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## The Resurgent Second Amendment

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# TULSA LAW REVIEW

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# TULSA LAW REVIEW

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## EDITOR'S NOTE

Book reviews are as versatile a tool as has ever been devised. They can critique or compliment a book, and often do both. They discuss prevailing theory while remaining free of theoretical dogma. Most crucially, they invite us to enrich ourselves with the texts they preview. The publication of book reviews in traditional law reviews provides an academic flavor, but the main course is still the quality and character of the books being reviewed.

This volume examines texts that engage an array of topics. Some discuss rights protections for the precious privileges that are often controversial yet still distinctly American. Texts on legal mechanics suggest where our government is headed, while texts on U.S. history look back on how far we have come. Some of the books reviewed discuss whether and how judges should defy unjust laws, even if sworn to uphold them. Race in America has always been a crucial and compelling issue, and it has inspired several books reviewed herein. Of course, constitutional law and politics feature heavily in this volume. They are topics about which legal minds never run out of things to say.

I hope this volume can inform a broad audience on the virtues of the books reviewed. I thank all of our many contributors this year, as well as Sandy Levinson and Mark Graber for their ongoing commitment to excellence.

—Jason McVicker  
Editor in Chief  
Tulsa Law Review

## THE RESURGENT SECOND AMENDMENT<sup>1</sup>

Robert J. Cottrol<sup>2</sup>

ROBERT H. CHURCHILL, *TO SHAKE THEIR GUNS IN THE TYRANT'S FACE: LIBERTARIAN POLITICAL VIOLENCE AND THE ORIGINS OF THE MILITIA MOVEMENT* (Univ. of Mich. Press 2009). Pp. 384. Cloth. \$40.00. Paperback. \$26.95.

ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* (W.W. Norton & Co. 2011). Pp. 361. Hardcover. \$27.95.

The Supreme Court's narrowly divided decision in *District of Columbia v. Heller* holding that the Second Amendment protected the right of individuals to possess handguns in their homes was the result of the convergence of a number of different forces, none of which would have seemed likely as little as two decades earlier.<sup>3</sup> The first of these was the legal academy's rediscovery of the Second Amendment in the 1990s. Those of us who participated in that rediscovery should acknowledge that much of the heavy lifting involved in unearthing the history was done by independent scholars affiliated with the gun owners' rights movement.<sup>4</sup> Still, the legal academy's rediscovery was critical, giving the endorsement of some of the nation's leading legal scholars, including William Van Alstyne, Akhil Amar, Sanford Levinson, Scott Powe, and Laurence Tribe, to what should be a fairly unremarkable proposition, that "the right of the people to keep and bear arms" was meant to protect the right of the people to keep and bear arms.<sup>5</sup>

1. Reviewing ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* (2011) and ROBERT H. CHURCHILL, *TO SHAKE THEIR GUNS IN THE TYRANT'S FACE: LIBERTARIAN POLITICAL VIOLENCE AND THE ORIGINS OF THE MILITIA MOVEMENT* (2009). The comments on WINKLER, *supra*, were based on a pre-publication draft manuscript.

2. Harold Paul Green Research Professor of Law, and Professor of History and Sociology, The George Washington University.

3. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

4. In the 1980s, three independent scholars, Stephen Halbrook, David Hardy, and Donald B. Kates Jr., were particularly important in challenging what by then had become the conventional wisdom that the Second Amendment only provided a limited protection connected with militia activity. See, e.g., STEPHEN P. HALBROOK, *THAT EVERYMAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (Univ. of N.M. Press 1st ed. 1984) (arguing that the Second Amendment was intended to preserve life and property as well as provide security from a tyrannical government); David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J. L. & POL. 1 (1987) (suggesting that both the individual and collective rights rationales are both required to fully comprehend the meaning of the Second Amendment); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983). The writings of historians Joyce Lee Malcolm and Robert Shalhope also played a critical role in the academic reassessment of the issue in the 1980s. See Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982).

5. For a discussion of the increased acceptance of the individualist model of the Second Amendment in the

The triumph of the individual rights view in *Heller* depended on more than a shift in scholarly opinion. We can probably agree that but for the controversial victory of George W. Bush over Albert Gore in 2000, the outcome in *Heller* would have been quite different. His victory gave President Bush the opportunity to appoint two Justices, John Roberts and Samuel Alito, who were persuaded by the individualist reading, to the High Court. Even the combination of a more favorable Court and an intellectual climate in which the individual rights view of the Second Amendment had regained a decent measure of intellectual respectability would not have been enough to bring about the Court's decision. Somebody had to bring the case. It is the story of that case, the attorneys who planned it, their opponents, and supporters that is the subject of Adam Winkler's fascinating study *Gunfight: The Battle Over the Right to Bear Arms in America*.<sup>6</sup>

Winkler provides an up-close examination of *Heller*. He is also concerned with recalling a history in which both the right to have arms and the regulation of guns co-existed in the American past.<sup>7</sup> If the modern debate has posited that these two concepts are polar opposites, Winkler uses *Gunfight* to remind us of their essential compatibility. Although Winkler's switching back and forth between the micro-history of the District of Columbia ("D.C.") litigation and the broader narrative concerning gun rights and gun regulation in American history gives *Gunfight* a somewhat disjointed character at times, Winkler is skillful at tying up the loose ends, bringing coherence to the broader narrative.

D.C.'s handgun ban and the litigation that ultimately overturned it are, of course, central to that narrative. There were good reasons why D.C. would become the venue for the Supreme Court's first serious consideration of the Second Amendment. A good case could be made that no other statute was likely to produce the Court's explicit recognition of an individual right to arms, at least not as a case of first impression. The Court had managed to avoid hearing a case directly on point for 69 years after its decision in *United States v. Miller*.<sup>8</sup> The District's statute seemed to be written almost as if it were designed to invite a Second Amendment challenge. The statute was an outlier, extreme in American terms. It banned ordinary firearms, not automatic weapons.<sup>9</sup> Its prohibition hit the entire population, not select classes like minors or people with criminal records. The statute also mandated that rifles and shotguns had to be rendered inoperative so that they could not be used for home defense.<sup>10</sup> No claim could be made that the statute was a reasonable regulation consistent with a private right to arms. To make it even more enticing, the District of Columbia was federal territory, so incorporation would not be an issue.<sup>11</sup>

That D.C. would provide the vehicle for the judicial revival of the Second

1990s see Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. R. 461 (1995).

6. WINKLER, *supra* note 1, at 14.

7. *Id.* at 12-14.

8. *Id.* at 24-25; *United States v. Miller*, 307 U.S. 174 (1939).

9. WINKLER, *supra* note 1, at 17.

10. *Id.*

11. Incorporation, or the application of the Bill of Rights to the states, had been one issue that had caused some courts to dismiss claims that state regulations infringed on Second Amendment rights. These cases relied on the Court's ruling in the nineteenth century case *Presser v. Illinois*, 116 U.S. 252 (1886).

Amendment was more than a little ironic. The handgun ban, passed in 1976, was originally seen as an opening salvo in what was to be a nationwide campaign to get large numbers of major cities to enact similar restrictions.<sup>12</sup> It was hoped that this effort would be a prelude to strict federal regulation and ultimately prohibition.<sup>13</sup> There were largely unsuccessful efforts to replicate the D.C. ban elsewhere in the 1970s and 80s. A statewide referendum in 1976 that would have banned handguns in Massachusetts failed, despite the Bay State's generally liberal politics.<sup>14</sup> The NRA had successfully convinced a number of state legislatures to pass firearms preemption legislation, limiting the ability of local municipalities to enact restrictive legislation.<sup>15</sup> Only Chicago and a few small towns in Illinois followed the District of Columbia's example with outright bans on handgun ownership. Still, when the D.C. ban passed, it was hailed as a jewel in the crown of the gun control movement, a movement which at the time was often frank in its desire for prohibition on handgun ownership and severe restrictions on long gun ownership.<sup>16</sup> The movement's advocates were also often openly hostile to the idea of gun ownership for self-defense.<sup>17</sup> Thus, the statute would stay on the books, a relic of another time which would invite the Court to take action.

Winkler gives us an insightful account of the litigation's unfolding. We meet the lawyers who planned the case, Robert Levy, businessman, lawyer, and fellow of the Cato Institute, Clark Neilly and other libertarian lawyers who supported the effort.<sup>18</sup> Winkler also tells us about Alan Gura, a newcomer to big time appellate litigation who would, through *Heller*, make constitutional history.<sup>19</sup> *Gunfight* also introduces us to ordinary people, not part of the American gun culture who nonetheless became advocates for the rights of gun owners simply out of the desire to defend their lives. Individuals such as Tom Palmer, a gay man who was only able to protect himself because he had brandished a pistol stopping a group of gay bashing thugs about to attack him,<sup>20</sup> and Shelly Parker, a black woman who fought to rid her neighborhood of drugs and then feared retaliation from the dope pushers who ruled the streets where she lived.<sup>21</sup> Parker's plight managed to produce a rare sympathetic portrait of a Second Amendment activist in the *Washington Post*, a paper known for its constant advocacy for stricter gun control laws.<sup>22</sup>

Winkler also tells about Dick Heller, a security guard at a federal courthouse who lived across the street from an abandoned housing project.<sup>23</sup> Heller carried a gun on the

12. WINKLER, *supra* note 1, at 18.

13. *Id.* at 18-19.

14. *From Bottle Bans to A-Plants . . . How Americans Voted*, U.S. NEWS & WORLD REP., Nov. 15, 1976, at 103.

15. See, e.g., ALASKA STAT. § 29.35.145 (2008); ARIZ. REV. STAT. ANN. § 13-3108 (2010 & Supp. 2010) (West).

16. See GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 9-12 (1991).

17. See WINKLER, *supra* note 1, at 22.

18. *Id.* at 45-60.

19. *Id.* at 6-8.

20. *Id.* at 21.

21. *Id.* at 43, 60.

22. Elissa Silverman, *Fight Against Ban Grew Out of Fear, Frustration*, WASH. POST, April 8, 2007, at C06.

23. WINKLER, *supra* note 1, at 42-43.



job, but could not keep one to defend his home from predators who lived in his neighborhood.<sup>24</sup> Heller managed to survive standing challenges to lend his name to the Supreme Court case.<sup>25</sup>

*Gunfight* guides the reader through the "fog of litigation" from D.C.'s perspective. D.C. had inherent difficulties defending the statute. The Courts were more conservative. This was true of the Supreme Court and the D.C. circuit as well. The statute was hard to defend. It was, in effect, an anti-self defense statute, requiring the citizen to be essentially defenseless at home, something no other American jurisdiction demanded. The District government made no efforts at trial to acknowledge a home defense exception. Indeed, D. C.'s advocates took a hard line in the District Court insisting the ban on weapons for home defense was absolute and those who possessed rifles and shotguns within the District's boundaries had to keep them inoperable.<sup>26</sup> It was an admission that would come back to haunt the D.C. advocate before the Supreme Court.<sup>27</sup>

Heller's challenge would lose in the District Court, but prevail in the D.C. Circuit. It was the first such ruling in American history. The ball was in D.C.'s court. Would the District apply for certiorari? Would it accept the appellate court's ruling and allow the statute to be struck down? Many on both sides of the debate were nervous. The stakes were high, perhaps higher for supporters of stricter gun control who had long enjoyed the support of the lower federal courts. The D.C. litigation could reverse that. *Heller* was particularly dangerous from their point of view. The facts were bad. Total prohibition and a ban on the instruments of self-defense in the home were not the kind of facts that made a favorable ruling likely. A ruling that the Second Amendment protected an individual's right to arms would be a devastating blow for the gun control movement.

Nevertheless, D.C. persisted. The District would petition for certiorari and defend the statute mandating handgun prohibition. That defense, as Winkler shows, was marred by internal squabbles within the D.C. government, internal squabbles that indicated no small amount of disarray as Washington's government prepared for the landmark case. D.C.'s internal conflicts led to the relatively late replacement of appellate advocate Alan Morrison with former Solicitor General Walter Dellinger as D.C.'s lawyer. Although both men were seasoned High Court advocates, Morrison had had more time to prepare and would have been able to devote his full energies to the case. Dellinger was preparing other cases for the Court when he was asked to represent D.C.

*Gunfight* gives us an excellent view of the oral argument.<sup>28</sup> The Justices were aware of Gura's inexperience. His most open ally on the Court, Justice Scalia, an avid hunter who had previously expressed his support for individual rights, gave the young attorney some coaching. At times, Scalia suggested that the libertarian lawyer slow down and at other points he suggested possible responses to questions posed by other justices.

24. *Id.* at 42.

25. *Id.* at 91-92.

26. *Id.* at 176-77.

27. During oral argument, D.C.'s advocate, Walter Dellinger, tried to repair the damage. In response to questioning from Chief Justice Roberts, Justice Alito, and Justice Scalia, he asserted that D.C. recognized a self-defense exception to the rule that rifles and shotguns had to be rendered inoperable. See Transcript of Oral Argument at 24, 82-86, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

28. WINKLER, *supra* note 1, at 173-79.

But Scalia's sympathies were not a surprise. The big question was Kennedy. How would he go? Early on, the swing Justice provided a hint that he was leaning toward an individualist reading of the Second Amendment; some observers noted a look of troubled resignation to Dellinger's face.

Winkler is successful at many things, from his vivid portrait of the *Heller* litigation to his discussion of firearms use and firearms regulation in the nation's history. But curiously, Winkler gives us an all too cursory intellectual history of the Second Amendment controversy, one that fails to do the topic justice. It also shortchanges one of Winkler's central concerns: how to reconcile the right to arms with reasonable regulation. For Winkler, the history is fairly straightforward. The collective rights or militia only view of the Second Amendment was the prevailing one until relatively recently. The individual rights view is a relative newcomer, brought about by the reaction of the NRA and others to the national gun control movement spawned by the tragedy and turmoil of the 1960s. As evidence for this, Winkler cites an article by political scientist Robert Spitzer, indicating the absence of law review literature supporting the individual rights view before the 1960s.<sup>29</sup> The Second Amendment, Winkler believes, should be recognized as protecting an individual right, but more so on a living constitution theory than on grounds of original intent or longstanding acceptance of the individualist view.

A stronger case can and has been made for the opposite history. Without getting into the debates over the eighteenth century framers' intentions and understandings, it is clear that the individual rights view of the Second Amendment was the dominant one among nineteenth century jurists and commentators.<sup>30</sup> Nineteenth century commentators certainly saw the link between the right to arms and the militia, but not the restrictive linkage urged by the modern gun control movement. The prevailing view was that an armed population was an inchoate militia that could be summoned to aid the state and could also act as a bulwark against potential tyranny. That view was repeatedly endorsed in the state court jurisprudence and even in the Supreme Court's case law, most notably in *Presser v. Illinois*.<sup>31</sup> This point of view was endorsed by leading nineteenth century commentators including St. George Tucker, Justice Joseph Story, and Michigan jurist Thomas Cooley.<sup>32</sup> The notion that the population at large was protected by the right to have arms also co-existed quite comfortably with the idea of regulation, including

29. See Robert J. Spitzer, *Symposium on the Second Amendment: Fresh Looks: Lost and Found: Researching the Second Amendment*, 76 CHL.-KENT L. REV. 349, 363-66 (2000).

30. For a good general treatment of this, see David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359 (1998).

31. Although *Presser* stated that the Second Amendment did not limit state regulation of firearms, the opinion by Justice Woods also stated:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia . . . the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.

*Presser v. Illinois*, 116 U.S. 252, 265 (1886).

32. Robert J. Cottrol & Raymond T. Diamond, *Public Safety and the Right to Bear Arms*, in THE BILL OF RIGHTS IN MODERN AMERICA: REVISED AND EXPANDED 88, 94-95 (David J. Bodenhamer & James W. Ely, Jr. eds., 2d ed. 2008); THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 297-99 (3d ed. 1898).

legislation prohibiting the carrying of concealed weapons, among other restrictions. This view would remain the prevailing one well into the twentieth century. It underlay the Court's decision in *Miller*,<sup>33</sup> and would be also be reiterated by, among others, political scientist Edward S. Corwin, one of the nation's leading constitutional commentators in the first half of the twentieth century.<sup>34</sup> The idea that the Second Amendment was originally meant to support the individual citizen's right to have arms as a potential hedge against tyrannical government was also endorsed by Roscoe Pound in his 1957 published lectures, *The Development of Constitutional Guarantees of Liberty*, although the former Dean of Harvard Law School called for minimal if any enforcement of the amendment on prudential grounds.<sup>35</sup> Far from having an ancient pedigree, the varying views that the Second Amendment only protects members of the militia acting in an official capacity is the newcomer, one that only gained strength with the post 1960s gun control movement.

My point here is not to rehearse once again the individual versus collective rights arguments. These have been well covered in other fora and the debate will go on. However, I do believe that a closer examination of the intellectual history of the debate and the nearly successful effort to nullify the Second Amendment in the second half of the twentieth century could have brought Winkler to a better understanding of one of his central concerns, how to reconcile a right to arms with the need for firearms regulation? Why is there a huge political movement ready to attack any effort at regulation? It exists precisely because the gun control movement that arose out of the turmoil and tragedy of the 1960s was radically different from earlier attempts at firearms regulation. If regulators in the nineteenth and early part of the twentieth century were largely concerned with how weapons might be carried, or whether a relatively small subset of weapons were too dangerous for public use, the modern gun control movement has always had a strong prohibitionist streak. For many, the D.C. statute was not extreme. It was a model. This prohibitionist streak had to be accommodated with a radical re-understanding of the Second Amendment, one that stated in effect that it protected nothing. There was no constitutional barrier to gun prohibition. This new vision never gained public acceptance.<sup>36</sup> But it did bring about the transformation of the NRA from a

33. Until *Heller*, *Miller* was routinely cited by the lower federal courts for the proposition that the Second Amendment did not protect the right of individuals to have arms outside of a militia context. That doctrine would not stand up under a careful reading of the McReynolds opinion in *Miller*. Nowhere in *Miller* does McReynolds inquire as to the militia status of Jack Miller and Frank Layton, originally indicted for unlawful transportation of a sawed off shotgun. The Court's opinion recognizes that at the time of the enactment of the Second Amendment the militia consisted of the entire male population that was expected to perform its duties with privately supplied weapons. The *Miller* Court relied heavily on the nineteenth century Tennessee case, *Aymette v. State*, which might be simplified into the proposition that certain weapons, those which civilized people would use to come to the aid of state authorities are constitutionally protected, while weapons which are largely used by criminals are not. 21 Tenn. (2 Hum.) 154, 159-60 (1840). Following the reasoning in *Aymette*, McReynolds declined to take judicial notice that a sawed off shotgun was ordinary militia equipment and thus constitutionally protected. U.S. v. Miller, 307 U.S. 174, 178 (1939). The focus was on the weapon and not the individual's militia status.

34. EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 203 (11th ed. 1954).

35. Roscoe Pound, From the Revolution to the Constitution, in THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 82, 89-91 (1957).

36. See, e.g., JAMES D. WRIGHT, PETER H. ROSSI & KATHLEEN DALY, UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA 238-40 (1983).

group that, as Winkler shows, was supportive of gun control measures in the first half of the twentieth century to one that fiercely opposed most regulatory measures from the 1970s on.

The knowledge that the gun control movement believed in no constitutional limitations to gun control and that that vision was supported by the nation's elites, including the national press and most of the federal judiciary gave the gun control debate much of its all-or-nothing character. Proposed regulations would be debated not on the grounds of their reasonability or efficacy, but as to whether or not they were stepping stones to further regulation and ultimate prohibition. The knowledge that the courts would set no limits in this area only fed the determination of gun owners not to yield an inch in the debate. It is too early to tell whether the Court's decisions in *Heller* and *McDonald* will change this dynamic. The Court has at long last announced judicial protection of still undetermined scope for the individual's rights under the Second Amendment. Both decisions purport to be very modest, only in effect overturning statutes in jurisdictions that were, in American terms, extreme outliers. Even so, a number of jurists have denounced both decisions as examples of judicial overreach.<sup>37</sup> The reconciliation between the right to arms and reasonable regulation that Adam Winkler would like to see established is not likely to come soon. Instead, it is likely to remain for some time the victim of the bitter culture wars that have been part of the Second Amendment debate for better than two generations.

The subject of historian Robert H. Churchill's *To Shake Their Guns in the Tyrant's Face: Libertarian Political Violence and the Origins of the Militia Movement* is how that bitter cultural struggle helped bring about the militia movement of the 1990s.<sup>38</sup> Churchill's task is to take us beyond the familiar stereotypes of the movement and its members: racists, right wing wackos, gun nuts etc., to provide a far more complex and nuanced narrative. In doing so, he provides a link between the modern militia movement and the libertarian ideology that informed a substantial portion of the political actors of the founding era. The Second Amendment appears in Churchill's study less as the object of judicial interpretation or academic commentary and more as an element of popular constitutionalism and national memory. For Churchill, the critical historical question is how ordinary Americans and their often opposing political factions have remembered the American Revolution and its insurrectionary implications.<sup>39</sup> A critical part of that historical question is how Americans in different eras have seen the interrelated issues of the right to have arms, the preservation of militias, and the possibilities of revolt against a potentially tyrannical state.<sup>40</sup> An understanding of that heritage is essential to an understanding of the militia movement of the 90s.

Churchill's central concern is the question of how an idea that was once a central part of American political and constitutional theory ultimately became marginalized, a

37. Including, interestingly enough, conservative jurists Richard Posner and J. Harvie Wilkinson. See J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 266-67 (2009); Richard Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, THE NEW REPUBLIC, Aug. 27, 2008, <http://www.tnr.com/print/article/books/defense-looseness>.

38. See CHURCHILL, *supra* note 1, at 22-23, 185-90.

39. *Id.* at 18-23.

40. *Id.* at 212-16.

notion only entertained, at least publically, by political extremists.<sup>41</sup> The idea that a right to arms and the preservation of popular and local militias were desirable as a hedge against a state gone bad were mainstream ideas in the founding generation. Federalists and anti-Federalists alike were heirs to the English Whig notion of the legitimacy of revolution against a sovereign guilty of trampling upon ancient liberties.<sup>42</sup> In their view, like the English Whigs of 1688, they had overthrown the rule of a despotic monarch who sought to deny them the traditional rights of Englishmen.<sup>43</sup> They agreed in principle that the capacity for popular revolution had to be preserved, even if they differed on the particulars of when a revolution might be justified, or what would be the appropriate mechanism for conducting insurrection.<sup>44</sup>

That revolutionary era consensus was light years away from the United States in the 1990s. The Second Amendment faced what many correctly believed was a hostile White House and a judiciary that was largely about the business of following Dean Pound's advice to nullify the constitutional provision protecting the right to arms. The militia movement that in many respects was echoing the prevailing political philosophy of the founding era was being roundly condemned from all points on the political compass. Churchill does a yeoman's job in guiding the reader through political violence and its justification in founding era ideology as a chapter in the history of American ideas. If the Federalists had agreed during the War for Independence that the Crown's usurpations justified taking up arms and overthrowing the British yoke, they were considerably less enthusiastic by the time they were in power and Revolutionary War veteran John Fries was engaging in armed protests against taxes levied during John Adams' administration.<sup>45</sup> This uncomfortable co-existence of the revolutionary era's libertarian philosophy and the need for an ordered government and an ordered society would not end with the founding generation. Long after that generation had passed from the scene, others would draw inspiration from the American Revolution and the Declaration of Independence with their calls for natural rights, which include the right to overthrow an oppressive government. Often the historical actors would come from diametrically opposite points of the political compass. Abolitionists would draw on this tradition when they engaged in extra-legal actions to prevent the forced return of fugitive slaves to southern states.<sup>46</sup> Their ideological opponents, pro-slavery and pro-Confederate Democrats, would also call on libertarian memories of the Revolutionary era when they invoked images of Lincoln as tyrant and usurper while advocating insurrection against the Unionist government.<sup>47</sup>

Churchill adds this narrative of political violence and political resistance to his discussion of modern America. Political violence would often be racial violence.<sup>48</sup> This

41. *Id.* at 2-6.

42. *Id.* at 36-40.

43. *See id.*

44. *Id.*

45. *See generally* Jane Shaffer Elsmere, *The Trials of John Fries*, 103 PA. MAG. HIST. & BIOGRAPHY 432 (1979).

46. CHURCHILL, *supra* note 1, at 102.

47. *Id.* at 115-16.

48. *Id.* at 150-53.

would surface almost immediately after the Civil War with the growth of the first Ku Klux Klan.<sup>49</sup> In the wake of the First World War, the second Klan continued this tradition.<sup>50</sup> It was able to cloak itself in an all-American package in many parts of the nation, emphasizing the virtues of white, Protestant America and launching attacks on blacks, Jews, Catholics, radicals, and the foreign born.<sup>51</sup> The second Klan was large scale and in many states mainstream in the 1920s. This group dominated politics in Indiana and was actively courted by political leaders in many states. Hooded Klansmen and women staged grand parades down the nation's great boulevards, including Pennsylvania Avenue in Washington D.C. Churchill also tells us about labor violence and the clandestine anti-Negro, anti-Catholic, anti-Semitic, and anti-foreign Black Legion of the 1930s.<sup>52</sup> Churchill tells us of the American left's fear of the Black Legion later and how that fear led in turn to the liberal repression of political actors on the right.

It is that latter concern, repression from the left from modern liberals, where *To Shake Their Guns in the Tyrant's Face* is at its most troubling and most valuable. The discussion of the revolutionary era, nineteenth century, and early twentieth century America are a prelude to Churchill's principal concern: the militia movement of the 1990s. The movement arose in part because of ideological disagreement over the meaning of the Second Amendment. But something more was afoot. As Churchill observes, the nation's political and intellectual elites had long since shed the founding era's belief in a right to revolution. They had done so for many reasons. The idea of insurrection rarely sits well with established leaders for obvious reasons. The nation had found this out early in its history when the Federalists, who had led the Revolution against George III, found themselves facing acts of rebellion in response to excise taxes they had imposed on the new nation. But something more had brought the notion of insurrection into bad odor among the nation's leadership classes in the latter half of the twentieth century. This notion was associated with political extremism, the kind of extreme movements of the left and right that had brought other nations to ruin, the kind of extremism that the American nation had gone to war against and had been permanently mobilized against since the early 1940s. Also, as the twentieth century was drawing to a close, support for insurrection was increasingly associated with uncomfortable memories, which served as unwelcome reminders of the nation's racist past, a past the nation was working hard to try and shed. Whatever the founding generation may have thought of insurrection, the leading heirs of the Revolution that began with a declaration justifying armed rebellion had turned firmly against the notion. It should be noted that the idea that insurrection could be justified, like the individualist view of the Second Amendment, still resonated strongly with significant segments of the American population. Politicians would have to at least give lip service to the concept, as indeed they would have to acknowledge support for the individualist view of the Second Amendment, even if the nation's 'betters' repeatedly told the citizenry that both concepts

49. *Id.* at 146-53.

50. *Id.* at 152-53.

51. *See id.* at 151-53.

52. *Id.* at 153-67.



were at best foolish and at worse downright dangerous.<sup>53</sup>

But it would take more than disagreement over the Second Amendment and its preservation of the possibility of revolution to bring about the militia movement. It would also take, as Churchill shows, the development of a more paramilitary approach to law enforcement: the transformation of police officers into quasi-soldiers, who are at times backed up by armored vehicles, armed helicopters, and automatic weapons.<sup>54</sup> Many of these developments were not exactly new in many of the nation's inner city communities, but the application of such tactics in many white communities was new and often surprising. Police charged with fighting the ever-unsuccessful drug war or enforcing gun laws that were unpopular in many communities found themselves in conflict with broad segments of the white working and middle class populations. This helped bring about a re-examination of many of the revolutionary philosophies of the founding era.

Federal law enforcement would supply the match to this tinderbox with two incidents of overreaching, if not incompetent and downright criminal behavior on the part of federal officials. Neither Randy Weaver, the White Supremacist of Ruby Ridge, Idaho, nor David Koresh, leader of the Branch Davidian cult of Waco, Texas, were particularly sympathetic characters; indeed they were quite odious. However, in their efforts to get both men, federal law enforcement agents killed dozens of people who either had committed only minor offenses or in some cases were entirely innocent of any crime, including children burned alive at the Branch Davidian compound.<sup>55</sup> Federal agents did so when, it should be added, less lethal alternatives were available.<sup>56</sup> The militia movement was born in large part as a reaction to the two incidents.<sup>57</sup>

Churchill is at his best in showing the many variations of that movement and the individuals who joined. The militia movement was accused of being racist. In some cases, the charge was well deserved. But many militia members went out of their way to extend a welcome to black members, some of whom became leaders in the militia movement in their own right. The refusal of many liberal groups to recognize this fact doubtless says a great deal about the persistence of stereotypes of a racist middle America among many liberals long after that stereotype, at least in its crudest form, has become woefully out of date. Churchill's discussion of the conduct of federal agents at

53. If the idea that the population should be armed to make revolution against a potentially tyrannical government possibly had fallen into disfavor among the nation's elites, it still seemed to have a resonance with significant segments of the population. In 1960, then Senator Hubert Humphrey published a response to a query from a gun magazine indicating his views on the importance of the Second Amendment and its role as a hedge against potential tyranny:

Certainly one of the chief guarantees of freedom under any government, no matter how popular and respected, is the right of citizens to keep and bear arms. This is not to say that firearms should not be very carefully used, and that definite safety rules of precaution should not be taught and enforced. But the right of citizens to bear arms is just one more guarantee against arbitrary government, one more safeguard against a tyranny which now appears remote in America, but which historically has proved to be always possible.

Hubert H. Humphrey, *Know Your Lawmakers*, GUNS, Feb. 1960, at 4.

54. See CHURCHILL, *supra* note 1, at 188-90.

55. See *id.* at 188-95.

56. See *id.* at 193.

57. *Id.* at 187-88.

both Ruby Ridge and Waco also raises disturbing questions that go far beyond the simple issue of liberal elites engaging in crude stereotyping. Were officials in the Justice Department, particularly Attorney General Janet Reno, not held fully accountable for botched lethal operations because the victims came from groups that were deeply unpopular with liberal constituencies? Was the Clinton administration able to silence the militia movement's very valid protest of misconduct by federal law enforcement agents in part because it was able to use false stereotyping of the movement's members and to enhance those stereotypes by falsely linking Oklahoma City bomber Timothy McVeigh with the militia movement? These are particularly disturbing questions for those concerned with the rule of law and how the law is administered to disfavored groups. Churchill has done an important service by reminding us of this.

The militia movement of the 1990s has receded, a victim both of bad publicity and of the changing times. That movement was in large part a response to the perceived threat that the Clinton administration posed to gun ownership and the continued viability of the Second Amendment. That threat seems less dire in light of eight years of the Second Amendment-friendly Bush administration, and the Court's decisions in *Heller* and *McDonald*. Even after its first two years, the Obama administration has failed to revive the perception of an imperiled Second Amendment, at least at the levels that existed in the 1990s. The first decade of the twenty-first century has also seen new concerns. Terrorism and economic hardship occupy the national consciousness in ways that would have been unimaginable in the last decade of the old century. The remedies for these ills and how to implement them without fundamentally altering our previous assumptions that we could enjoy a society that protected a broad degree of both security and freedom have largely crowded out the debate over the Second Amendment and its meanings. The debate is still there, in inchoate form. The individual rights view of the amendment enjoys, as it always has, broad popular support. Moreover, to that popular support has been added a narrow endorsement by the nation's highest Court. However, that acceptance on the part of the nation's jurists is precarious. The debate is still with us, and Winkler and Churchill both do much to help us understand it.