the legitimacy of original public meaning-focused constitutional interpretation. See *id.*

¹³ See, e.g., Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625 (2008); Jack N. Rakove, *The Second Amendment: The Highest State of Originalism*, 76 CHI.-KENT L. REV. 103 (2001); The New York Times.com, <http://topics.blogs.nytimes.com/2008/06/26/qa-jack-rakove-on-heller-and-history/> (June 26, 2008, 18:55 EST).

legal scholars,¹⁴ historians of the founding era have been joined by numerous other public intellectuals in condemning *Heller* as an unprincipled exercise of judicial law-making.¹⁵ Indeed, some of *Heller*'s strongest critics are conservative judges and jurists with unimpeachable movement conservative credentials.¹⁶

The Hubris of *Heller*

My own objections to Justice Scalia's work product in *Heller* focus on the fact that his allegedly history-driven method depends fundamentally on numerous false historical claims.

According to Justice Scalia and the *Heller* majority, the Second Amendment's language about

¹⁴ See, e.g., Alan Gura, *Heller and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvie Wilkinson*, 56 UCLA L. REV., 1127 (2009); Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008 at A13.

¹⁵ Prominent historians of late eighteenth century political thought in the United States to have criticized Justice Scalia's opinion as results driven include Jack Rakove and Saul Cornell. See Cornell, *supra* note 13; The New York Times.com, *supra* note 13 (featuring Q&A with Rakove); see also Merkel, *supra* note 7. Over a dozen leading historians of the late eighteenth century joined an amicus brief in *Heller* highly critical of the private rights reading of the Second Amendment. Brief of Amici Curiae Jack N. Rakove et al. in support of Petitioners at 9-13, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008)(No. 07-290). The brief was signed by leading eighteenth-century specialists Jack N. Rakove, Fred Anderson, Carol Berkin, Saul Cornell, Paul Finkelman, R. Don Higginbotham, Stanley N. Katz, David Konig, Pauline R. Maier, Peter S. Onuf, Robert E. Shalhope, John Shy, and Alan Taylor, as well as historians whose work focuses on other periods. See *id.* David Konig, a highly respected legal historian with particular expertise in the founding period is willing to take original public meaning at face value as a philosophy of constitutional interpretation, but argues that the Scalia opinion disingenuously imports nineteenth century concepts into the eighteenth century in order to prop of the desired reading. Konig, *supra* note 12. Academics in other disciplines who have expressed enormous skepticism of the *Heller* majority opinion include law professors Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 215-26 (2008), and Adam Winkler, *Heller's Catch 22*, 56 UCLA L. REV. 1551 (2009), and legal and public policy scholars Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshows form a Social Welfare Perspective*, 56 UCLA L. REV. 1041 (2009).

¹⁶ See J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009); Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 32-33 (labeling Scalia's opinion "faux originalism").

the militia and the State is prefatory and non-operative, while the plain meaning of the functional text respecting the right to bear arms, as understood at the time of its creation, is that the Constitution protects a personal right to carry commonly held weapons for purposes of confrontation.¹⁷ Having read the pivotal introductory language about the militia out of the equation, Scalia and the majority conclude that the core meaning of the constitutional text is that individuals have the right to armed self-defense, and that any secondary meaning related to performing armed service in the militia is secondary and idiosyncratic.¹⁸ These claims depend on haphazard assumptions rather than historically supportable deductions. In fact, the surviving historical record demonstrates quite conclusively that just the opposite of what Justice Scalia asserts is true. Not only was discussion of the right to bear arms almost invariably linked to discussion of the virtues of the militia and the dangers of standing armies in the late eighteenth century, but the “operative” phrase “bear arms” carried an overwhelmingly martial meaning when the Second Amendment was debated and ratified.¹⁹

As recorded in the Annals of Congress, twelve members of the House of Representatives spoke when the text that became the Second Amendment was under consideration in 1789. All discussed militia- and military-related issues, principally conscientious objection.²⁰ Not one mentioned private self-defense, hunting, or gun collecting.²¹ Senate debates were not transcribed until 1794 when the Senate first opened its proceedings to reporters and the public, but an electronic search of the Library of Congress database (containing all extant official records of the Continental and U.S. Congresses between 1775 and 1791) reveals forty-one additional uses of

¹⁷ See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008).

¹⁸ See *id.* at 2794.

¹⁹ See 1 ANNALS OF CONG. 778-81, 796 (Joseph Gales ed., 1834).

²⁰ See *id.*

²¹ See *id.*

the phrase “bear arms” or “bearing arms” in contexts other than discussion of the proposed Bill of Rights.²² In all but four instances the use is unambiguously military and collective.²³

Of course, aficionados of original public meaning have been known to shrug off damning evidence taken from the deliberations of legislative or constitution-making bodies²⁴ on the grounds that the intent of a collective body is a mysterious and elusive thing, not well calculated to be clearly ascertainable, and not likely to map on to the common sense understandings of the good people out of doors whose act of ratification gave constitutional text binding authority in the first place.²⁵ But when usage in legislative and constitutional chambers is overwhelmingly contra the meaning espoused by advocates preaching original public meaning, surely the burden rests on the original public meaning adherents to show that their preferred understanding, while inconsistent with that of the text’s authors, is nonetheless in harmony with that of its ratifiers.

The problem for Justice Scalia is that the record respecting public usage of the phrase “bear arms” overwhelmingly supports a dominant military meaning just as clearly as do the records from legislative chambers. As reported by careful historian Nathan Kozuskanich in the peer-reviewed and highly respected *Journal of the Early Republic*, an electronic search of Charles Evans’s *American Bibliography*, a comprehensive collection of surviving books and pamphlets in the colonies and United States from 1690 to 1800, yields 210 hits for “bearing arms” and its cognates other than those contained in reprints of the Bill of Rights and other government papers.²⁶ According to Kozuskanich, 202 of these 210 uses (96.2 percent) are

²² Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms*, 29 J. EARLY REPUBLIC, 585, 587 (2009).

²³ *See id.*

²⁴ *See* Scalia, *supra* note 10.

²⁵ *See id.*

²⁶ Kozuskanich, *supra* note 22, at 587.

unambiguously military and collective, not private and personal.²⁷ The same search on *Early American Newspapers*, a database of over 120 American newspapers from 1690 to 1800, yields 143 hits, 140 of which (97.9 percent) Kozuskanich describes as clearly related to rendering military service or performing militia duty.²⁸ In ignoring this record (cited by several amici in *Heller*), Justice Scalia elevated what was in the late eighteenth century a decidedly eccentric and outlying meaning to the summit of constitutional orthodoxy.

Not only is Justice Scalia's *Heller* opinion unsupported by the historical record, it has been savaged by several leading lights among historians of late eighteenth-century American political thought, including Jack Rakove and Saul Cornell.²⁹ To my knowledge, Justice Scalia's interpretation is considered historically accurate by only two PhD historians whose expertise focuses on the late-eighteenth-century United States: Robert Churchill and James Henretta.³⁰ Granted, at least two additional prominent *Heller* enthusiasts, Joyce Lee Malcolm and Robert Cottrol, hold PhDs in history, but Malcolm's expertise is in seventeenth-century England and Cottrol wrote his PhD on black communities in Providence, Rhode Island in the antebellum period before he embarked on a law teaching career.³¹

²⁷ *See id.*

²⁸ *See id.*

²⁹ *See supra* note 11.

³⁰ For informed historical analyses consistent with Justice Scalia's position (neither one of which takes Kozuskanich's empirical work into account), see Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 *LAW & HIST. REV.* 139 (2007); James A. Henretta, *Collective Responsibilities, Private Arms, and State Regulations: Toward the Original Understanding*, 73 *FORDHAM L. REV.* 529 (2004).

³¹ *See* George Washington University Law School Faculty Homepage for Robert J. Cottrol, <http://www.law.gwu.edu/Faculty/Profile.aspx?id=1721#> (last visited Feb. 11, 2010); George Mason University Law School Homepage for Joyce Malcolm, http://www.law.gmu.edu/faculty/directory/fulltime/malcolm_joyce (last visited Feb. 11, 2010).

On the other side, a veritable honor role of thirteen prominent historians of the late-eighteenth-century United States joined other distinguished scholars in an amicus brief in *Heller* highly critical of the private rights reading of the Second Amendment.³² These historians object to the conclusions endorsed in the *Heller* opinion not simply on the grounds that they are irreconcilable with historical facts, but because they depend on a disingenuous interpretation of constitutional language. Indeed, for those who understand that the meaning of language is historically inflected rather than suspended out of time, the opinion's linguistic assumptions and purported conclusions beggar belief.³³ Justice Scalia broke the text of the Second Amendment down into its component parts, arbitrarily labeled the text that did not comport with his predilections a "preface," and the part he found more congenial "operative."³⁴ In the process, he relied on mid- and late-nineteenth-century interpretive conventions that allegedly downplay the significance of preambles, and ignored the dominant interpretive paradigms of the late eighteenth century that accord preambles very substantial weight.³⁵ He then broke the language he called operative down into its component parts, and ruled that the essence of the Amendment, the right to bear arms, meant the right to carry weapons for confrontation in the late-eighteenth-century United States, even as he ignored the fact that well over ninety percent of surviving recorded uses from the colonial and early national periods concern service in the military or militia as opposed to private uses of weapons.³⁶

Thus, it is not only the counter-factuality of Justice Scalia's opinion that strikes historians as wrongheaded: from the perspective of specialists in late-eighteenth-century American

³² See *supra* note 15.

³³ See Saul Cornell, *Heller, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 UCLA L. REV. 1095 (2009); Konig, *supra* note 12.

³⁴ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789 (2008).

³⁵ See Cornell, *supra* note 33, at 1106-12; Konig, *supra* note 12, at 1297.

³⁶ See Cornell, *supra* note 33; Konig, *supra* note 12.

political thought, the most disturbing feature of the *Heller* opinion is that it is militantly a-contextual. Deliberate avoidance of context in turn depends on tuning out the preamble which when crafted highlighted the context and helped crystallize the meaning to late-eighteenth-century eyes and ears. As a theoretical matter, Justice Scalia abhors context, because it muddies the waters of the fictive world of objective interpretive simplicity that he finds congenial.³⁷ According to Justice Scalia, Randy Barnett, and other leaders of the original public meaning school, neutral interpretation requires recovering constitutional meanings without recourse to anything that might inject subjective values into the process.³⁸ But in the Second Amendment context this approach is inherently dishonest to the extent it purports to be based on fidelity to the understanding of the ratifying public, precisely because that public chose to ratify the whole text of the Amendment, not just the part Justice Scalia arbitrarily classified as significant. Indeed, those who voted to ratify the language at issue two hundred twenty and twenty years ago had subjective values, and they had tried very hard to insure that those values were written into the language that presented itself for ratification before they allowed themselves to be satisfied it merited approval.³⁹

As historians of American political thought know all too well, an enormous amount of scholarly effort over the past two generations has gone into rediscovering all the nuanced meanings of the political discourse of the revolutionary and founding periods. That effort yielded what historians call the republican synthesis, and aspects of the republican synthesis were absorbed into the law schools twenty or so years ago when people like Bruce Ackerman

³⁷ See Cornell, *supra* note 33; Konig, *supra* note 12.

³⁸ See Barnett, *supra* note 10; Scalia, *supra* note 10.

³⁹ On the role of popular politics and opinion in the struggle to create the Bill of Rights, with a particular emphasis on popular opinion's effect on James Madison's drafting, see RICHARD LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS* (2006).

and Cass Sunstein became intrigued with the concept.⁴⁰ But something was lost in translation. To historians, the anti-army trope was always at the center of the republican paradigm, and to anyone who spent long years in grad school reading the works of J.G.A Pocock, Bernard Bailyn, and pre-1992 Gordon Wood,⁴¹ there can be no doubt that the language of the Second Amendment signaled to Americans who read or heard the words in 1789 or 1791 a desire to be free of the baneful effects of standing armies that had absolutely nothing whatsoever to do with hunting or shooting burglars.⁴²

It is crucial for Justice Scalia to keep Pocock and company out of the picture, because once they are on the scene Scalia's interpretive gambit and that of private rights enthusiasts is at an end. Hence, Scalia emphasizes that the task of the judge applying original public meaning originalism is to interpret text according to its everyday and ordinary meaning, and not probe into its secret or technical meanings.⁴³ But in this instance at least, this process of reliance on

⁴⁰ See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); Cass Sunstein, *Beyond the Republican Revival*, 99 *YALE L.J.* 1539 (1988).

⁴¹ See, e.g., BERNARD BAILYN, *IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); *PAMPHLETS OF THE AMERICAN REVOLUTION* (Bernard Bailyn & Jane N. Garrett eds., 1965); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); J.G.A. POCOCK, *POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY* (6th ed. 1971); *THREE BRITISH REVOLUTIONS: 1644, 1688, 1776* (J.G.A. Pocock ed., 1980); *THE VARIETIES OF BRITISH POLITICAL THOUGHT, 1500-1800* (J.G.A. Pocock, et al. eds., 1993); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969) [hereinafter WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*]; but see also GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION: HOW A REVOLUTION TRANSFORMED A MONARCHICAL SOCIETY INTO A DEMOCRATIC ONE UNLIKE ANY THAT HAD EVER EXISTED* (1992) [hereinafter WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION*], in which Wood maintained a republican outlook respecting the early revolutionary period, but mapped out a course towards liberal democracy as he discussed the transition from the revolutionary period to the early republic. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, *supra* note 41; WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION*, *supra* note 41.

⁴² See H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002).

⁴³ As Justice Scalia writes, "normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to

reconstructed simple self-evidence is unfaithful to original understanding, because the language of the Second Amendment was actually originally understood by the average, everyday American on the streets or in the fields in 1789-1791 in the anti-army, anti-corruption idiom elucidated by Pocock and company, as the empirical work of Kozuskanich makes abundantly clear.⁴⁴ To be sure, Joyce Appleby, Daniel T. Rogers, James Kloppenberg, T.H. Breen and others have challenged the ascendancy of the republican synthesis.⁴⁵ But even those who argue that the republican case was pressed too far acknowledge its power at its core and question merely its application at the edges, stressing that there are some things it does not explain. And historians skeptical of republicanism's explanatory power regarding the individualistic Age of Jackson still accept its explanatory power for the revolutionary period.⁴⁶ To the overwhelming majority of professional historians there remains little doubt that for non-elites and nascent individualists as well as classically trained planters and urban lawyers, language about militia

ordinary citizens in the founding generation.” *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008).

⁴⁴ See Kozuskanich, *supra* note 22.

⁴⁵ JOYCE APPLEBY, *CAPITALISM AND THE NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790s* (1984); T.H. BREEN, *THE LOCKEAN MOMENT: THE LANGUAGES OF RIGHTS ON THE EVE OF THE AMERICAN REVOLUTION* (2001); James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9 (1987); Daniel T. Rogers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992).

⁴⁶ The limits of the liberal reaction to republicanism and the validity of the core republican insights even under liberal scrutiny are discussed in Isaac Kramnick, *The “Great National Discussion”: The Discourse of Politics in 1787*, 45 WM. & M. Q. 3 (1988), and Linda K. Kerber, *The Revolutionary Generation: Ideology, Politics and Culture in the Early Republic*, in *THE NEW AMERICAN HISTORY* 31- 59 (Eric Foner ed., 2d. ed. 1997), which both suggest that multiple modes of discourse animated American politics in the early nineteenth century, with republicanism predominating up until a contested point that falls sometime after ratification of the Bill of Rights. On this point, see also Konig, *supra* note 12. I developed my own argument respecting the survival of republicanism as the dominant paradigm in American political thought during the ratification period in UVILLER & MERKEL, *supra* note 42, at 248-52.

and bearing arms sounded in terms of civic virtue and not private rights to hunt or shoot burglars when the Bill of Rights was debated and ratified.⁴⁷

Justice Scalia's rhetoric about neutral principles of judging notwithstanding, to historians of the late eighteenth century (other than Robert Churchill) *Heller* is self-evidently a case of a judicially invented right, or, at the very least, a mid-nineteenth-century right transposed backwards in time to the late eighteenth century.⁴⁸ There is, however, a larger issue at stake in *Heller*, and it concerns the legitimacy of judicial invalidation of legislation— not just on grounds of violation of a judicially invented private right to weapons possession, but on any judicially enforced grounds whatsoever. When Chief Justice Marshall asserted the authority of law courts to strike down legislation and executive action in *Marbury v. Madison*⁴⁹ and *McCulloch v. Maryland*,⁵⁰ he was at great pains to explain two things: first that the invalidation amounted (again, in Hamilton's words) to an act of judgment not of will, and second, that in invalidating acts of the democratic arms of federal and state government was not usurpation of the powers of the peoples' representatives, but rather an act authorized by the higher authority of the Constitutional Convention, in which the people themselves set up a system to delimit the authority of their legislative and executive agents.⁵¹ And perhaps this claim of Marshall's— legitimizing judicial review by reference to the super-majoritarian authority of the ratifying conventions—had some validity in 1803. But Jefferson's famous time-window of nineteen years—the time, using contemporary demographic data, during which half the generation of adults who had ratified a Constitution would pass on—was hard at work. By the time Marshall

⁴⁷ See *supra* notes 14-15 and accompanying text.

⁴⁸ See Konig, *supra* note 12.

⁴⁹ *Marbury v. Madison*, 5 U.S. 137 (1803).

⁵⁰ *McCulloch v. Maryland*, 17 U.S. 316 (1819).

⁵¹ *Id.*; *Marbury*, 5 U.S. at 176.

decided *McCulloch*, relatively few who had voted to ratify remained, and by the end of the antebellum years, all had passed.⁵²

It is more than counter-intuitive that originalists would still rely implicitly on the same supermajoritarian claim as Marshall to justify judicial review, for the founding generation's capacity to license agents surely does not escape to confines of the Rule Against Perpetuities. To invoke a long dead principal to veto the acts of agents of the living is not an appeal to democracy or to popular sovereignty. It is an appeal to defunct authority. It bears emphasis that the question of the basis for judicial review remains analytically distinct from that of ensuring the neutrality of judicial review should judicial review be found appropriate. While Justice Scalia claims that originalism of the original public meaning stripe can keep subjective values out of the invalidation process, as far as I can tell he has nothing other than vague hints at ancestor worship (and lets face it, they are not even his ancestors) to offer to justify recourse to the process at all.

With this analytic groundwork laid, let us unpack the absurdity of Justice Scalia's interpretive claim in *Heller* in all of its dimensions. His reasoning, in its express and implicit dimensions, closely tracks the following schematic:

It is legitimate for the Supreme Court of the United States to intervene and by a one-vote majority strike down a gun control statute enacted in the 1970s by the democratically elected legislature of the District of Columbia because:

- a. 220 years ago, 500,000 or so voters, all of them long since dead, ratified a Constitution

⁵² On Jefferson's theory that constitutions lost their legitimacy once half the generation that had ratified the instrument passed away, see HERBERT E. SLOAN, *PRINCIPLE & INTEREST: THOMAS JEFFERSON AND THE PROBLEM OF DEBT*, 50-85 (1995). Sloan's masterful book draws on many sources, but his focus is on Jefferson's famous letter to Madison of 6 September 1789, in which Jefferson explained that "*the earth belongs in usufruct to the living; the dead have neither powers nor rights over it.*" *Id.* at 50. In the same letter Jefferson explained his demographic calculations that yielded the nineteen-year time frame for constitutional legitimacy. *Id.* at 51-53.

- b. That does not expressly establish judicial review in the Supreme Court
- c. But can be creatively read to do so
- d. And was amended within a few years to contain language
- e. That overwhelmingly, at the time it was used, signified nothing whatsoever about private self-defense
- f. But as interpreted today by Justice Scalia clearly had a principally private self-defense significance at the time it was ratified.

In a path-breaking article in the *Yale Law Journal*,⁵³ Jeremy Waldron made several trenchant and controversial points about judicial review generally, and judicial review in the United States in particular. As Waldron remarked, Americans tend to celebrate judicial review as the great national contribution to political science, and perhaps as a consequence they may overestimate its philosophical significance and—more importantly—fail to realize how profoundly anti-democratic the device is.⁵⁴ This problem is compounded, in Waldron’s eyes, because there is neither an empirical nor a principled case that judges are better suited than legislators to take rights seriously and to protect their exercise by minorities.⁵⁵ I disagree with Waldron to the extent that he feels judicial review cannot be justified, but I agree that the burden is on those who would justify it.⁵⁶ And, if originalism it is to justify judicial intervention, I’d like

⁵³ See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

⁵⁴ *Id.* at 1348-49, 1353.

⁵⁵ *Id.* at 1349, 1405.

⁵⁶ My sense is that at least in the extended federal republic, there is something to be said for judicial intervention as an added bulwark against abuse of local and regional minorities, for precisely the reasons articulated by Madison in *The Federalist No. 10*. THE FEDERALIST NO. 10 (James Madison). The more diverse and extended the polity, the less likely it becomes that a national majority will agree to reduce any particular minority to second-class citizenship. That said, Madison’s system celebrated in *The Federalist No. 10* is also rigged against change and in favor of the status quo. *Id.* In this light in particular, Waldron’s point that it may be merely a function of historical contingency—rather than the nature of judging—that led the federal

to hear a far better explanation of how the supermajority of 1788 trumps the majority of today than that which underlies Justice Scalia's reasoning.

On the most basic level, conventional justifications for judicial intervention in the name of originalism make little sense, as aptly illustrated by their application to the *Heller* majority opinion: people we never knew who are long since dead made rules to bind us, and we must follow them because they said so. (Of course, as a historical matter, it is anything but clear that the framers or ratifiers did say we must follow their rules, but originalists have never been concerned with historical accuracy.) And, in following the rules they made, we must interpret the rules exactly as they intended, because they said so. (Of course, once again, the truth of the matter is that they didn't say so, since the Constitution did not come with an owner's manual, or an interpretive handbook.) And Justice Scalia is here today to interpret the language exactly as those people 220 years ago would have interpreted it, because he says so. (They certainly never said so, for there are no founding era prophesies that a judge would one day rise to restore the fallen nation to true constitutional understanding.) Having established, at least implicitly, this foundation as a warrant for neutral judging, Justice Scalia then gets the interpretation patently wrong, embracing a meaning that was, at best, a fringe outlier when the text was created. On the whole, it is a farcical exercise.

Fans of originalism or variants of originalism as diverse as Bruce Ackerman⁵⁷ and the tandem of the John McGinnis and Michael Rappaport⁵⁸ have sometimes argued—on grounds partly instrumental and partly directed towards legitimizing constitutional principles by reference

judiciary to take African American rights more seriously than state legislatures during the 1950s and 60s cannot readily be dismissed.

⁵⁷ See ACKERMAN, *supra* note 40; BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

⁵⁸ See John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 TEX. L. REV. 1115 (2007).

to popular sovereignty—that the Constitution merits greater deference than simple legislation because the former was ratified by a supermajority of an animated populace rather than by a narrow legislative majority acting on behalf of a largely disengaged electorate.⁵⁹ This premise, too, is perhaps more alluring on casual first impression than on closer inspection. To be sure, the consent of nine out of thirteen states was required to give the Constitution effect, but the votes of the conventions in such populous states as Virginia, Massachusetts, and New York were very close, ratification failed in North Carolina and Rhode Island, and numerous groups (comprising an overwhelming majority of the population) were excluded from the electoral process and the ratification conventions in every state.⁶⁰ The claim that the Constitution was ratified by a supermajority of the people is, therefore, very much less clear than the case that it was ratified by a super-majority of the states.

Assuming originalism-inspired judicial review could overcome the democratic deficit problem, there arises the perhaps more fundamental issue of whether the revolutionary generation possesses any moral authority to govern beyond the grave. The Constitution of 1787-1788 and the Bill of Rights of 1789-1791 are at once eloquent and elegant, and over the course of more than two centuries' use they have shown themselves eminently workable, but these documents and the institutions they bequeathed originated in a violent and in many respects unjustifiable revolution. The revolutionary generation led a revolt on behalf of a minority with highly questionable grievances, and in the process, initiated a war that killed 40,000 and drove

⁵⁹ See generally ACKERMAN, *supra* note 57; ACKERMAN, *supra* note 40; McGinnis & Rappaport, *supra* note 58.

⁶⁰ See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 94-160 (1996), for a trenchant analysis of the ratification process. The role and extent of popular participation is analyzed cogently in SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828, at 81-157 (1999).

100,000 into exile.⁶¹ What principles did the war vindicate, and were the human costs of victory justified by the gravity of the alleged wrongs the revolutionary Americans sought to overcome?

The Declaration of Independence intones incontrovertible and compelling precepts of human rights and good government, but the bill of particulars it recites against the British government do not appear especially persuasive in the fullness of time. There are essentially two classes of grievances against the King—one consisting of executive orders to enforce the law against smugglers, tax evaders, and rioters, the other of repeated failures to veto Parliamentary legislation deemed undesirable by colonists who disputed the subject matter jurisdiction of Parliament in North America.⁶² The first class of grievance then merely chides an executive for enforcing the law—perhaps over-zealously, perhaps recklessly—and in the process costing loss of property and small-scale loss of life. The colonial response initiated a war that cost more lives by orders of magnitude, perhaps by several thousand fold.⁶³ The second class of complaint, concerning failure to use the negative, is in large measure fanciful, since the power of the Crown to veto acts of the Westminster Parliament had long lied in abeyance, and had not been asserted since Queen Anne vetoed the Scottish Militia Bill of 1708 one year after the Union.⁶⁴ This larger

⁶¹ On casualty figures for the American Revolution see MICHAEL CLODFELTER, *WARFARE AND ARMED CONFLICTS: A STATISTICAL REFERENCE TO CASUALTY AND OTHER FIGURES*, 1618-1991, at 197-99 (1992), and on total numbers of loyalty refugees, see 1 *THE AMERICAN REVOLUTION: AN ENCYCLOPEDIA* 963-64 (Richard L. Blanco & Paul J. Sanborn eds., 1993), which estimates that between a fifth and a third of the white population remained loyal to the Crown and that between eighty and one hundred thousand white and blacks fled the thirteen colonies to British-controlled territories during or immediately after the War. Substantial numbers of additional American refugees were attracted in the British territory of Lower Canada by government land bounties during the 1780s and 1790s. 1 *THE AMERICAN REVOLUTION*, *supra* note 61, at 972-74.

⁶² See, e.g., *THE DECLARATION OF INDEPENDENCE (U.S. 1776)*; DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* 54-55 (2007).

⁶³ Cf. CLODFELTER, *supra* note 61 (noting that five people died in the “Boston Massacre” and an estimated forty thousand or more died during the Revolutionary War).

⁶⁴ See, e.g., JOHN ROBERTSON, *THE SCOTTISH ENLIGHTENMENT AND THE MILITIA ISSUE* 6 (1985); J.R. WESTERN, *THE ENGLISH MILITIA IN THE EIGHTEENTH CENTURY: THE STORY OF A*

class of grievance, then, did not in truth concern failure of regal duty, but objection to Parliamentary policy. Yet many of the Parliamentary acts deemed particularly offensive now appear more enlightened than the colonists' preferred alternatives. These included the "right" to remove Indians more aggressively than Britain thought prudent or just, "security" against the exercise of Catholicism by Quebecois who chose to remain true to the faith and civil law they had inherited, "freedom" from repealed taxes that had confiscated a trivial portion of colonial wealth, and the "duty" of a violent and at times terroristic minority to impose radical political change on a passive majority. In point of fact, these are hardly the well springs of binding moral obligations to descend to the tenth generation and beyond.

To be sure, the fighting done and independence achieved or imposed, depending on one's perspective, the framers did propose, and the public did ratify, a well-conceived and workable system of republican government in a federal republic. Mr. Justice Scalia is also quick to laud them for having the foresight to leave us (their successors in interest) free to change⁶⁵ that system—if we can overcome its deep barriers of entrenchment and amend by two-thirds majority in each federal house and with the concurrence of each house of the legislature in at least thirty-eight states; that is, avoid veto to the proposed amendment by a coalition that could be as feeble as a single-vote majority in thirteen of the 101 legislative chambers in the federal republic.⁶⁶

POLITICAL ISSUE, 1660-1802, at 162 (1965); David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "the Right of the People to Keep and Bear Arms,"* 22 LAW & HIST. REV. 119, 132 (2004).

⁶⁵ See *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

⁶⁶ The Constitution states:

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the

For this, the living generation is supposed to be grateful to Mr. Madison? We can change the rules that govern our lives because a cabal who lived 220 years ago proposed that we might, and a small majority of the voting-eligible population, in a then sparsely populated country embracing less than half the territory, and one hundredth of the people of the present United States said we can—but if, and only if, we can achieve majorities in at least seventy-seven of the 101 legislative chambers in the current federal republic? For this so-called gift, I will not thank Mr. Madison or his almost-chosen generation.⁶⁷ From the perspective of first principles of democracy and constitutionalism, it would seem to me much more legitimate to assert in pointedly Jeffersonian terms that we now living could change the rules that govern our lives today if a substantial majority of voters now living agree to do so.⁶⁸ More concretely, it is not at all clear as a matter of moral duty that the opinions of people living 220 years ago should have any thing to do with whether the people of the District of Columbia can decide to ban handguns in our own lifetimes. It is even less clear that Justice Scalia’s patently false gloss on what people living 220 years ago meant by enacting the Second Amendment should trump what the democratically elected government of the District of Columbia clearly and self-evidently meant

several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress.

U.S. CONST. art. V. All states but unicameral Nebraska have two chambers; the ninety-nine state chambers plus the federal chambers make 101.

⁶⁷ The reference is to Lincoln’s famous description of the flawed American nation as God’s “almost chosen people,” which Lincoln employed in his Address to the Senate of New Jersey on February 21, 1861 during his journey to Washington for his first inauguration. *See generally* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 575 (Roy P. Basler, ed., 2001).

⁶⁸ On Jefferson’s theory that the dead cannot bind the living, see SLOAN, *supra* note 52.

when it duly enacted a statute banning handguns on behalf of an electorate who still favor that legislative choice over the alternative selected for them by the Supreme Court.⁶⁹

How *McDonald* May Change the Constitutional World as We Know It

So much for the *Heller* decision, for Justice Scalia's handiwork, and the generation of '76. What about *McDonald v. City of Chicago* and incorporation? And what about intergenerational fealty owed to those who fought and died four score and some years after the colonists rebelled? This, to me, is a decidedly different question, and one that might be answered in the affirmative without recourse to nationalism and patriotic fervor to steer ones judgment. On grounds of human rights and collective responsibility alone it should be self-evidently less problematic that the generation that ratified the Fourteenth Amendment has a greater moral claim on posterity than the revolutionaries of 1776, who merely asserted what Harvard history professor David Armitage calls "settler grievances" against the colonial metropolis.⁷⁰

Nearly four hundred thousand Union soldiers died during the Civil War.⁷¹ And what did they die for? Not for the right to be free from Catholicism in Quebec, or easily affordable taxes

⁶⁹ See D.C. CODE § 7-2507.02 (1973); see also District of Columbia Mayor's Office, District Government Reacts to *Heller* Ruling (June 26, 2008), <http://www.dc.gov/mayor/news/release.asp?id=1325&mon=200806>; Paul Duggan & David Nakamura, *D.C. Government Faces a New Reality*, WASH. POST, June 27, 2008, at A09, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/26/AR2008062603988.html>.

⁷⁰ See ARMITAGE, *supra* note 62, at 135-36 (describing a historical pattern of colonial settlers of European descent growing to resent restrictions and obstacles imposed by the imperial protective power on the exploitation of aboriginal peoples).

⁷¹ Union losses in combat combined with deaths from disease while in military or naval service or in enemy captivity during the War totaled over 364,000. Over 281,000 more suffered what the Department of Veterans Affairs classifies as non-mortal wounds during the Civil War. See Department of Defense, *Principal Wars in which the United States Participated: U.S. Military Serving and Casualties*,

on tea, or to obtain unhindered access to Indian lands beyond the crest of the Appalachians. They fought to save the Union, and as the Civil War wore on, more and more clearly, they fought to end slavery.⁷² The Reconstruction Congress that assembled when their work was done proposed not only recognition of slavery's end but state obligations to uphold equal protection, due process, and privileges or immunities as amendments to the Constitution, and the nation ratified the language Congress had drafted.⁷³ Four hundred thousand died for a noble cause, one of unassailable importance under modern human rights law. The figure four hundred thousand is significant for one, perhaps, less obvious reason as well. It is roughly the number of persons transported from Africa to mainland British North America and the United States—this country's share of the larger toll of ten million survivors of the African slave trade to the Americas over nearly four centuries, an “execrable commerce” that cost many millions more lives in Africa and on the Atlantic journeys to the principal New World slave societies of Brazil, St. Dominique (now Haiti), and Jamaica.⁷⁴ Perhaps, then, four hundred thousand Union dead represents the first

<http://siadapp.dmdc.osd.mil/personnel/CASUALTY/WCPRINCIPAL.pdf> (last visited Apr. 27, 2010). Many of this number, including amputees, doubtless died prematurely owing to the primitive state of medical care and merciless economic realities during the late nineteenth century. The eminent Civil War historian James McPherson estimates that at least fifteen percent of those wounded during the Civil War later died as a result of injuries sustained on the battlefield. See MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 347, 854 (1988).

⁷² See MCPHERSON, *supra* note 71, at 490-510.

⁷³ See U.S. CONST. amends. XIII-XIV. See generally ACKERMAN, *supra* note 57, at 99-252; DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 353-481 (2d ed. 2005).

⁷⁴ On the total numbers of victims of the Atlantic Slave Trade, and the number of persons transported from Africa to British North America and the United States, see PHILIP D. CURTIN, *THE ATLANTIC SLAVE TRADE: A CENSUS*, 268 (1969), HUGH THOMAS, *THE SLAVE TRADE: THE HISTORY OF THE ATLANTIC SLAVE TRADE, 1440-1870*, at 805 (1997); and DAVID ELTIS, *THE RISE OF AFRICAN SLAVERY IN THE AMERICAS*, 208 (2000). The phrase “execrable commerce” is Jefferson's, from the “original Rough draught” of the Declaration of Independence. 1 *THE PAPERS OF THOMAS JEFFERSON* 426 (Julian P. Boyd et al eds., 1950). Jefferson's charge that the “CHRISTIAN king of Great Britain determined to keep open a market where MEN should be bought & sold . . . has prostituted his negative for suppressing every legislative attempt to

great step in the process of expiating the guilt associated with the forced transport of four hundred thousand Africans in the slave trade to the United States, and certainly the sacrifice of the Grand Army of the Republic was conceived in precisely these terms at the time.⁷⁵ In this light, I am prepared to acknowledge a personal debt to that generation of 1861-1876, utterly unlike the lesser debt owed to the generations of 1776 or 1789.

Accepting a special sense of duty to the Civil War dead and the constitutional amendments they made possible need not require conceding to Akhil Amar or Robert Cottrol that the Fourteenth Amendment privatized the Second Amendment right to arms.⁷⁶ Evidence regarding the meaning of the Privileges or Immunities Clause of 1868—while certainly not clear, one-sided or unambiguous—does admit of a non-trivial claim that those voting to ratify the Fourteenth Amendment intended to recognize a right to self-defense for freed persons and for other Union sympathizers facing terrorism and violence in the South. It bears emphasis however that the suddenly fashionable claim for total incorporation of a very privatistic Bill of Rights is

prohibit or restrict this execrable commerce” was struck before the Continental Congress approved the Declaration. *Id.*

⁷⁵ Lincoln’s words from the Second Inaugural poignantly reprise the theme of national sin, sacrifice, and redemption:

Fondly do we hope – fervently do we pray – that this mighty scourge of war may speedily pass away Yet if God wills that it continue, until all the wealth piled up by the bondman’s two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as we said three thousand years ago, so it must be said, “the judgments of the Lord, are true and righteous altogether.”

RICHARD J. CARWARDINE, LINCOLN 240-42 (2003); MCPHERSON, *supra* note 71, at 844 (quoting and analyzing Lincoln’s text).

⁷⁶ See AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 262 (1998); Robert Cottrol & Raymond T. Diamond, *Public Safety and the Right to Keep and Bear Arms in THE BILL OF RIGHTS IN MODERN AMERICA: REVISED AND EXPANDED* 88-107 (David J. Bodenhamer & James W. Ely eds., 2d ed. 2008).

much less strong than some in the academy currently assume.⁷⁷ The Thirty-Ninth Congress included forty-nine Senators and 183 Representatives during the debates on the Fourteenth Amendment.⁷⁸ Unlike the Annals of Congress containing excerpts from the First Congress's debates on the Bill of Rights, the Congressional Globe is complete and comprehensive in its coverage of the debates on Reconstruction. It is highly probative then that of the 232 members seated when the Fourteenth Amendment was under discussion, only one Senator and five Representatives uttered what can be construed as endorsements of a total incorporation theory.⁷⁹ Advocates of total incorporation and champions of a reconstructed, privatized right to arms

⁷⁷ Apart from Amar who argues for “refined incorporation” of virtually the entire Bill of Rights through the Fourteenth Amendment, AMAR, *supra* note 76, at 215-30, prominent academics to advance a total incorporation model in recent decades include Michael Kent Curtis and Richard L. Aynes, both of whom challenged the then-dominant selective incorporation paradigm, which rested in part on the historical work of Raoul Berger and Charleston Fairman cited below. See MICHAEL KENT CURTIS, *NO SHALL STATE ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1994). As well as older works by Fairman and Berger, Fourteenth Amendment scholarship skeptical of Justice Black's total incorporation model includes RONALD M. LABBE & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION AND THE FOURTEENTH AMENDMENT* (2003), WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988), Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909 (1998), and George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627 (2007). Fairman and Berger's classic critiques of incorporation are set out in Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1950) and Forrest McDonald, *Forward to RAOUL BERGER, GOVERNMENT BY THE JUDICIARY: TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 157-66 (2d ed. 1997).

⁷⁸ See BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-2005, at 170-73 (2005) (listing all members of Congress by session and state). Congress debated the Fourteenth Amendment intermittently from January 12, 1866, when John Bingham and Thaddeus Stevens introduced separate motions in the Joint Committee on Reconstruction that formed the earliest drafts of the future Amendment, until June 13, 1866, when the final version of the Amendment was adopted by the House (the Senate had passed the Amendment on June 8) and forwarded to the states for ratification. See 1 BERNARD SCHWARTZ, *STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS* 187, 325 (1970). My numbers slightly undercount membership because I counted only once seats occupied by more than one person during the period on account of death or resignation. I did not count non-voting territorial delegates, of whom there were nine in the House of Representatives.

⁷⁹ See Thomas, *supra* note 77, at 1644.

inevitably cite the speeches of John Bingham, a member of the Joint Committee on Reconstruction, and principal spokesperson for the pending amendment in the House.⁸⁰ In particular, those favoring total incorporation rely on Bingham's comments of February 28, 1866 when he said an early version of the Fourteenth Amendment he introduced in the House of Representatives aimed to "secure to the citizens of each State all the privileges and immunities of citizens of the United States in the several States."⁸¹ Earlier that day, in introducing the new draft of the Amendment, Bingham stated with apparent clarity "the proposition . . . is simply . . . to arm the Congress . . . with the power to enforce the bill of rights as it stands in the constitution today. It hath that extent—no more."⁸²

But this is hardly all that Bingham said about the pending Fourteenth Amendment. The deeper one delves into the debates, the clearer it becomes that Charles Fairman and Raoul Berger had good reason to characterize Bingham as a haphazard and inconsistent thinker, who frequently said one thing only to retract it when pressed by other members to elucidate his most recent remarks.⁸³ At times, Bingham happily endorsed the view that the Privileges or Immunities Clause was intended to do no more than ensure non-discrimination and equal access to whatever civil rights a particular state granted white inhabitants, and it is anything but clear

⁸⁰ See, e.g., STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at 35, 63, 110, 121, 125-26, 131, 188 (1998); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 346 (1991).

⁸¹ CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

⁸² *Id.* at 1088. Bingham proceeded to read the Amendment as it then stood: "The Congress shall have the power to make all laws which shall be necessary and proper to secure to the citizens of the several States, and all persons in the several States, equal protection in the rights of life, liberty, and property." *Id.* It is hardly obvious that Bingham's gloss of this language should apply equally to the final version of Sections One and Five of the Amendment, which uses different language and goes beyond February formula to divest the states of powers of rights abuse even as it vests the federal government with new powers to secure the same rights that the states could not longer legally violate.

⁸³ See BERGER, *supra* note 77, at 160-65; Fairman, *supra* note 77, at 25-26.

that he was concerned with substantive rights except so far as he wished to ensure that any substantive rights applied equally in favor of all adult male citizens.⁸⁴ He could not give a principled and consistent answer regarding the impact of the Fourteenth Amendment on state police powers, respecting the question of whether it created national police powers, its impact on women's rights, and whether it applied only in former Confederate states or throughout the Union.⁸⁵

Citing Bingham does little to demonstrate the sense of the House or of Congress; it does absolutely nothing to prove the plain meaning of Privileges or Immunities at the time they were voted into the Constitution by the people, for despite constant prodding, Bingham proved unable to offer an intelligible definition – whether plain or sophisticated – of Privileges and Immunities. Indeed, on February 28, 1866, shortly after introduction of the new draft of the Amendment, an exchange between Bingham and the experienced lawyer and legal academic Robert Hale, Republican of New York, reached its denouement when Hale labeled Bingham's peroration on natural law and that "justice which is the highest duty of nations as it is the imperishable attribute of the God of nations" a "calm, lucid, and logical vindication of the amendment . . . [by] an able constitutional lawyer."⁸⁶ Hale then proceeded to dismantle the inconsistencies and incongruities in Bingham's emotive appeal in favor of his early version of the Fourteenth Amendment, and mercilessly abused Bingham for not being able to answer consistently whether the Amendment created a national police power.⁸⁷ Hale's label "able constitutional lawyer" was, to borrow a phrase from Chief Justice Marshall, "solemn mockery."⁸⁸

⁸⁴ See NELSON, *supra* note 77, at 117-18; CONG. GLOBE, *supra* note 81, at 1094-95.

⁸⁵ See CONG. GLOBE, *supra* note 81, at 120.

⁸⁶ *Id.* at 1094.

⁸⁷ *Id.*

⁸⁸ *Id.*; *Marbury v. Madison*, 5 U.S. 137, 180 (1803).

Bingham did not get much clearer after the House took up a revised proposal in the spring that ultimately ripened into the familiar and still contested text of the Fourteenth Amendment's famous Section One. On May 10th, he offered his final explanation of the amendment's meaning:

the words of the Constitution that “the citizens of each State shall be entitled to all “privileges and immunities of citizens of the several states” include, among other privileges, the right to bear true allegiance to the Constitution and the laws of the United States, and to be protected in life, liberty, and property. Next, sir, to the allegiance which we all owe to God our Creator, is the allegiance which we owe to our common country.⁸⁹

Fuzzy as Bingham's sentiments may be from the standpoint of those seeking interpretive guidance, at the very least they appear to rule out incorporation of Sanford Levinson's insurrectionary Second Amendment⁹⁰ (and James Madison's Establishment Clause⁹¹). That, though, is probably the extent of the wisdom they afford on the question of total incorporation.

As William Nelson has documented, anti-discrimination was the dominant theme that arose during Congressional debates on the Fourteenth Amendment.⁹² The twentieth century's obsessive attentiveness to the doctrinal limits of procedural due process, substantive due process, equal protection, and privileges or immunities was not foreshadowed when the Fourteenth Amendment was under consideration in Congress or by the ratifying public out of doors. Sections Two through Four of the Fourteenth Amendment—which imposed disabilities on former Confederates who could not take the iron-clad oath, diminished the representation of states that disenfranchised on account of race, and disowned the Confederate debt—were of

⁸⁹ CONG. GLOBE, *supra* note 81, at 2542.

⁹⁰ The argument that the Second Amendment protects a right to use force against an oppressive government was famously argued in Stanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1990). For a critique of the insurrectionary theory, see H. RICHARD UVILLER AND WILLIAM MERKEL, *supra* note 42, at 170-78.

⁹¹ On the importance of disestablishmentarianism to Madison and Madison's thinking regarding the First Amendment, see LABUNSKI, *supra* note 39, at 223-24.

⁹² See NELSON, *supra* note 77, at 71-80.

cardinal importance from 1866-1868, even though they are now of purely historical interest. When contemporary legislators and voters turned their attention to the proposed Section One with its Due Process, Equal Protection, and Privileges or Immunities Clauses, they were far more likely to concern themselves with the anti-subordination as an overarching concept than with the specific contours of what later became three separate branches of Fourteenth Amendment jurisprudence. Indeed, it was frequently assumed that those concepts were non-technical and overlapping, rather than legalistic, rigid, and fully defined. John Bingham was hardly the only member of Congress or of the public unable to offer a completely theorized and consistent account of the meaning due process, privileges or immunities, or equal protection. As Nelson argues, the narrow but by no means untenable or even surprising reading the Supreme Court gave Privileges and Immunities in *The Slaughterhouse Cases* initiated a long historical process in which the different components of Section One acquired distinct meanings through judicial interpretation.⁹³ As long as Congress remained committed to Reconstruction, its focus was as much on federal legislative remedies for Southern misdeeds as it was on judicially enforced disabilities, and after Reconstruction ended, it was many years before the Supreme Court's shift in focus from economic to non-economic liberties accelerated the evolution of doctrinally distinct branches of Fourteenth Amendment law. *The Slaughterhouse Cases*,⁹⁴ and even the classic Harlan dissents of the late nineteenth century,⁹⁵ appear to assume a Thirteenth and Fourteenth Amendment working in tandem for general anti-subordination purposes rather than the constitutionalization of particular limits on legislative authority when applied with an even hand.

⁹³ *Id.* at 155-74.

⁹⁴ *The Slaughter House Cases*, 83 U.S. 36 (1873); *see also* NELSON, *supra* note 77, at 156-74.

⁹⁵ *See Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting); *Civil Rights Cases*, 109 U.S. 3, 33 (1883) (Harlan, J., dissenting).

Michael Kent Curtis,⁹⁶ Richard Aynes,⁹⁷ and others have doubtless succeeded in unsettling a once orthodox understanding that Justice Black⁹⁸ lacked any academically credible case for total incorporation. Yet three particular points Charles Fairman and Raoul Berger relied on in rejecting Black's total incorporation theory remain very difficult for champions of incorporation to counter. If the Privileges or Immunities Clause incorporated the Bill of Rights:

- a. Why did no member of either House object to the Blaine Amendment that would have prohibited state taxes to support religious schools as redundant (seeing as, under the incorporation theory, the First Amendment Establishment Clause would have already been incorporated against the states)?⁹⁹
- b. Why were there no objections on incorporation grounds against the decision in many states during the Reconstruction period to replace grand jury indictment with presentment?¹⁰⁰
- c. And why did Congress ratify several constitutions submitted by southern states seeking readmission that did not contain all the guarantees of the federal Bill of Rights?¹⁰¹

Aynes concedes that these are (at least superficially) hard charges for the incorporationists to answer, but suggests perhaps by way of plea in mitigation that the contradiction between incorporation and toleration of state violations of provisions of the federal Bill of Rights would not have been readily apparent to many during the 1860s and 1870s because most people were not thinking in terms of federal judicial enforcement of the Bill of Rights against the states and those that were did not know the contents of state law.¹⁰² Aynes's answer was perhaps more satisfactory when he first made it nearly twenty years ago, when the dominant paradigm of originalism still focused on the intent of the framers. After all, a secret intent might

⁹⁶ See CURTIS, *supra* note 77.

⁹⁷ See Aynes, *supra* note 77.

⁹⁸ See *Adamson v. California*, 322 U.S. 46, 68-123 (1947) (Black, J., dissenting).

⁹⁹ See Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO STATE L.J. 435, 464 (1981).

¹⁰⁰ See Fairman, *supra* note 77, at 82-85, 97-99, 101, 103-06, 111.

¹⁰¹ See *id.* at 126-32.

¹⁰² See Aynes, *supra* note 77, at 94-96.

be an intent all the same, even if it remained a mystery to the public at large. But in this age of Scalia-esque original public understanding, the failure of the general public to appreciate John Bingham's alleged incorporationist intent is telling indeed. If the people out of doors did not know about incorporation and its intended impact on the laws of their states, how could they have understood that their support for ratification amounted to endorsement of the mysterious doctrine?

Even admitting total incorporation (something I am not inclined to do) leaves the question of whether the allegedly incorporated right to arms was understood to vest in individuals in their private capacity, or as members of the militia. Those who stress the former argument underestimate the importance of black and integrated militia in the minds of those who supported Reconstruction and who voted in favor of the Fourteenth Amendment. The militia, understood in pointedly civic terms, had not wholly morphed (as Akhil Amar maintains¹⁰³) into the Ku Klux Klan and like organs of terror by the time the Fourteenth Amendment was ratified. The volunteers who comprised the Union Army and the citizens (black and white) who served in the militia units of Reconstruction governments in the South have far stronger militia credentials under terms of the 1792 Militia Act (still on the books in 1866-1868) than the masked night riders who rallied for the outlaw cause of violent restoration of a system of racial subordination. Legal academics and the general public have lost sight of the extent to which the collapse of Reconstruction was a consequence not simply of violence, but of the defeat of black and integrated militia loyal to the Republican Party and Reconstruction by extralegal white militia loyal to the Democratic Party and Redemption.¹⁰⁴ The failure of Reconstruction was not (as

¹⁰³ AMAR, *supra* note 76, at 257-67.

¹⁰⁴ See STEVEN HAHN, *A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION*, 265-313 (2003); OTIS A. SINGLETARY, *NEGRO MILITIA AND RECONSTRUCTION* (1957).

Woodrow Wilson, Ulrich Bonnell Phillips, or William Dunning would have it) that it was tried at all, or—as Robert Cottrol or Stephen Halbrook would have it—that it was too statist and insufficiently libertarian.¹⁰⁵ If the federal government had succeeded in preserving the ability of black persons and others loyal to Republican governors to bear arms in the lawfully constituted state militia established by Reconstruction governments, Reconstruction might have endured. Likewise, an integrated police force in the late nineteenth and early twentieth centuries could have altered the face of Jim Crow, or perhaps precluded it altogether.¹⁰⁶

We cannot know the contours of the history that never was. But speaking in the spirit of the hypothetical past invoked by Amar, Halbrook, and Cottrol, I am skeptical that the counterfactual narrative they prefer would have played itself out in quite the halcyon manner they suppose, had their chosen parameters actually held sway. The ability of individual black persons to arm themselves in a private capacity may have facilitated the defeat or intimidation of the Klan, but it could also have led to a ratcheting up of violence and the coming of a prolonged and highly destructive race war. Perceptions of the likelihood of either scenario depend in large part on one's faith in the deterrent effect of guns balanced against their potential to bring catastrophic harm in the hands of the passionate, the hateful, or the frightened. On those questions, my inclinations are rather different than the ones John Lott brings to bear in his

¹⁰⁵ Cf. Robert J. Cottrol, *Introduction to GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT* (Robert J. Cottrol ed., 1994); 22 WILLIAM ARCHIBALD DUNNING, *THE AMERICAN NATION: A HISTORY* (1907); HALBROOK, *supra* note 80; ULRICH BONNELL PHILLIPS, *LIFE AND LABOR IN THE OLD SOUTH* (1929); Woodrow Wilson, *The Reconstruction of the Southern States*, 87 *ATLANTIC MONTHLY* 1 (1901).

¹⁰⁶ The thesis that Reconstruction's "failure" is that it was not pursued long enough and hard enough by the federal government was famously advanced by ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* (1988). To whatever extent it may be fair to characterize Reconstruction as a failure rather than a partial success, it is perhaps worthy of note that the unquestionably successful reconstructions of Germany and Japan after World War II did not pursue a libertarian course, or rely on private arms to stave off a violent resurgence of the old order and its oppressive ways.

controversial analysis of public safety in our own times.¹⁰⁷ In the debates over the relations between access to guns and the level of crime, some rely on manipulated figures, others on articles of faith, and some few on solid research and reasoning, but there is no shortage of authorities for either of the mutually exclusive propositions that more guns mean less crime or that more guns mean more death. When it comes to restoring the original understanding of the right to arms during Reconstruction, both camps appear to project backwards into a remade and altered historical landscape their favored visions of the present.

One telling objection to the preferred gun rights vision of a rewritten post-bellum past focuses on the practical unenforceability of any legal right in favor of African Americans in the old New South that actually existed. Since post-Reconstruction judicial enforcement of non-economic individual liberties – particularly enforcement in favor of members of socially disadvantaged groups – did not return to the United States until the 1930s at the earliest, it is not clear what a reconstructed private right to arms could have done for individuals confronting redeemed state governments and white power apparatuses bent on ensuring subordination. The subtext for Halbrook, Cottrol, and company, I suppose, is ultimately not that courts would have protected black access to arms had the Privileges and Immunities Clause been properly enforced to incorporate a private right to guns, but that death in a gun fight is better than subjugation. Cottrol and Halbrook's vision was rejected by black America in the 1870s: confronted with the reality of the end of Reconstruction, millions of black southerners opted for accommodation rather than race-based civil war.¹⁰⁸ Their grand-children and great-grandchildren lived to see the

¹⁰⁷ JOHN LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS* (2nd ed. 2000).

¹⁰⁸ On the non-violent (but far from passive and acquiescent) settlement that black southerners negotiated with the re-emergent white power structure at the end of Reconstruction, see FONER, *supra* note 106, at 281-91, HAHN, *supra* note 104, at 312-13, and LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY*, 525, 529-32, 537-38 (1980).

end of second class citizenship and the coming of formal equality. Perhaps the accommodationist option was less heroic than that favored by the National Rifle Association (and in this and any other context, the supposition that the NRA cares deeply for the welfare of black America is rather difficult to swallow),¹⁰⁹ but in the longer term, the strategy of accommodation attained results that are at least arguably more desirable than race war to the point of extirpation.

The Second Amendment, as originally understood, is a poor basis for recognizing a private right to weapons possession. The Privileges or Immunities Clause of 1868 is a more plausible alternative, but one not dictated by original understanding or history. That said, there may well be several viable avenues towards legitimizing judicial intervention to veto legislation or executive action adversely impacting the putative right of individuals to own guns for purposes of private self-defense. These might include popular constitutionalism, the Ninth Amendment, substantive due process, living privileges and immunities as opposed to privileges or immunities frozen in time, or privatistic and defense emanations from various specific provisions of the Bill of Rights, including the Second Amendment. And perhaps some of these theories more accurately explain the result (if not the opinion) in *Heller* and the likely result in *McDonald* than Justice Scalia's theory of original meaning. I have much sympathy for popular constitutionalism, but at least on the national level, it is not entirely clear what function popular constitutionalism really serves. Legislative choices cannot long be out of sync with popular constitutional values without the electoral and legislative processes bringing the two back into harmony, leaving little work for judges who might otherwise be inclined to invalidate legislation that does not square with the nation's constitutional sensibilities. On the local or regional legislative level, the question with respect to popular constitutionalism is whether national norms should trump local variations. The new democratic experimentalists, as well as Louis Brandeis,

¹⁰⁹ On the essentially racist appeal of the NRA, see Siegel, *supra* note 15, at 215-26.

might answer not to the extent local experimentation is snuffed out, but rights enthusiasts of any particular stripe would retort: *experiment with anything you like, just not our rights*.

The American people as a whole feel that there is a right to own guns, and that this right applies against the states. I am confident the Court won't disappoint them. My hope is that it preserves a wide swath for local regulatory options, including substantial restrictions. Brandeis's experimentalism appeals to me.¹¹⁰ If Stephen Halbrook wants to live in a society with easy access to guns, and I want to live in one where access to guns is controlled, with fifty-one principal jurisdictions and innumerable municipalities and counties with independent legislative authority in the United States, there should be room for each of us. Of course, many gun enthusiasts, Mr. Halbrook among them, will say D.C.'s draconian solution was wrongheaded. After all, D.C.—with the toughest gun laws in the country—also has often had the highest murder rate in the country.¹¹¹ That may be true, but Hawaii has the lowest murder rate, and it also has tough laws.¹¹² New York City has strong gun control laws, and a moderate murder rate by American standards, lower than that of many less populous states.¹¹³ Japan, England, and Northern Ireland have very few guns at all, and lower murder rates than any American

¹¹⁰ As Justice Brandeis famously remarked: “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Brandeis's insight helps inform the contemporary movement for democratic experimentalism, which favors pursuit of multiple market and regulatory approaches to social and economic problems with a view to fostering the emergence of past practice solutions. *See generally* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 431 (1998).

¹¹¹ *See* The Disaster Center, United States Crime Rates 1960-2008, <http://www.disastercenter.com/crime/uscrime.htm>.

¹¹² *See* Federal Bureau of Investigation, Crime in the United States by State 2007, http://www.fbi.gov/ucr/cius2007/data/table_05.html.

¹¹³ *See id.*

jurisdiction.¹¹⁴ Germany and France have many guns, but lots of restrictions, and lower murder rates than any American jurisdiction.¹¹⁵ There seem to me many rational choices democratic legislatures could make. Let them make them.

What concerns me more is projection,¹¹⁶ that is, the desire of some in gun culture states to impose their values of easy access and wide ownership on people living in states that have opted for tighter controls. In a somewhat unorthodox maneuver in 2009, gun rights enthusiasts in the House of Representatives tried to attach—as a rider on unrelated legislation—a Congressional statement proclaiming that the Article IV Privileges and Immunities Clause protected to ability of anyone who carried a licensed firearm in any state to carry that weapon in any other state, local laws notwithstanding.¹¹⁷ The legislative gambit failed, but gun rights enthusiasts, including Alan Gura, lead counsel in *Heller* and *McDonald*, are eagerly pursuing a judicial alternative. Historically, the beauty of Brandeis-style experimentation in the pluralistic federal republic has been that people are free to move to states where the regulatory regime harmonizes with their preferences. But one litigious person being able to impose the value system of one community on another by relocating is a different matter. For those who value easy access to guns,

¹¹⁴ See UNITED NATIONS OFFICE ON DRUGS AND CRIME, TENTH UNITED NATIONS SURVEY OF CRIME TRENDS AND OPERATIONS OF CRIMINAL JUSTICE SYSTEMS, COVERING THE PERIOD 2005-2006, at 28, 58 (Dec. 19, 2008) [hereinafter UNITED NATIONS OFFICE], available at <http://www.unodc.org/documents/data-and-analysis/CTS10%20homicide.pdf>; World Health Organization, Numbers and Rates of Registered Deaths 2006, <http://apps.who.int/whosis/database/mort/table1.cfm> (follow the “Japan” hyperlink; then follow the “2006” hyperlink).

¹¹⁵ See *id.* at 32; World Health Organization, *supra* note 114.

¹¹⁶ Justice Cardozo famously employed this term in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) in the context of New York’s attempt to project its authority across state lines by dictating the price of milk to Vermont producers who dealt with New York dealers.

¹¹⁷ See Bernie Becker & David M. Herszenhorn, *Gun Rights Expansion Fails in Senate*, N.Y. TIMES, July 23, 2009, at A18, available at http://www.nytimes.com/2009/07/23/us/politics/23guns.html?_r=1&scp=3&sq=thune%20concealed%20carry%20amendment&st=cse; Paul Kane, *Senate Narrowly Defeats Concealed-Carry Measure*, WASH. POST, July 23, 2009, at A02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/22/AR2009072202893.html>.

residency in an easy access state is the natural and time-honored solution. Asking Justice Scalia to mandate easy access on your fellow citizens living in jurisdictions where the majority favors tight control is wholly distinct and thoroughly anti-democratic approach, and it begs a result neither dictated by terms of the Second Amendment nor required by the language of the Fourteenth in either the Due Process or Privileges or Immunities Clauses. It is, in essence, dictatorship by the officious libertarian intermeddler.

Pundits and prognosticators—Cass Sunstein, Mark Tushnet, and Larry Slolum among them—have labeled the *Heller* decision minimalistic, indeed quintessentially minimalistic, in keeping with what some describe as the Roberts Court’s commitment to moderation.¹¹⁸ These characterizations of *Heller* invest much capital in Justice Scalia’s disclaimer in favor of presumptively valid classes of gun restrictions, allegedly not called into question by the *Heller* holding. But was *Heller* at its core really minimalistic? And is the *McDonald* decision likely to be similarly minimalistic in its implications? There is ample reason to fear not, as illustrated by the claims of prominent gun rights advocates, Alan Gura, Don B. Kates, Stephen Halbrook, Nelson Lund, and David Kopel.¹¹⁹ As several of these commentators point out, Justice Scalia did not do a particularly good job of explaining how the presumptively valid forms of gun restriction he appeared to endorse in *Heller* square with his more general pronouncement that the

¹¹⁸ See supra notes 3 & 4.

¹¹⁹ See Brief of Petitioner-Appellant, *McDonald v. City of Chicago*, No. 08-1521 (Nov. 16, 2009) (urging that most state gun control legislation violated the Privileges or Immunities Clause as well as the Due Process Clause of the Fourteenth Amendment); Brief for Respondents the National Rifle Association of America, Inc. et al. in support of Petitioners, *McDonald v. City of Chicago*, No. 08-1521 (Nov. 16, 2009); Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009) (urging that *Heller* conceded too much to the regulators and that the original understanding of the Second Amendment permits virtually no regulation); David B. Kopel, *Amicus Brief in McDonald v. Chicago: On Behalf of the International Law Enforcement Educators and Trainers Association, et al.*, U. DENV. LEGAL STUD. RES. PAPER (Nov. 22, 2009), <http://ssrn.com/abstract=1511425>.

Second Amendment, as originally understood, protects a private right to carry weapons for purposes of confrontation. To the extent that conflicts arise between his dicta in favor of presumptively valid restrictions and his grand theory in favor of gun rights, it is presumably the restrictions that will be required to yield. Both in terms of preferred policies and perceptions of constitutional dictates, the claims of the hardcore gun champions named above are radical and absolutistic, and the cadre remains committed to litigating until the Supreme Court announces an iron clad rule that they deem truly worthy of celebration.

Little if any legislation—with the possible exception of prohibitions against gun possession by convicted felons—would likely stand if the Court embraced the positions favored by the NRA’s chosen band of advocates in *McDonald*. Once the slave power conspiracy won what ultimately proved its greatest victory in *Dred Scott v. Sandford*,¹²⁰ and the Supreme Court announced that the federal government lacked the power to restrict slavery in federal enclaves, moderates like Abraham Lincoln immediately suspected that a second *Dred Scott* decision was in the offing, and that the Supreme Court harbored designs of currying further favor with the slave power by announcing that the states themselves (including progressive enclaves like Wisconsin and Massachusetts) lacked the capacity to interfere with the rights of slaveowners to bring their human property where they would, including to communities inimically opposed to slavery.¹²¹ The notion that the black man had no rights the white man need respect threatened to expand into the proposition that the black man had no rights any white man or community could

¹²⁰ *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

¹²¹ The most insightful and damning historical account of the slave power conspiracy as architect of secession is 2 WILLIAM FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS TRIUMPHANT: 1854-1861* (2007). The *locus classicus* for Lincoln’s anticipation of a second *Dred Scott* decision announcing that states lacked the power to prohibit slavery within their own territories are the debates with Douglas, particularly the fifth debate at Knox College in Galesburg on October 7, 1858. On the northern public’s reaction to *Dred Scott*, see generally MCPHERSON, *supra* note 71, at 176-81, and DAVID M. POTTER, *THE IMPENDING CRISIS: 1848-1861*, at 267-96 (Don E. Fehrenbacher ed., 1976).

respect, even if it wished. This spring, the nation may well stand on the threshold of another second *Dred Scott* decision, which is to say it faces a bolder and more expansive *Heller* decision, holding that no community has any rights the gun wielding libertarian need heed. If Alan Gura gets all he wants from the high court, a five-justice majority will announce precisely this doctrine on the last day of the term in June.

Alan Gura's view, however, is by no means the most radical gun rights view harbored by mainstream, influential thinkers in the gun power conspiracy. In my capacity as a skeptical outsider to the gun rights movement, the most startling testimony regarding the unlimited right to arms I have heard was uttered by Sandra Froman, one time Chief Counsel and from President of the NRA, speaking a mere fifteen miles from NRA headquarters in that *sanctum sanctorum* of the recast and reanimated Second Amendment, George Mason University School of Law in Arlington, Virginia.¹²² On October 17, 2007, when *Heller* was docketed, but not yet argued in the Supreme Court, I was among the featured speakers at a Second Amendment conference at Mason, home to some of the loudest and proudest NRA spokespersons in the legal academy.¹²³ During the late afternoon panel discussion, a question (perhaps rhetorical) was raised concerning

¹²² For a biographical sketch of Froman, see Kevin Cool, *Top Gun*, STAN. MAG., Mar./Apr. 2006, <http://www.stanfordalumni.org/news/magazine/2006/marapr/features/froman.html>

¹²³ See William Merkel, Remarks at the George Mason University Civil Rights Law Journal Symposium: The Second Amendment and Twenty-First Century Jurisprudence (Oct. 17, 2007) The transcript can be viewed at the George Mason University Website. George Mason University Civil Rights Law Journal, Symposium 2007, http://www.law.gmu.edu/gmuclj/symposium_2007.php. It would be difficult to conceive of an institution more closely wedded to gun rights than George Mason Law School. The NRA itself endowed the grotesquely named Patrick Henry Professorship of Constitutional Law and the Second Amendment held by Professor Nelson Lund, and Robert Levy, a George Mason alumnus who was the leading mover behind the *Heller* case, has twice made million dollar gifts to his alma matter. See *NRA Endows Chair at George Mason U. Law School*, CHRON. HIGHER EDUC., Mar. 14, 2003, <http://chronicle.com/article/NRA-Endows-Chair-at-George-/19835/>; *George Mason Law School Receives a Gift of \$1 Million from Robert A. Levy*, GEO. MASON U. SCH. L., June 24, 2006, <http://www.law.gmu.edu/news/2006/473>; see also John Gibeaut, *A Shot at the Second Amendment*, A.B.A. J., Nov. 2007, at 50.

how many persons gathered in the lecture theatre would feel safer if every person in the arena were armed. One member of the audience (I believe David Kopel, perhaps scheduled to appear on a panel later that evening) immediately raised his hand to volunteer an affirmative answer. But it was another member of the audience, soon identified as Sandra Froman, who offered the most elaborate response. There seemed to be an implicit sense in the room that the individual members of an armed populace would need some sort of queue to know precisely when to intervene with lethal force to forestall a crazed, violent person doing something drastic, and in the aftermath of Virginia Tech all sensed that on academic premises this matter was of immediate, pragmatic import. Before anyone could formulate this question concretely, Froman was ready with the announcement that though she no longer spoke for the NRA, she was certain a pamphlet and an educational program could be made available to teach right-thinking people the signs to look for among those with itchy triggers, so that good citizens would be prepared to intervene preemptively before the violence prone should choose to shoot. For the right-leaning, Froman anticipated the best of all possible worlds: a universally armed community living pursuant to a privatized Bush Doctrine, in which the decent folk would know not only that they should and could shoot first, but precisely when it was most appropriate. Froman didn't descend into particulars the time, but those with active imaginations could doubtless quickly conjure some of the characteristics and criteria that would make a person more like Iran than Britain on the scale of preemption-worthy dangerousness.¹²⁴

¹²⁴ The controversial Bush Doctrine was announced as the National Security Strategy of the United States of America in September 2002. As the White House explained:

The United States has long maintained the option of preemptive actions to counter a sufficient threat to national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if the uncertainty remains as to the time and place of the enemies attack.

President Froman's invitation to regress into the Hobbesian state of nature actually attempts to bring about one of the outcomes that the Fourteenth Amendment—and the Civil Rights Act for which it provided permanent constitutional footing—aimed to preclude. The right of a citizen to governmental protection, and to duty of citizens to show allegiance to the government that affords them such protection, were bedrock principles asserted by members of 39th Congress spanning the entire political spectrum of persons loyal to the Union during debates on the Civil Rights Act and the constitutional amendment that it spawned.¹²⁵ The reciprocal individual right to protection and governmental duty to protect were founded on natural law, and in their domestic dimensions had clear analogues and parallels in the international law concept of diplomatic protection enabling and binding states to protect the rights of their citizens against violation by foreign sovereigns.¹²⁶ Democratic Senator Reverdy Johnson of Maryland, Senator Lyman Trumbull of Illinois (multiple and changing party affiliations), Republican U.S. Representative John Marshall Broomall of Pennsylvania, Republican Representative Samuel Shellabarger of Ohio, Republican Representative James Wilson of Iowa, and Republican U.S. Representative Martin Russell Thayer of Pennsylvania all made clear during debates on the Civil Rights Act that the reciprocal concepts of protection and duty were central to the constitutional compact, and central to citizenship. Indeed, Hobbes himself had famously made the same point after the English Civil War, urging disenchanted royalists to make their peace with the Republican government as he himself had done precisely because it offered peace and

MARY ELLEN O'CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE* 293 (2d ed. 2009). The Bush Doctrine served as a principal internal justification in the administration's choice to attack Iraq in 2003 and as the basis for failed efforts to rally domestic and international support for preemptive strikes against Iran. See W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525 (2006).

¹²⁵ See FARBER & SHERRY, *supra* note 73, at 423-54.

¹²⁶ On diplomatic protection, see ANTONIO CASSESE, *INTERNATIONAL LAW* 143-44, 231-32, 366-68 (2d ed. 2005).

stability.¹²⁷ Hobbes was no fan of the state of nature, and having lived through a long succession of brutal wars in England and on the continent, he preferred peace to anarchy.¹²⁸ Two centuries later, Lyman Trumbull's vision was even less equivocal:

How is it that every person born in these United States owes allegiance to the Government? Everything the he is or had, his property and his life, may be taken by the Government of the United States in its defense . . . and can it be that . . . we have got a Government which is all-powerful to command the obedience of a citizen, but has no power to afford him protection? Is that all this boasted American citizenship amounts to? . . . Sir, it cannot be. Such is not the meaning of our Constitution. Such is not the meaning of American citizenship. The Government, which would go to war to protect its meanest – I will not say citizen – inhabitant . . . in any foreign land whose rights were unjustly encroached upon, has certainly some power to protect its own citizens in their own country. Allegiance and protection are reciprocal rights.¹²⁹

Trumbull makes patent what is so enticing to Froman: the claim that the government cannot protect me is in fact a claim that I have no duty to the government. In this light, Froman's violence inflected vision of the good life is perhaps not all that surprising. The psycho-drama of allegiance renounced generally simmers not far below the smooth surface of the gun rights movement's rhetorical invocations of the spirit of '76.

Conclusion

Notwithstanding the craziness of the radical gun rights preference for private violence over public security, Second Amendment enthusiasts are in the majority in the country, perhaps even in a super-majority. Why do they fear the democratic process, and local outcomes that do not ape their preferences? Why do they, like the slave-power conspirators of old, demand

¹²⁷ See THOMAS HOBBS, *LEVIATHAN*, 147-48, 469-70 (J.C.A. Gaskin ed., 1996). On the political context in which Hobbes appealed to royalists to avow allegiance to the Commonwealth, see QUENTIN SKINNER, *HOBBS AND REPUBLICAN LIBERTY*, 178-82, 198-208 (2008).

¹²⁸ See SKINNER, *supra* note 127, at 178-82, 198-208.

¹²⁹ CONG. GLOBE, *supra* note 81, at 1757.

constitutional protection for anti-social behavior that is under no threat from national popular majorities? Why do they demand, like the slave-power conspirators of old, that dissent from their absolutistic vision be read out of the constitutional compact? Why do they insist on perpetualism and absolutism when it comes to the right to guns? Why does the Froman vision have appeal, and why has the NRA, which in theory does not object to enforcement of existing reasonable regulations, never encounter a regulation that its members accept as reasonable? I can think of at least two answers, each of which is more than a little troubling. One explanation for the gun community's absolutists approach is captured best in Stephen Halbrook's mono-causal and mono-maniacal *The Founder's Second Amendment: The Origins of the Right to Keep and Bear Arms*, in which the author sets out his secular case that a private right to gun possession is the summa bona of American Revolutionary eschatology.¹³⁰ For Halbrook, the Revolutionary War was fought to vindicate the right to arms. The revolutionaries prevailed without mention of foreign or professional assistance because of that celebrated right to arms, and then the Constitution was authored to vindicate the right to arms that had been won by the Revolution. Later, the Bill of Rights with its capstone Second Amendment was added to remove threats to the right to arms that the Constitution created. There are other, lesser elements to the Bill of Rights, and they merit some mention. First Amendment freedoms, for instance, have a certain utility, because they secure the right to discuss the right to arms. (Halbrook stops short of mentioning the right to worship guns free of governmental interference.) Likewise the Fourth Amendment doubly protects the right to arms against unreasonable search and seizure. And the Sixth Amendment ensures that one can have counsel in federal court to vindicate the right to arms. In sum, guns cease in Halbrook's analysis to be tools, but become the end all and be all of

¹³⁰ STEPHEN P. HALBROOK, *THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* (2008).

earthly existence. In a near inversion of Immanuel Kant's celebrated categorical imperative that no person is a mere means to a greater end, people and constitutionalism in Halbrook's account threaten to become bare instruments to protect guns.¹³¹

A second rather more disturbing and impious answer to the question of why the NRA has launched the most absolutistic, driven, paranoid and obsessive campaign to warp the constitutional compact since the days of the slave power sounds in terms of false religion, ancestor worship, and idolatry. Under the gun enthusiasts post-modern version of covenant theology, the Founding Fathers (with Constitution-hater Patrick Henry taking front and center and Constitution-drafter James Madison fading into the distance)¹³² were a prophetic and indeed sainted generation, who received a divine dispensation to cherish, worship, and employ the gun in pursuit of a heightened state of libertarian piety, from which later lesser generations have tragically fallen away. As in the Old Testament's cycles of declension, during which the people of God took to serving Baal and lesser false foreign gods in between times of prophetic revelation and reaffirmation of God's Covenant with Israel, the people of America have taken to serving liberalism, statism, socialism, and lesser non-gun related rights in these late degenerate times. The mission of the gun rights movement is to restore the nation to its true foundations, and to cast off the blasphemous and faddish perversions of the Warren, Burger, and insufficiently righteous Rehnquist Courts in favor of true gun-focused and Godly principles. This sacred duty commands obedience; in the eyes of the true believers that obedience is a consequence of historical fidelity and Christian faith. Indeed, in the eyes of the most fervent believers restoration of the lost gun-centered Constitution comes close to being a necessary precondition

¹³¹ See William G. Merkel, 114 AM. HIST. REV. 1074 (2009) (reviewing HALBROOK, *supra* note 130).

¹³² On Patrick Henry's intense but unsuccessful campaign to sabotage the Constitution and prevent its ratification see LABUNSKI, *supra* note 39, at 27-28.

for the Rapture. Sadly for the rest of us, these modern day Pharisees are quite blind to the absurdity of their fervent vision for which neither Holy Scripture, late-eighteenth-century political thought, or Reconstruction Era politics provide firm support.¹³³

More sadly still, baring unforeseen and nearly unforeseeable momentary spasms of insight among one of the five members of the *Heller* majority, the United States may well stand mere months away from a judicial fiat endorsing a new constitutional dispensation of universal and unfettered access to arms utterly unlike any secular or pious understanding that animated the national mainstream during the age of independence or during that most Godly epoch of anti-slavery and national constitutional regeneration that produced the Fourteenth Amendment. The nation lives in troubled times, and the triumph of the constitutional freak show looms near at hand. May it prove as fleeting as the slave power conspiracy's ascendancy after *Dred Scott*, and may its demise come much more gently and with precious little loss of life.

¹³³ I was somewhat surprised to learn that the editors of the Santa Clara Law Review read this paragraph as an unwarranted attack on Christianity. The author is a moderate Episcopalian, with a fondness for traditional liturgy and progressive sermonizing. Rather than casting aspersions on believers, I intended to draw an implicit contracts between the pacific message of the Beatitudes and the violence inflected secular rhetoric of the contemporary American right. That rhetoric frequently elides untenable originalist assumptions about American history with idolatrous ancestor worship and often takes on Christian cadences and pretends to make a Christian appeal. To point out these characteristics of one of the dominant tropes of our times is hardly to disparage Christian beliefs. My argument was developed in more detail in William G. Merkel, *A Cultural Turn: Reflections on Recent Historical and Legal Writing on the Second Amendment*, 17 STAN. L. & POL'Y REV. 671, 696-98 (2006).

CHAPTER TWELVE

MCDONALD V. CITY OF CHICAGO, FROM
GUN IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF
HISTORY, POLITICS, CULTURE, AND THE LAW

The Supreme Court's 2008 decision in *District of Columbia v. Heller* recognized a Second Amendment right to possess firearms for purposes of private self-defense, marking the first time the high court had acknowledged the existence of a Second Amendment right analytically distinct from the right to hold weapons suitable for service in the lawfully established militia. The question of whether the constitutional right to armed self-defense applied against state and municipal actors as well as the federal government was left open by the Heller Court, and became the subject of much attention and debate over the next two years. Shortly after *Heller* was announced, Otis McDonald, an elderly resident of a high crime neighborhood in Chicago, challenged the city's tough restrictions on hand gun ownership in federal district court. McDonald's lawyers argued that the right recognized in *Heller* should be construed to limit state and municipal regulatory authority in the same way it limited the power of federal governmental actors.

It may seem self-evident to most non-lawyers today that the provisions of the Bill of Rights apply to action by state and local government as well as to action by Congress or federal officials. For much of American history, however, the Supreme Court construed the Bill of Rights as binding only the federal government. The most famous articulation of the old understanding that the Bill of Rights did not apply to the states is that of Chief Justice John Marshall, who in *Baron v. Baltimore* in 1833 refused to allow a Fifth Amendment claim related to the taking of property by a municipal government. Following the Civil War and Reconstruction, some progressives argued that either the Privileges or Immunities Clause or the

Due Process Clause of the Fourteenth Amendment made federal Bill of Rights guarantees applicable against the states. The Supreme Court rejected this argument in *The Slaughter-House Cases* of 1873 (denying claims alleging the unconstitutionality of a monopoly granted by the City of New Orleans) and *United States v. Cruikshank* (decided 1876, refusing to enforce a Second Amendment claim against anyone other than the Federal Government). The Supreme Court has never accepted the argument that the Fourteenth Amendment applied the entire Bill of Rights against the states, but over the course of the Twentieth Century the Supreme Court gradually recognized in piecemeal fashion that particular provisions of the Bill of Rights applied to the states and municipalities through the Due Process Clause of the Fourteenth Amendment. This process of “selective incorporation” had largely run its course by the early 1970s, with almost all provisions of the Bill of Rights held applicable against the states. Prominent exceptions included the Second Amendment right to arms which had at that time not yet been enforced against federal action, the Seventh Amendment right to jury trial in civil cases, and the Fifth Amendment right that a criminal trial not commence unless the defendant had first been indicted by a grand jury.

Thus, the *McDonald* case presented the federal judiciary with the question of whether the newly recognized Second Amendment right should join most other provisions of the Bill of Rights in limiting state and municipal authority in exactly the same fashion it limited federal authority. The federal trial court rejected McDonald’s challenge to Chicago’s gun control law, reasoning that the United States Court of Appeals for the Seventh Circuit [the federal Circuit that embraces Illinois] had previously upheld a handgun ban and that *Heller* had not addressed state and municipal restrictions on gun ownership. The Seventh Circuit affirmed the trial court, relying on *United States v. Cruikshank*, *Presser v. Illinois*, and *Miller v. Texas*, three Supreme

Court cases declining to apply Second Amendment restrictions to the states decided in the late nineteenth century before the Supreme Court had begun the process of incorporating Bill of Rights guarantees against the states. The Court of Appeals acknowledged that there was reason to question the continuing validity of these precedents, but made clear that any decision to overturn Supreme Court decisions must rest with the Supreme Court itself.

Oral argument in *McDonald v. City of Chicago* took place in the United States Supreme Court on March 2, 2010, with Alan Gura, who successfully represented Heller in his suit against the District of Columbia, appearing for the appellant, former Solicitor General Paul Clement appearing for amicus National Rifle Association, and James Feldman, who argued over forty cases before the Supreme Court during a long career with the Solicitor General's Office, representing the City of Chicago. The Supreme Court announced its decision on June 28, splitting 5-4 on the question of whether the right to hold firearms for purposes of self-defense recognized in *Heller* applied to the states. Justice Alito wrote the lead opinion, which was joined by Chief Justice Roberts, Justice Scalia, and Justice Kennedy. The four justice plurality held that a Second Amendment right to weapons for purposes of self-defense applied against the states through the Due Process Clause of the Fourteenth Amendment. Justice Thomas provided the fifth vote in favor of applying the right against the states, but maintained in a separate opinion that this should be accomplished via the medium of the Privileges or Immunities Clause. Justice Breyer dissented in an opinion joined by Justices Ginsburg and Sotomayor, arguing that *Heller* was wrongly decided, that firearms bans in urban settings were commonplace when the Second Amendment was ratified, and that democratic experimentalism cautioned against aggressive federal judicial enforcement of a newly minted right that might severely undercut the ability of state and local legislatures to combat deadly violence. Justice Stevens' dissent, the last opinion

he authored before his retirement, provided a final opportunity for him to engage Justice Scalia on the question of when and by what standards judicial review of policy decisions made by democratically enacted branches of government is appropriate and legitimate. Justice Stevens chided the originalist reasoning of Justice Alito in *McDonald* and more particularly of Justice Scalia in *Heller*, and defended in spirited fashion the legal process theory rational that had dominated the Court from the late 1930s through the early 1980s. Justice Scalia answered Stevens in an animated concurrence that defended originalist methodology against charges of judicial activism.

Justice Alito's opinion for the four justice plurality clearly rejected Chicago's argument that the Second and Fourteenth Amendment's leave state and local government free to issue total prohibitions on possession of handguns in the home for private self-defense. At the same time, the four justice plurality and the four dissenters joined in rejecting Alan Gura's argument that the *Slaughterhouse Cases* should be overturned, and the entire Bill of Rights made applicable against the states via the Privileges or Immunities Clause of the Fourteenth Amendment. Gura's bold initiative found favor only with Clarence Thomas among the nine. Respecting matters apart from total handgun bans and overturning *Slaughterhouse*, it is probably fair to say that the *McDonald* plurality left open more questions than it answered. The plurality endorsed Justice Scalia's formulation regarding the substance of the right to arms first articulated in *Heller*, writing "[i]n *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the

Second Amendment right recognized in *Heller*.”[citations omitted]. The plurality also echoed Justice Scalia’s tentative list of presumptively valid reasonable restrictions on that right, including prohibitions of weapons not in common use (such as machine guns), prohibitions against felons or the mentally ill possessing weapons, and prohibitions against carrying weapons in certain sensitive places (for instance schools). But the plurality did not announce a standard against which to judge the reasonability of restrictions on the right to arms, endorsing neither “rational basis review,” “intermediate scrutiny,” “strict scrutiny” or any other more or less permissive or unforgiving formula for judicial review of laws burdening constitutional rights that the Court has frequently employed in the past. Hence, questions such as the constitutionality of restrictions on minors carrying guns, carrying guns outside the home or in cars, possession of veritable arsenals, and using guns for purposes other than self-defense will be left for lower courts to wrestle with on a case by case basis pending eventual further guidance from the Supreme Court.

The *McDonald* case joined a rich array of constitutional issues and sub-issues. The questions presented in the case engendered heated debate in the general public, among politicians, and in the academy. The five Supreme Court opinions in the case not only reflect cross currents of popular and political thinking regarding gun control and the right to arms, they also engage fundamental questions regarding the role of the Supreme Court in rights enforcement and in adjusting policy choices embraced by political actors responsible to democratic majorities. The five opinions ultimately reflect profoundly different approaches to the problem of justifying judicial review under the Constitution. Issues confronted in the various opinions include the binding effects of precedent, notably *The Slaughterhouse Cases*, in which the Supreme Court articulated what is generally taken to be a severely limited reading of the

Privileges or Immunities Clause of the Fourteenth Amendment, and *Cruikshank*, in which the Supreme Court held that the Privileges or Immunities Clause did not make the Second Amendment or any other provision of the Bill of Rights applicable to the states. The five *Heller* opinions wrestle with the legitimacy of “substantive due process” as a vehicle for enforcing rights not specifically applicable against the states under the text of the Constitution or not mentioned in that text at all, and the closely connected issue of whether constitutional rights against governmental actors must have precisely the same scope when applied against state and federal authorities. In the process, the opinions revisit four questions fundamental to the *Heller* case: (1) what role (if any) the Second Amendment’s Militia Clause plays in circumscribing the right to arms, (2) whether the right to arms encompasses a right to self-defense even though the latter is not mentioned in the Constitutional text, (3) whether there is a constitutional right to self-defense independent of any right implied by the Second Amendment, and (4) whether the meaning of the right to arms is frozen in time to reflect the original understanding of the right in 1791 when the Second Amendment was ratified or in 1868 when the Fourteenth Amendment was ratified.

For the plurality, Justice Alito unequivocally endorsed Justice Scalia’s controversial maneuver of subordinating the Second Amendment’s first thirteen words into an easily dismissed “prefatory clause” and concomitant elevation of the Amendment’s closing fifteen words into an “operative clause” fully capable of defining the Amendment’s meaning even standing on its own. For the *McDonald* plurality as for the *Heller* majority then, the Constitution commands that “the right of the people, to keep and bear arms, shall not be infringed,” and this command ultimately applies independent of the “well regulated militia” to which it was coupled in the text ratified by the people. The four *McDonald* dissenters rejected this position, with Justice Breyer’s opinion

emphatically calling for reversal of *Heller* on the grounds that historians have generally dismissed Justice Scalia's divorce of the right to arms from the militia in *Heller* as wholly incompatible with the late eighteenth century American focus on the militia as a constitutional check against a politically and fiscally dangerous professional army. Justice Sotomayor, who had replaced Justice Souter since the decision in *Heller*, signed Breyer's opinion, suggesting that her addition to the Court did not alter its balance respecting the Second Amendment. The *McDonald* Court divided on the question of the exclusively military meaning of bearing arms along exactly the same lines as it did respecting the importance or otherwise of the Militia Clause, with Justice Breyer again calling for *Heller* to be overturned because a strong majority of historians and linguists commenting on *Heller* have rejected Justice Scalia's position that the predominant meaning of bearing arms in the late eighteenth century was to carry weapons for purposes of confrontation, not necessarily in a military capacity.

For the *Heller* majority and the *McDonald* plurality, the original public understanding of "keep and bear arms" at the time the Second and Fourteenth Amendments were ratified encompassed keeping weapons at the ready for purposes of private self-defense. For the four justices who dissented in each case, however, the constitutional text does not speak to the question of weapons possession outside the context of service in the lawfully established militia, and this raises the issue of whether a right to armed private self-defense might be implicit in the American constitutional system even if it is not commanded directly by the constitutional text. For the dissenters, recognition of a right to private self-defense presents a question entirely analogous to that presented by the issues of constitutional protection for marriage, family relations, sexual privacy, abortion, and same sex intimacy, all of which the Supreme Court has recognized as constitutionally protected rights not expressly described in the text of the

Constitution. Since the retirement of Hugo Black some forty years ago, every justice on the Court has at least on occasion accepted the legitimacy of some non-enumerated rights, strong but inconsistent protestations from Justices Scalia and Thomas notwithstanding. Debates have focused on what formula or standard might allow the judiciary to constitutionally enforce some rights not written into the Constitution, and decline to recognize others asserted by litigants. For more than seventy years, this issue has dovetailed with the question of what elements of the Bill of Rights are so important as to merit federal judicial application against the states. From the 1930s through the 1970s, in landmark cases including *Palko v. Connecticut* (1937), *Adamson v. California* (1947), and *Duncan v. Louisiana* (1968), the Court embraced different formulas for assessing which rights to apply against the states. Application of related but distinguishable standards such as “fundamental to ordered liberty” (*Palko*) and “fundamental to the American scheme of justice” (*Duncan*) suggested very different things respecting the appropriateness of foreign reference points in ascertaining whether a putative right merited constitutional inclusion. Since the United States stands virtually alone among the states of the world committed to constitutionalism and the rule of law in its tolerance of broad access to deadly weapons, any transnational frame of reference rooted in abstract considerations of reason or justice or in empirical assessment of practices among states would point strongly against recognition of a right to weapons possession. The outcome in *McDonald* then hinged in part on Justice Alito’s rejection of Chicago’s claim that the appropriate standard for deciding whether to apply the right to arms against the states was the *Palko* test with its implicit invocation of a world-wide frame of reference.

Quite apart from normative considerations regarding the value of particular rights, concerns respecting democratic bona fides and constitutional legitimacy contributed to tension

on the McDonald Court regarding deference to public policy choices of local legislatures. In many respects, the argument in favor of policy making by democratically accountable actors revisited arguments against judicial rights enforcement familiar from the debates over incorporation during the era of Chief Justice Warren, but Justice Breyer in particular attempted to distinguish decisions respecting gun policy and the right to arms from those involving other incorporated rights on the grounds of the extreme social cost associated (at least by some scholars, observers, and voters) with easy access to guns. Justice Breyer embraced an argument once associated with Justice Louis Brandeis holding that federalism provides a laboratory, and that multiple locally tailored approaches to crime control are preferable not only from the standpoint of legitimacy, but also from the perspective of best practices and democratic experimentalism. Thus, Justice Breyer argued for special solicitude to local preferences given the severity of gun violence in urban areas.

Finally, McDonald is notable as the ultimate installment in a long exchange between Justices Stevens and Scalia concerning the philosophies underlying their constitutional jurisprudence. Over the last forty years, Antonin Scalia has emerged as the principal spokesman for originalism among jurists and academics. Justice Stevens meanwhile has remained committed to the jurisprudence of legal process theory that was dominant on the Supreme Court from the late New Deal through the early 1980s. For Justice Stevens, McDonald afforded an opportunity to offer a final systematic justification of his jurisprudential philosophy and a detailed critique of Justice Scalia's contrary jurisprudence. Justice Scalia responded with perhaps his most detailed defense of originalism since his 1997 book, *A Matter of Interpretation*. The legal process theory endorsed by Justice Stevens was first articulated on the Court by then Justice Harlan Fiske Stone in his famous Footnote Four in the *Carolene Products* decision of

1937. Justice Stone explained that that judges in constitutional cases should let legislative and executive determinations of policy alone unless (1) the government action in question violated clear constitutional text, (2) was incapable of correction through the democratic process because the process had become warped or corrupted in favor of special interests, or (3) unfairly burdened a discreet or insular racial or religious minority who could not hope for redress by majoritarian means. Since Justice Stevens (like Justice Breyer) rejected the majority's position that the Second Amendment plainly protects a right to weapons for private purposes and that it was originally understood to do so, he maintained that Chicago's gun ban did not fall within the first Carolene Products category of laws fit for judicial invalidation. It likewise fell outside the second and third Carolene Products categories because gun owners and advocates are not shut out of the political process by unfair means or through prejudice. Justice Scalia's concurrence defended his originalist reasoning in *Heller* against Justice Stevens attack, and argued that other philosophies supporting judicial review and in particular legal process theory allowed judges free reign to veto legislative choices in favor of their own political values and preferences. For Justice Scalia, strict judicial adherence to the original understanding of constitutional text possessed by the general public at the time of its ratification provides the best although not a foolproof guarantee against judicial subjectivity in constitutional adjudication. For Justice Stevens in contrast, the indeterminacy of original understanding and the strong supposition that Justice Scalia had clearly departed from the dominant meaning the Second Amendment held when it was ratified suggested that the method of originalism was neither neutral nor objective and that it should be abandoned in favor of nuanced and honest applications of the legal process theory and substantive due process case law developed during the eras of Harlan Fiske Stone, Earl Warren, and Warren Burger.