

# Journal of Criminal Law and Criminology

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Volume 106 | Issue 2

Article 2

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Spring 2016

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### Recommended Citation

Saul Cornell, *“Half Cocked”: The Persistence of Anachronism and Presentism in the Academic Debate Over the Second Amendment*, 106 J. CRIM. L. & CRIMINOLOGY (2016).  
<https://scholarlycommons.law.northwestern.edu/jclc/vol106/iss2/2>

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## **“HALF COCKED”: THE PERSISTENCE OF ANACHRONISM AND PRESENTISM IN THE ACADEMIC DEBATE OVER THE SECOND AMENDMENT**

**SAUL CORNELL\***

*James Lindgren’s recent forward to The Journal of Criminal Law and Criminology’s 2015 symposium on “The Past and Future of Guns,” purports to be a neutral and scholarly account of the current state of the debate on the meaning of the Second Amendment. Lindgren’s introductory essay fails to achieve both of these goals. Rather than survey the pre-Heller scholarship in a comprehensive and even-handed manner, Lindgren provides a distorted and superficial account of the historical literature. He compounds this error by ignoring the vast post-Heller scholarly literature, failing to note that much of this recent body of scholarship has been deeply critical of Heller, and has generally vindicated the work of the historians he criticizes. Indeed, the evidence he himself offers in defense of his interpretation actually undercuts his claims about the meaning of the Second Amendment. Lindgren’s essay does not chart a path forward in this contentious debate, but proffers an incomplete and analytically flawed account of the Founding Era’s understanding of this important provision of the Constitution.*

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THE FUTURE OF THE PAST: HISTORICAL SCHOLARSHIP  
AND THE SECOND AMENDMENT AFTER *HELLER*

Reading James Lindgren's recent forward to *The Journal of Criminal Law and Criminology's* symposium on "The Past and Future of Guns,"<sup>1</sup> one might be tempted to think that nothing new on the Second Amendment had been written in the aftermath of the Supreme Court's decision in *District of Columbia v. Heller*.<sup>2</sup> In fact, *Heller* has spawned a vast new scholarly literature.<sup>3</sup> Not only does Lindgren not engage with the historical scholarship written prior to *Heller*, he fails to consider the post-*Heller* literature, rendering his account of the state of the debate over the Second Amendment's historical meaning both incomplete and unsound.<sup>4</sup> Moving forward in the contentious debate over firearms regulation does, as Lindgren asserts in his discussion of the policy issues,<sup>5</sup> require more attention to evidence, but this sage counsel applies to history every bit as much as it applies to statistical analysis.<sup>6</sup>

It is a bit surprising to see an article on the past and future of the gun debate that makes no mention at all of important recent work by scholars such as Duke University's Joseph Blocher and Darrell Miller, Yale University's Reva Siegel, or Harvard scholar Cass Sunstein, to name just a few of the new voices and senior figures in constitutional law that have entered this ideologically charged field after *Heller*.<sup>7</sup> All of these scholars reject Lindgren's interpretation of history and his reading of *Heller*.<sup>8</sup> Some

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<sup>1</sup> James Lindgren, *Forward: The Past and Future of Guns*, 104 J. CRIM. L. & CRIMINOLOGY 705 (2015).

<sup>2</sup> 554 U.S. 570 (2008).

<sup>3</sup> See *infra* notes 7–10.

<sup>4</sup> See *infra* notes 7, 9, 11.

<sup>5</sup> Lindgren, *supra* note 1, at 705, 711.

<sup>6</sup> See PHILIP J. COOK & KRISTEN A. GOSS, *THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW* 155–70 (2014) (providing an overview of the historical roots of American gun control measures). Although scholarly standards demand such rigor, there is little evidence that this has much impact on public policy debates. See Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1311–18 (2003).

<sup>7</sup> See, e.g., Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009); Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 85–90 (2013); Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852 (2013); Darrell A. H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009); Cass Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246 (2008); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

<sup>8</sup> See *infra* pp. 207–08 (describing the civic rights interpretation of the Second

of the harshest criticism of the D.C. gun case and its abuse of history has come from conservative scholars and judges, including Richard Epstein, Charles Fried, Richard Posner, and J. Harvie Wilkinson, another fascinating aspect of the post-*Heller* jurisprudential landscape that Lindgren neglects.<sup>9</sup>

In a brief response it would be impossible to survey the full richness of the new scholarly developments Lindgren overlooks.<sup>10</sup> Nor does space permit a detailed exposé of all of the historical errors and analytical flaws in *Heller* and the outdated body of scholarship Lindgren cites in his essay.<sup>11</sup> In the interest of moving the debate forward, some salient points are worth stressing.

There is substantial scholarly support for the argument that the “individual rights” view articulated in *Heller* and defended by Lindgren was largely an invented historical tradition.<sup>12</sup> Gun rights advocates both within and outside of the legal academy worked assiduously to create this revisionist history of the Second Amendment<sup>13</sup> and deployed it effectively

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Amendment).

<sup>9</sup> J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009) (“*Heller* represents a triumph for conservative lawyers. But it also represents a failure—the Court’s failure to adhere to a conservative judicial methodology in reaching its decision.”); Richard A. Epstein, *A Structural Interpretation of the Second Amendment: Why Heller is (Probably) Wrong on Originalist Grounds*, 59 SYRACUSE L. REV. 171, 173–74 (2008); Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC (Aug. 26, 2008), <https://newrepublic.com/article/62124/defense-looseness>; Charles Fried, *The Second Annual Kennedy Lecture: On Judgment*, 15 LEWIS & CLARK L. REV. 1025, 1045 (2011) (arguing that the “inappropriate” application of history “led the Court astray” in *Heller*). As Sanford Levinson notes, “Even more to the point, with regard to grasping the complexity of the contemporary debate, is the fact that some strikingly hostile responses to *Heller* have been written by judges and scholars usually (and accurately) identified with the conservative politics.” Sanford Levinson, *United States: Assessing Heller*, 7 INT’L J. CONST. L. 316, 319 (2009).

<sup>10</sup> See the articles cited in notes 7 and 9 for a small sampling of post-*Heller* scholarship critical of *Heller* and many of the historical assumptions upon which Lindgren’s essay relies.

<sup>11</sup> Lindgren’s approach embodies many of the vices of law office history and “history-lite.” For the prevalence of these flaws in much Second Amendment scholarship, see generally Martin S. Flaherty, *Can The Quill Be Mightier Than The Uzi?: History “Lite,” “Law Office,” And Worse Meets The Second Amendment*, 37 CARDOZO L. REV. 663 (2015). For further elaboration on this point, see *infra* pp. 206–18.

<sup>12</sup> Ironically, Lindgren falls prey to a vice decried by Justice Scalia in a critique of legislative history. Lindgren’s selective survey of research in this area was similar to the exercise criticized by Justice Scalia in which judges “look over the heads of the crowd and pick out [one’s] friends.” ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 36 (1997). Lindgren cites approvingly the work of his former co-bloggers at *The Volokh Conspiracy*, such as Randy Barnett and Eugene Volokh, and ignores the dozens of critiques of *Heller* from across the ideological spectrum. See *supra* notes 6, 8 and accompanying text.

<sup>13</sup> See generally David B. Kopel, *The Second Amendment in the Nineteenth Century*,

in *Heller*. As Reva Siegel and Michael Waldman have each shown, the individual rights interpretation of the Second Amendment was a modern creation.<sup>14</sup> For most of the last century the dominant interpretation of the Second Amendment was as a collective right, not an individual right. The eminent early twentieth century Harvard legal scholar Zechariah Chafee, Jr. captured the earlier scholarly consensus around this conception in an influential article written more than seventy years before *Heller*: “[u]nlike the neighboring amendments,” the Second Amendment, Chafee averred, “safeguards individual rights very little and relates mainly to our federal scheme of government.”<sup>15</sup> Chafee’s article was hardly the only one to embrace such a view. Most legal scholars and courts accepted this collective rights view until a new wave of revisionist scholarship emerged in the 1990s.<sup>16</sup>

Lindgren’s dismissive characterization of historians’ efforts to formulate a new paradigm for understanding the Second Amendment prior to *Heller* is cast in quasi-conspiratorial terms, as if it were part of some nefarious anti-gun agenda. Lindgren’s account of this historiography confuses two different groups of scholars and fails to understand the connections between Second Amendment scholarship and early American

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1998 BYU L. REV. 1359 (1998); Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995) (discussing Second Amendment scholarship). For a critique of the revisionist paradigm, see *infra* notes 14–15 and accompanying text.

<sup>14</sup> MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* xiii, 87–140 (2014) (arguing that the prominence of the individual rights interpretation is the result of a “jurisprudential campaign” by gun-rights activists that began in the 1970s); Siegel, *supra* note 7, at 239 (arguing that throughout most of the twentieth century, legal scholars interpreted the Second Amendment with a primary emphasis on the militia clause, but that “decades of gun rights mobilization transformed the ‘natural’ meaning of the Constitution’s text so that . . . a law-and-order Second Amendment simply appeared there as the founders’ Constitution”); see also Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 371 (2000) (charting the rise of a new individualistic interpretation of the Second Amendment and discussing the role of gun rights advocates in advancing this view).

<sup>15</sup> Zechariah Chafee, Jr., *Right to Bear Arms*, 2 ENCYCLOPEDIA OF THE SOC. SCI. 209 (1930). On the intellectual, political, and legal significance of the Encyclopedia in American life, see Jerome Hall, *The Encyclopedia of the Social Sciences*, 25 ILL. L. REV. 233 (1930) (book review) (“Not since the day of the French encyclopedists has as significant a task been undertaken.”). Chafee drew on an earlier article by Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473 (1915), which was among the most influential law review essays developing this point of view. See Spitzer, *supra* note 14, at 384.

<sup>16</sup> See Spitzer, *supra* note 14, at 384 (providing additional evidence that the Chafee view was the dominant paradigm for understanding the Second Amendment for much of the last century).

historiography.<sup>17</sup> He argues that historians:

[W]ith essentially no original evidence to support their view—and some evidence directly contrary to it—the states’ rights academics came up with an entirely new view, which they termed the “civic rights” view. According to this view, the right to keep and bear arms was an individual right, but it could be exercised only with the permission of the state in a militia.<sup>18</sup>

It is hard to credit the claim that there was no new evidence to support the view that the Second Amendment was a civic right. Indeed, Lindgren’s hyperbole is typical of much gun rights oriented scholarship, and it is precisely for this reason that Sanford Levinson has described such claims as antithetical “to serious intellectual debate.”<sup>19</sup> The new historical paradigm that Lindgren mocks, variously described as a limited individual right, a militia-based right, or a civic right emerged almost simultaneously in the writings of scholars who were working independently from one another and employing different methodological tools, but who were all responding to debates and trends within early American legal historiography.<sup>20</sup> The one commonality among all the scholars drawn to this paradigm was not their connection to contemporary gun politics or previous support for its theory of states’ rights, but their emphasis on the necessity of rooting Founding Era American law in the culture of the early modern Anglo-American Atlantic world.<sup>21</sup>

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<sup>17</sup> Lindgren, *supra* note 1, at 707.

<sup>18</sup> *Id.*

<sup>19</sup> Levinson, *supra* note 9, at 327. Among the multitude of new sources consulted by scholars associated with the civic paradigm were H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* 150 (2002) (exploring the Latin origins of the ablative absolute used in the Second Amendment); Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 *CONST. COMMENT.* 221, 227–35 (1999) (challenging the belief that Pennsylvanians sought a modern-style individual right at the time of the state’s drafting of its constitution by analyzing the Test Acts, a law that disarmed part of the population and the views of the Anti-Federalist Dissent of the Minority); 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, 120 (2004) (exploring the conventions on preambles and the disarmament of the Scottish militias).

<sup>20</sup> Lindgren, *supra* note 1, at 707.

<sup>21</sup> Lindgren conflates two different groups of historians working on the Second Amendment in recent years: those associated with a collective rights model, and those who advanced a civic rights model. For a more nuanced and accurate discussion of the historiography, see William Merkel, *A Cultural Turn: Reflections on Recent Historical and Legal Writing on the Second Amendment*, 17 *STAN. L. & POL’Y REV.* 667, 672 (2006) (arguing that historical scholarship opposing the individual rights view is best seen in terms of a republican school focusing on a civic right and a traditional states rights interpretation,

The claim that this new historical paradigm lacked any evidence from the Founding Era neglects the centrality of the militia and the related fear of standing armies to Anglo-American republican discourse in the period between the Glorious Revolution and the adoption of the amended Constitution.<sup>22</sup> The pervasiveness of republican ideas in the legal and political discourses of the Atlantic world in the eighteenth century has been documented time and again by historians of early modern political thought.<sup>23</sup> More than forty years of historiography on republicanism contradicts Lindgren's suggestion that the new civic paradigm was somehow conjured out of thin air.<sup>24</sup> Lindgren's misunderstanding of the relevant historiography goes beyond his lack of appreciation for the centrality of republicanism to Anglo-American legal culture in this period—his analysis demonstrates a failure to grasp some of the most elementary principles of historical inquiry. Thus, he confidently asserts that:

The problem with [the civic rights model] was that, again, there was no contemporary evidence from the Framers' era to support it, and, indeed, no one had ever heard of the civic rights view for the first two centuries of the Second Amendment's existence. The first use of the term "civic right" to describe the Second Amendment in American law reviews appeared in a 2002 article by the historian Saul Cornell. It would be strange if most of the Framers held the civic rights view of the Second Amendment, but kept it a secret from everyone, including the other Framers.<sup>25</sup>

It is hardly surprising that the Founding Generation did not use a term invented by modern scholars to describe the Second Amendment—how could they?<sup>26</sup> Lindgren has fallen into an elementary historical fallacy. By conflating what modern historians have said about the past with what historical actors actually said in the past, Lindgren has confused a

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sometimes described as a collective right).

<sup>22</sup> See J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, 183–216 (1975) (arguing that the Second Amendment derives from a language about freedom and the militia stretching back to Machiavelli and the Renaissance).

<sup>23</sup> For a useful overview of this concept and the related notion of civic humanism, see Philip Pettit et al., *Republicanism*, *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., 2003), <http://plato.stanford.edu/archives/spr2003/entries/republicanism/>; Athanasios Moulaskis, *Civic Humanism*, *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., 2011), <http://plato.stanford.edu/archives/win2011/entries/humanism-civic/>.

<sup>24</sup> See G. Edward White, *Reflections on the "Republican Revival": Interdisciplinary Scholarship in the Legal Academy*, 6 *YALE J.L. & HUMAN.* 1, 5 (1994); Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 *J. AM. HIST.* 11, 14–17 (1992).

<sup>25</sup> Lindgren, *supra* note 1, at 708.

<sup>26</sup> See *supra* note 21.

“semantical question about the name by which the object is called,” with the historical object itself. In essence, he blurs the differences between primary and secondary sources by conflating modern historical labels with the historical beliefs they describe.<sup>27</sup>

From a strictly textualist interpretive modality, the assertion that there is no evidence for a militia-based reading of the Amendment is easily rebutted by reference to the Second Amendment’s text, especially its preamble.<sup>28</sup> Lindgren attempts to get around this particular textual embarrassment by invoking the authority of libertarian legal scholar Eugene Volokh’s controversial, and now largely discredited, claim about the role of preambles in Founding Era constitutional texts.<sup>29</sup> Unfortunately, Lindgren ignores the scholarly critiques of Volokh’s work, some voiced before *Heller* and others elaborated since the decision.<sup>30</sup> Moreover, anyone familiar with Founding Era sources would have little trouble finding evidence to challenge Volokh’s anachronistic interpretation. A good place to start might be the 1750 legal dictionary authored by Giles Jacob, a popular Founding Era text among lawyers.<sup>31</sup> Thomas Jefferson and John Adams each owned a copy of Jacob’s law dictionary.<sup>32</sup> Jacob defined the role of a

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<sup>27</sup> DAVID HACKETT FISCHER, *HISTORIANS’ FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* 21 (1970).

<sup>28</sup> On textualism as a basic modality of constitutional interpretation, see PHILLIP BOBBIT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 25–38 (1982).

<sup>29</sup> Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 801–02 (1998) (arguing that the preamble to the Second Amendment should not be interpreted as establishing the sole purpose of the Amendment, but simply a purpose).

<sup>30</sup> David Thomas König, *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, 154–55 (2004) (analyzing a number of Founding era constitutional and legal treatises treating preambles as the key to establishing the meaning of a text); *see generally* David Thomas König, *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) (providing additional evidence that Volokh’s interpretation of preambles was historically flawed). Taken together König’s two essays have effectively discredited the Volokh thesis. Indeed, legal scholar Sanford Levinson, a leading proponent of the individual rights view and critic of *Heller* describes König’s critique of the Volokh/Scalia view of preambles as “devastating.” Levinson, *supra* note 9, at 321.

<sup>31</sup> *See generally* GILES JACOB, *A NEW LAW DICTIONARY* (6th ed. 1750). *See also* König, *supra* note 19, at 156 (describing the wide use of Jacob’s dictionary in the eighteenth century).

<sup>32</sup> For additional evidence of the influence of Jacob’s dictionary in early America, see Gary L. McDowell, *The Politics of Meaning: Law Dictionaries and the Liberal Tradition of Interpretation*, 44 AM. J. LEGAL HIST. 257, 261 (2000). Although McDowell demonstrates the importance of legal dictionaries, his account of the Lockean assumptions about language in the Founding Era is deeply flawed. For a more sophisticated account of John Locke’s views of language, see Hannah Dawson, *Locke on Language in (Civil) Society*, 26 HIST. POL.



preamble in a way that flatly contradicts Volokh's claims: "[t]he Preamble of a Statute . . . which is the Beginning thereof, going before, is as it were a Key to the Knowledge of it, and to open the Intent of the Makers of the Act; it shall be deemed true, and therefore good Arguments may be drawn from the same."<sup>33</sup> This particular gloss on preambles, derived from Lord Coke, was echoed in New Jersey Justice of the Peace James Parker's popular Founding Era legal guide.<sup>34</sup> A 1788 advertisement for Parker's guide described the book as essential reading for Americans interested in the law. "This book is highly esteemed and very necessary" not only for gentleman in their public capacity as Justices of the Peace, but for "every other person who would wish to be acquainted with the laws of the land we live in."<sup>35</sup> Volokh's analysis of preambles ignores these types of sources and other relevant texts essential to recovering the Founding Era's interpretive assumptions and rules of construction. Instead of reconstructing Founding Era practices, Volokh erroneously employs approaches to statutory construction drawn from treatises written a half century later. In short, Volokh reads history backwards, applying nineteenth century rules to understand eighteenth century texts. If one corrects his anachronistic methodology and applies the correct eighteenth century rules and

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THOUGHT 397 (2005). For the relevance of Dawson's work to the originalism debate, see Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 586 (2011).

<sup>33</sup> JACOB, *supra* note 32, under "statute." Volokh does not consult Giles, and misconstrues other relevant Founding Era sources by applying the rules found in nineteenth century treatises, including JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION § 48 (1882); FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES GENERAL TREATISE ON STATUTES 688 (39th ed. 1835); THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 55 (1857); E. FITCH SMITH, COMMENTARIES ON STATUTE AND CONSTITUTIONAL LAW AND STATUTORY AND CONSTITUTIONAL CONSTRUCTION §§ 562, 567, 573 (1848). Justice Scalia emulated Volokh's anachronistic practice of using texts written at least a half century after the Second Amendment to reconstruct its original meaning. See Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 808 n.51 (1998); *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008).

<sup>34</sup> JAMES PARKER, CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY, AND AUTHORITY OF JUSTICES OF THE PEACE, vii (1788).

<sup>35</sup> PARKER, *supra* note 34, at vii. In the period between 1788 and 1791 Coke's rules on preambles were included in half of the James Parker manuals published in America in this interval. For a good example of how Parker's views of preambles influenced other popular legal writers in this period, see FRANCOIS XAVIER MARTIN, THE OFFICE OF THE JUSTICE OF THE PEACE 186 (1791). On the importance of justice of the peace manuals in shaping early American legal culture, see generally Larry M. Boyer, *The Justice of the Peace in England and America from 1506 to 1776: A Bibliographic History*, 34 Q.J. LIBR. OF CONGRESS 315 (1977); John A. Conley, *Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth-Century America*, 6 J. LEGAL HIST. 257 (1985).

assumptions to the text, one of the central pillars of Justice Scalia’s textualist argument in *Heller* collapses.<sup>36</sup>

Additional evidence that the Volokh/Lindgren/Scalia approach to preambles is historically flawed is provided by the very example Lindgren offers to substantiate his interpretation. When read in context, Lindgren’s own effort to buttress Volokh’s argument, drawn from the Virginia Declaration of Rights’ provision on freedom of religion, actually undermines Volokh’s claim about the function of preambles in the Founding Era.<sup>37</sup> The Virginia text asserts:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience.<sup>38</sup>

Lindgren’s gloss on this text is ahistorical; rather than reconstruct eighteenth-century patterns of reading as the baseline for interpreting this text, he simply reads the text as any modern lawyer might.<sup>39</sup> For Lindgren, “reason” is synonymous with logic and rationalism. Although this might be a plausible reading if the text were written today, such an interpretation is

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<sup>36</sup> Although Volokh did not consult Founding era justice of the peace manuals in his work on preambles, in his later writing on the Second Amendment he does invoke their authority as highly probative of Founding era legal meaning. See Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 101 (2009) (describing the importance of justice of the peace manuals as evidence of public meaning in the Founding Era).

<sup>37</sup> Lindgren, *supra* note 1, at 707.

<sup>38</sup> George Mason, THE VIRGINIA DECLARATION OF RIGHTS (June 12, 1776).

<sup>39</sup> Lindgren’s interpretive approach is under-theorized in his essay, but he appears to be using a textualist modality, taking the reasonable modern reader as his baseline for interpreting the Virginia Declaration of Rights, a profoundly ahistorical approach to reading an eighteenth century text. Thus, his interpretation neither follows a genuinely originalist approach nor an authentic historical one. Cf. Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT 47, 48 (2006) (arguing for the reasonable Founding Era reader as the basis for constructing original meaning). On the historical alternative to originalism, see generally Saul Cornell, *Originalism As Thin Description: An Interdisciplinary Critique*, 84 FORDHAM L. REV. 1 (2015); Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721 (2013); Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935 (2015); Jack N. Rakove, *Tone Deaf to the Past: More Qualms about Public Meaning Originalism*, 84 FORDHAM L. REV. 3 (2015). There are multiple candidates for the legal meaning of a text, and not all are determined by history. See Richard H. Fallon, Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235 (2015) (surveying a variety of different possible candidates for how to ascertain the relevant legal meaning of a text, including reasonable meaning, linguistic meaning, contextual meaning, intentional meaning, and interpreted meaning).

hard to reconcile with the linguistic and ideological context in which the text was written and read in 1776. Here is how Lindgren reads the text:

Because of the preamble to Virginia's Bill of Rights, would it be reasonable to think that Virginia could decide to protect religions that are based on reason, but not religions based on tradition and memorized catechisms? Of course not. The preamble gives a rationale and a purpose to the right (in this case, the protection of religious liberty); it does not restrict it.<sup>40</sup>

The term "reason" in this context was synonymous with the free exercise of an individual's mental faculties: it meant to argue or to debate.<sup>41</sup> Lindgren is clearly not familiar with the Enlightenment background of the Founding Era and its relevance to the history of religious freedom.<sup>42</sup> George Mason, the primary architect of the Virginia Declaration of Rights, and Thomas Jefferson, another champion of religious freedom, were both profoundly influenced by John Locke's writings on toleration.<sup>43</sup> Locke and those who drew inspiration from him used the term "reason" in a much broader sense than Lindgren's ahistorical reading of the text suggests: "Every Man," Locke wrote, "has Commission to admonish, exhort, convince another of Error; and by reasoning to draw him into Truth."<sup>44</sup> Admonishment and exhortation were not antithetical to reason in Locke's view. Thomas Jefferson used reason in a similar sense when he proposed the following bill in 1779: "The holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do, but to extend it by its influence on reason alone."<sup>45</sup> The Founding Generation would have been categorically

<sup>40</sup> Lindgren, *supra* note 1, at 707.

<sup>41</sup> SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (10th ed. 1792).

<sup>42</sup> There is a vast literature on the American Enlightenment. For a useful starting point, see Shane J. Ralston, *American Enlightenment Thought*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <http://www.iep.utm.edu/amer-en/> (last visited Sept. 1, 2016) (summarizing the central beliefs of the American enlightenment, including its support for a Lockean view of religious toleration).

<sup>43</sup> See *A Bill for Establishing Religious Freedom, 18 Jun. 1779*, FOUNDERS ONLINE, NATIONAL ARCHIVES, <http://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082> (last updated Mar. 28, 2016); THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON, Vol. 2, 545–53 (Julian P. Boyd, ed., 1950); Gerald S. Sandler, *Lockean Ideas in Thomas Jefferson's Bill for Establishing Religious Freedom* 21 J. HIST. IDEAS 110, 110 (1960).

<sup>44</sup> JOHN LOCKE, A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 14 (Mark Goldie ed., 2010). Jefferson copied this passage from Locke into one of his notebooks. *Notes on Locke and Shaftesbury, 11 October–9 December 1776*, FOUNDERS ONLINE, National Archives, <http://founders.archives.gov/documents/Jefferson/01-01-02-0222-0007> (last updated Mar. 28, 2016); THE PAPERS OF THOMAS JEFFERSON, *supra* note 43, Vol. 1, 544–50.

<sup>45</sup> THE PAPERS OF THOMAS JEFFERSON, *supra* note 43, at Vol. 1, 544–50.

opposed to any coercion in matters of religion, so the fit between the preamble and the enacting clause was actually quite tight in Lindgren’s example. In short, his own evidence contradicts Volokh’s claims about the function of Founding Era preambles.

The textualist arguments in favor of the militia-based view of the Amendment are among the strongest evidence to support this interpretation, but one need not rest such an argument on textualist grounds alone. Consider the case of St. George Tucker.<sup>46</sup> Lindgren makes the following claim about Tucker’s understanding of the Second Amendment: “If, as the civic rights camp believes, the Framers believed in the civic rights view of the Second Amendment, somebody should have told St. George Tucker, perhaps the leading American legal commentator of the day.”<sup>47</sup> It is not clear who exactly Lindgren believes should have told St. George Tucker about modern historical debates over his writings. There are two basic evidentiary problems with his claims about Tucker. First, Lindgren simply ignores Tucker’s clear statement that the reason the Second Amendment was adopted by the First Congress was to buttress the federalism provisions of the Tenth Amendment, a point that Justice Stevens raised in his *Heller* Dissent.<sup>48</sup> Tucker’s text offers another example of a Founding Era source supporting a conception of the right to bear arms that Lindgren claims is a modern invention.

The second flaw in Lindgren’s interpretation derives from his failure to engage in a genuinely holistic historical exercise of reconstructing Tucker’s vision of rights before zeroing in on his interpretation of the right

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<sup>46</sup> Tucker was a leading Virginia jurist and prominent Jeffersonian who published an important annotated American edition of Blackstone’s *COMMENTARIES*. For Tucker’s relevance to modern debates over the Second Amendment, see *District of Columbia v. Heller*, 554 U.S. 570, 594–95 (2008).

<sup>47</sup> Lindgren, *supra* note 1, at 709.

<sup>48</sup> *Heller*, 554 U.S. at 666 n.32. Lindgren’s interpretation of Tucker relies entirely on the work of a single unrepresentative historian Robert Churchill. Lindgren, *supra* note 1 at 708. Most historians have been critical of *Heller* and the scholarship it rested on; for a quick summary, see Justice Breyer’s Dissent in *McDonald v. City of Chicago*, 561 U.S. 742, 914 (2010) (Breyer, J., dissenting) (describing the growing historical consensus that *Heller* was wrong). For a discussion of Justice Stevens’ use of Tucker and modern gun rights interpretations of Tucker’s writings, see generally Saul Cornell, *St. George Tucker’s Lecture Notes, the Second Amendment, and Originalist Methodology: A Critical Comment*, 103 *Nw. U. L. REV.* 1541 (2009). Lindgren’s failure to provide a full and balanced scholarly discussion of the evidence and debate over Tucker’s thoughts only underscores the ideologically distorted and tendentious nature of his essay. For a model scholarly treatment of this controversy that acknowledges the divergent interpretations of the Tucker evidence, see Martin H. Redish and Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a “Controlled Activism” Alternative*, 64 *FLA. L. REV.* 1485, 1499–1501 (2012).

to bear arms. In volume two of Tucker's *Blackstone* there is an expansive footnote that explains his conception of rights. Tucker divided rights into four different categories: natural, social, civil, and political.<sup>49</sup> The right of self-preservation was a natural right. The category of civil rights for Tucker included rights related to citizenship. Thus, Tucker expressly noted that "aliens, women and children under the age of discretion . . . negroes and mulattoes . . . have no civil rights in Virginia, taken in this strict and limited sense."<sup>50</sup> These were precisely the groups in Virginia that did not bear arms, so Tucker's category of "civil right" corresponds to the modern category of civic right.<sup>51</sup> Lindgren approaches the Second Amendment with the simple dichotomous model that has come to dominate modern debate over this issue. Any scholar who took Tucker's thought seriously and sought to understand it historically would recognize that the learned Virginian's eighteenth century conception of rights simply does not fit neatly into the modern categories Lindgren and other legal scholars have sought to impose on the past. Lindgren and others who share his approach to the Second Amendment systematically conflate the common law right to keep or use arms for lawful purposes and the constitutional right to keep

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<sup>49</sup> ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA* 145 n.42 (1803). My notion of a civic right, the concept that Lindgren disparages as a modern invention, was based on Tucker's notion of a "civil right." I deliberately chose not to use Tucker's own language because his preferred term carries such a different set of associations in modern law. See *Civil Rights: An Overview*, LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/civil\\_rights](https://www.law.cornell.edu/wex/civil_rights) (last visited Sept. 1, 2016); Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123, 1143 (2006) (arguing that the Second Amendment, by contrast, fit into Tucker's third and fourth categories, civil rights and political rights). "Tucker's term 'civil right' might best be rendered in modern parlance as a civic right, a right that 'appertain[s] to a man as a citizen or subject.'" *Id.* (quoting TUCKER, *supra* note 49, at 300). In response to Lindgren's snide suggestion that someone needed to inform Tucker about the existence of a civic right, it would be more relevant to ask why Lindgren did not discuss Tucker's eighteenth century conception of civil rights and its relevance to arms bearing?

<sup>50</sup> TUCKER, *supra* note 49, at 145.

<sup>51</sup> See generally Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123 (2006) (arguing for the need to look at all of Tucker's relevant writings on the right to bear arms not just the often quoted passage discussing the "palladium of liberty"). Cf. Stephen P. Halbrook, *St. George Tucker's Second Amendment: Deconstructing 'The True Palladium of Liberty'*, TENN. J.L. & POL'Y 3, 120 (2006) (making a gun-rights rebuttal to my interpretation). Halbrook makes no effort to contextualize Tucker's theory of rights and ignores the fact that his discussion of self-defense in the section on homicide makes no reference to bearing arms. *Id.*

and bear arms as part of a well-regulated militia.<sup>52</sup> In Tucker’s terminology, the former was a natural right modified by common law and the latter was a civil right. A Moravian pacifist in Pennsylvania might have been able to bear a gun for a variety of lawful purposes, but he would have been religiously scrupulous about bearing arms.<sup>53</sup> Women and children might claim a right of individual self-defense under common law, but were not among those who were required to bear arms.<sup>54</sup> Although not every use of the phrase “bear arms” was exclusively military, it was unquestionably the dominant usage in the print culture of the Founding Era.<sup>55</sup> Even if one casts aside the actual patterns of usage, and treats the two usages as equally plausible, Founding Era rules of construction required a recourse to the text’s preamble as the appropriate way to decide which reading was legally correct.<sup>56</sup>

Lindgren’s methodology also suffers from a common problem that nearly all originalist inquiry falls prey to, a failure to weigh and adequately contextualize eighteenth century texts, effectively treating all sources as if they were equally probative.<sup>57</sup> Legal scholar Larry Kramer has described

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<sup>52</sup> As Yale’s Reva Siegel observes, “there is more evidence in the majority opinion establishing the existence of a common law right of self-defense than there is demonstrating that such a right was constitutionalized by the Second Amendment’s eighteenth-century ratifiers.” Reva Siegel, *Heller and Originalism’s Dead Hand*, 56 UCLA L. REV. 1399, 1415 (2009).

<sup>53</sup> The Pennsylvania Moravians provide one of the more interesting examples of conscientious objectors. In contrast to Quakers whose radical peace testimony prohibited all forms of interpersonal violence, including harsh words and gossip, Moravians accepted the right of individual self-defense, but opposed bearing arms for military reasons. See generally Jared S. Burkholder, *Neither “Kriegerisch” nor “Quäkerisch”: Moravians and the Question of Violence in Eighteenth-Century Pennsylvania*, 12 J. MORAVIAN HIST. 143; Jack D. Marietta, *Conscience, the Quaker Community, and the French and Indian War*, 95 PA. MAG. HIST. & BIOGRAPHY 3 (1971); Hermann Wellenreuther, *The Quest for Harmony in a Turbulent World: The Principle of “Love and Unity” in Colonial Pennsylvania Politics*, 107 PA. MAG. HIST. & BIOGRAPHY 537 (1983). For additional discussion of the problem of conscientious objectors and the right to bear arms, see Saul Cornell, *Conflict, Consensus & Constitutional Meaning: The Enduring Legacy of Charles Beard*, 29 CONST. COMMENT. 383, 397–401 (2014).

<sup>54</sup> See Cornell, *supra* note 49, at 400.

<sup>55</sup> Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms*, 29 J. EARLY REPUBLIC 585, 606 (2009) (reviewing the scholarly debate over the meaning of the term “bear arms” in the Founding Era and concluding that the dominant usage in the print culture of the period fits a military or collective self-defense understanding of the term).

<sup>56</sup> BLACKSTONE, *supra* note 48, at \*60.

<sup>57</sup> As traditional originalist Richard Kay has noted, public meaning originalism has made it easier to manipulate sources about original meaning, not rendered originalism more rigorous. Richard S. Kay, *Original Intention and Public Meaning in Constitutional*

this originalist error as the “funhouse mirror” effect, in which evidence from the past is magnified out of proportion to its actual influence or significance, producing a grotesquely distorted version of the actual history.<sup>58</sup> Lindgren’s discussion of Maine Anti-Federalist Samuel Nasson’s views of arms bearing illustrates this type of distortion.<sup>59</sup> It is easy to see why Lindgren would have chosen Nasson’s text, which is readily available to modern researchers, because of its inclusion in modern documentary collections.<sup>60</sup> The fact that a text is widely available to modern scholars does not necessarily mean that it was widely available in the Founding Era or even representative of broader views at the time it was written. Nasson was writing to George Thatcher, a Federalist member of the First Congress, and a lawyer who would go on to become one of New England’s most illustrious jurists.<sup>61</sup> Nasson was a barely literate Maine Anti-Federalist, an odd choice for a proxy for the typical reader of the Constitution posited by most originalist theories.<sup>62</sup> Lindgren never provides a compelling legal justification for taking the views of the Anti-Federalists electoral losers and substituting them for the victorious Federalists who dominated the First Congress that actually wrote the Second Amendment.<sup>63</sup> There is no

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*Interpretation*, 103 NW. U. L. REV. 703, 719 (2009).

<sup>58</sup> Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 394 (2003); see also Cornell, *supra* note 49, at 390–91.

<sup>59</sup> Lindgren commits a common originalist error by treating the Founding Era as if it were a time of broad constitutional consensus instead of recognizing the profound tensions and conflicts in this period. See Cornell, *supra* note 51, at 47. On the range of voices in the Founding Era on the meaning of the right to keep and bear arms, see SAUL CORNELL, *A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 41–70 (2006). For a slightly revised version of this argument based on post-*Heller* scholarship, see Saul Cornell, *The Right to Bear Arms*, in *THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION* 739–44 (Mark Tushnet et al. eds., 2015).

<sup>60</sup> Samuel Nasson, *Letter from Samuel Nasson to George Thatcher* (July 9, 1789), in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 260–61 (Helen E. Veit et al. eds., 1991).

<sup>61</sup> See Cornell, *supra* note 59, at 64.

<sup>62</sup> On the political culture of the Maine frontier in this period, see ALAN TAYLOR, *LIBERTY MEN AND THE GREAT PROPRIETORS: THE REVOLUTIONARY SENTIMENT ON THE MAINE FRONTIER 1760–1820*, 110 (1990). For an overview of the originalism debate including the rise of the new originalism, see generally Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013).

<sup>63</sup> See generally Saul Cornell, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828* (1999) (arguing that anti-federalism is best understood as including at least three distinctive groups—elites, middling radicals, and plebeian radicals; the backcountry was dominated by the latter two groups); Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753 (2015) (analyzing different models of historical meaning relevant to constitutional theory).

credible historical evidence to support Lindgren’s assumption that Nasson’s views had any influence on Thatcher or any other members of the First Congress. If Nasson’s view had been as typical or as influential as Lindgren claims, Congress would have modeled the language of the Second Amendment on the Dissent of the Pennsylvania Minority, a widely distributed Anti-Federalist text which had demanded express protection for a right to hunt.<sup>64</sup> Yet, despite its wide distribution, no other published author or state ratification convention echoed the Dissent’s demands for such a right and it was not included in the text Madison consulted when drafting the Second Amendment.<sup>65</sup>

Lindgren’s silence about Thatcher’s extensive discussion of the meaning of the right to bear arms written in the *Cumberland Gazette* is also puzzling. “Scribble Scrabble,” the identity Thatcher adopted in his popular writing, offers yet another example of an eighteenth century source that supports a civic conception of arms bearing that Lindgren claims is a modern invention.<sup>66</sup> As this brief response has repeatedly demonstrated, Lindgren has not grappled with the voluminous scholarly literature on this issue, especially scholarship written after *Heller*.<sup>67</sup> Nor has he demonstrated a solid grasp of the relevant historical methodologies necessary to understand the meaning of Founding era legal texts. The role of history in constitutional adjudication remains controversial, but one thing seems indisputable: if we are going to use history in constitutional law we

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<sup>64</sup> Joseph Blocher, *Hunting and the Second Amendment*, 91 NOTRE DAME L. REV. 133, 160–61 (2015).

<sup>65</sup> See Paul Finkelman, *A Well Regulated Militia: The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 208 (2000) (discussing how Madison “emphatically rejected the goals and language” of the Dissent in drafting the Second Amendment). For another discussion of the problems of using the Dissent as proxy for broader patterns of belief about the meaning of arms bearing, see Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 158–60 (2007).

<sup>66</sup> George Thatcher, *Scribble Scrabble*, CUMBERLAND GAZETTE, Dec. 8, 1786. In this essay Thatcher uses the term “bear arms” broadly to include both military and non-military uses, while simultaneously asserting that only bearing arms for the common defense was constitutionally entrenched in the Massachusetts Declaration of Rights. For a discussion of Thatcher’s views on the right to bear arms, see generally Patrick J. Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 NW. U. L. REV. 1821 (2015).

<sup>67</sup> In his preface, Lindgren commends the articles in the symposium for adopting “a seriousness of tone and a commitment to evidence-based reasoning.” Lindgren, *supra* note 1, at 711. He further suggests that future scholarship must “follow the evidence to reach conclusions that our ideological compatriots might not embrace.” *Id.* at 715. Given these statements, the failure to cite or engage with post-*Heller* scholarship is even harder to fathom.



need to get the history right.<sup>68</sup> At the start of his foreword, Lindgren warned: “Guns seem to have a strange power over people: too often passion drives out thought.”<sup>69</sup> Ironically, Lindgren’s own essay has become yet another illustration of this sad fact. Instead of moving the debate forward, Lindgren’s account is stuck in the acrimonious pre-*Heller* world. It is time to move this debate forward and bring greater historical rigor to Second Amendment scholarship.

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<sup>68</sup> For good discussions of the multiple roles history might play in contemporary constitutional theory, see Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 657 (2013); see generally Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 *NOTRE DAME L. REV.* 1753 (2015).

<sup>69</sup> Lindgren, *supra* note 1, at 705.