

## Book Review

Mark V. Tushnet, *Out of Range: Why the Constitution Can't End the Battle Over Guns*. New York: Oxford University Press, 2007, pp. 176, \$19.95.

Reviewed by Dennis A. Henigan

Rarely does an author go to the trouble of writing a book about a subject in which he has little interest. Yet that apparently is what Harvard Law School Professor Mark Tushnet did in *Out of Range: Why the Constitution Can't End the Battle Over Guns*. He acknowledges as much in the Introduction: "Before writing this book, I had only an academic interest in the Second Amendment—and I still do; neither the Second Amendment nor gun policy generally ranks high on my list of concerns" (xv). Tushnet writes not only as a disinterested observer, but as a largely uninterested observer.

This unusual vantage point has much to do with the tone and content of this book. The author writes as a thoughtful, dispassionate onlooker, encountering the arguments on both sides of the gun issue for the first time. There is much that is rewarding about following Professor Tushnet as he winds his way through the arguments, displaying his considerable descriptive and analytic skills. In short, much of *Out of Range* is truly enjoyable reading.

It is not surprising that Tushnet regards neither the Second Amendment nor gun policy as high on his list of personal concerns, since the core theme of the book is that the gun debate is not over legal or policy issues that have importance in themselves, but rather is a debate about something else entirely—as he puts it, "about how we understand ourselves as Americans" (xix). In his view, the gun issue is yet another battle in the perpetual "culture wars," in which great heat is generated on both sides about legal and policy questions that turn out to be of little significance. According to Tushnet, interest groups function to fan the cultural flames on both sides of the issue in order to bring in donations, but neither policy proposals to expand gun ownership and carrying, nor those to further regulate it, are likely to make any difference to the level of gun crime and violence (76).

There is no question that there are important cultural dimensions to the gun issue. For many Americans, the gun has enormous symbolic significance as the wellspring of individual liberty and the guarantor of a free society. And,

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for many on the gun control side, it is difficult to understand how guns can be seen as anything other than instruments of death and destruction.

But, as I develop more fully below, it is surely possible to acknowledge the cultural dimensions of the gun issue without reaching the conclusion that there is nothing more at stake. For example, Tushnet concludes that “gun policies of any sort probably have relatively little effect on the level of gun violence, not to mention violent crime” (130). This claim is largely unsupported in his text and, in fact, is contradicted by a wealth of empirical evidence that remains unmentioned in the book. Moreover, recent Supreme Court decisions giving a broad reading to the Second Amendment (issued after the publication of the book) may well have the paradoxical effect of lessening the cultural intensity of the gun debate, allowing a greater focus on the practical benefits of gun regulation for public safety.

Tushnet’s theme—that the gun debate is “much ado about nothing,” except the culture wars—is the central flaw in *Out of Range*. Having begun his examination of the gun issue from a largely “uninterested” perspective, *Out of Range* essentially functions as an elaborate justification of that perspective. The “uninterested observer” point of view gives the book one of its strengths—its radical dispassionateness—but turns out also to be the source of its greatest weakness in its failure to make any serious effort to understand the public health and safety importance of gun regulation.

Perhaps this is an appropriate point for me to recognize that, given my own record as a gun control advocate, it should come as no surprise that I would have a problem with a text suggesting that stronger gun laws would have no impact on crime or violence. Indeed, I have worked for over twenty years for one of the groups—the Brady Center to Prevent Gun Violence—that Tushnet sees as a big part of the problem, because such groups (he also includes the National Rifle Association here) simply stir up the cultural war on guns, distracting attention from other policies not involving gun regulation that could have a real impact in making us safer.

To this I would respond that disinterested, or even uninterested, observers can be wrong, while passionately committed advocates can be right. It should be the quality of the arguments and evidence that ultimately matters, not the mindset of the advocate. Tushnet’s “uninterested” approach has not cornered the market on insight. Indeed, it deprives *Out of Range* of the depth required for a more satisfying illumination of a very complex issue.

### **The Second Amendment Debate**

Most of the book is devoted to the clash of arguments over the meaning of the Second Amendment: “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.”<sup>1</sup> Of course, much has happened on that front since *Out of Range* was published in 2007. A year later, the Supreme Court issued its

1. U.S. Const. amend. II.

landmark ruling in *District of Columbia v. Heller*,<sup>2</sup> a 5-4 decision striking down the District of Columbia's handgun ban and holding, for the first time in our history, that the Second Amendment guarantees a right to possess a gun in the home for self-defense, with no necessity of a connection between gun possession and a "well regulated Militia." Since the District of Columbia is a federal enclave, *Heller* established this right only as to the District and the federal government, reserving the question whether the Second Amendment right, as newly defined, applies as a restraint on states and localities through the Fourteenth Amendment.<sup>3</sup> In June 2010, the Supreme Court, in *McDonald v. City of Chicago*, answered this question in the affirmative, by the same 5-4 vote that had decided *Heller*.<sup>4</sup> The *McDonald* Court struck down Chicago's handgun ban as a violation of the Second Amendment.

Tushnet's treatment is very much a "first impression" of the Second Amendment debate. In his words, he has "described the main lines of argument," but "can't pretend that my discussion here deals with every nuance of the arguments made by proponents of gun rights and those of gun control" (25). Of course, Tushnet is free to provide a "once over lightly" account. It also is legitimate to inquire whether his first impression may be misleading, once the inquiry goes a bit deeper.

Tushnet finds the opposing arguments about the Second Amendment "in reasonably close balance." If a strictly originalist approach is used—that is, if an "understanding of its terms when it was adopted" were the only issue—Tushnet finds that the pro-gun-rights position "is a bit stronger than the alternative" (xvi). However, he finds an exclusively originalist approach defective as a general interpretive principle. If original meaning is used merely as a starting point and other interpretive tools, such as precedent, are taken into account, Tushnet finds that "[g]un control proponents have a significantly stronger case than their adversaries..." (xvi).

The role of originalism in the debate is an interesting subtext of Tushnet's discussion. Given his conclusion that supporters of gun control have a much better case if originalism is given a minor part in the debate, he is puzzled about "why gun-control proponents think they should fight" on "textual and originalist grounds" (68). He must be equally puzzled as to why Justice Stevens' dissent in *Heller* devotes so much attention to the original meaning

2. 128 S.Ct. 2783 (2008).

3. *Heller*, 128 S.Ct. at 2813 n.23.

4. *McDonald v. City of Chicago*, No. 08-1521 (U.S. Sup. Ct. decided June 28, 2010). It should be noted, however, that there was no majority for a common theory explaining how the Second Amendment applies to states and localities. Four justices, in a plurality opinion by Justice Alito, determined that the Second Amendment applies through the Due Process Clause of the Fourteenth Amendment, but not through that Amendment's Privileges or Immunities Clause. *McDonald*, No. 08-1521, at 44 (Alito, J., plurality opinion). In his concurrence, Justice Thomas adopted the Privileges or Immunities theory, but rejected the Due Process theory. *Id.* at 1 (Thomas, J., concurring).

issue (although it also addresses precedent and other considerations as well), and why Justice Breyer, in his dissent in *McDonald*, continues the attack on *Heller*'s analysis of original meaning.<sup>5</sup>

My own view is that the fight on "textual and originalist grounds" is unavoidably important to understanding the Second Amendment because the text itself is so foreign to contemporary ears. How are we to even begin to understand what a "well regulated Militia" is without trying to discern what the phrase meant in 1791? What is it to "keep and bear Arms"? To contemporary courts, the Second Amendment must appear as if written in a foreign language. This is not to say that original meaning is the only relevant interpretive tool, but it is certainly easy to understand why it has assumed such a dominant role in the Second Amendment debate.

The fact that the text seems so opaque to modern readers does not necessarily mean that its original meaning is, as Tushnet seems to think, a close question. The text may need translation, but its meaning is not necessarily destined to be unclear once the proper techniques of translation are used. A careful analysis of the historical record makes a strong case that the subject matter of the Second Amendment is entirely the distribution of military power between state militias and a federal standing army, and has nothing to do with the right to have a gun for personal purposes.

In this conclusion, I have good company. Justice Stevens's powerful dissent in *Heller* plainly did not find it to be a close question, concluding that the majority opinion "has utterly failed" to establish a non-militia, personal right "as a matter of text or history."<sup>6</sup> It also is revealing that the originalist interpretation of the Second Amendment as guaranteeing a right to be armed for personal, non-militia purposes receives virtually no support among professional historians. Of the sixteen academic historians who joined briefs *amicus curiae* in *Heller*, fifteen argued for the militia purpose view.<sup>7</sup> The historians' attack on the personal purpose reading has continued in earnest

5. *McDonald*, No. 08-1521, at 2-5 (Breyer, J., dissenting).

6. *Heller*, 129 S.Ct. at 2846 (Stevens, J., dissenting).

7. The historical case supporting the view that the original meaning of the Second Amendment concerned the bearing of arms in an organized militia was persuasively presented in a brief filed in *Heller* by fifteen academic historians. See Brief of Jack N. Rakove et al., as Amici Curiae Supporting Petitioners, *Heller*, 128 S.Ct. 2783 (No. 07-290). Only one professional historian, Professor Joyce Lee Malcolm of George Mason University Law School, filed a brief in *Heller* supporting the contrary view as a matter of original meaning. Brief of the CATO Institute and History Professor Joyce Lee Malcolm as Amici Curiae Supporting Respondent, *Heller*, 128 S.Ct. 2783 (No. 07-290). Long before *Heller*, historians had maintained a full-scale assault on the theory that the original meaning of the Second Amendment was to guarantee the right to have guns apart from militia service. See e.g., Saul Cornell, *A Well Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (Oxford Univ. Press 2006); H. Richard Uviller & William G. Merkel, *The Militia and the Right to Arms, or, How the Second Amendment Fell Silent* (Duke Univ. Press 2002); Carl T. Bogus (ed.), *The Second Amendment in Law and History: Historians and Constitutional Scholars on the Right To Bear Arms* (New Press 2000).

after *Heller*, with twenty-four historians (and one political science professor) joining *amicus* briefs in *McDonald v. City of Chicago* sharply critical of the *Heller* majority's treatment of original meaning.<sup>8</sup> Indeed, in his *McDonald* dissent, Justice Breyer, joined by Justices Ginsberg and Sotomayor, noted "[s]ince *Heller*, historians, scholars, and judges have continued to express the view that the Court's historical analysis was flawed."<sup>9</sup> Justice Breyer was moved to ask: "If history, and history alone, is what matters, why would the Court not now reconsider *Heller* in light of these more recently published historical views?"<sup>10</sup> Those who support the *Heller* ruling on originalist grounds ought to experience some discomfort from the withering criticism of the majority opinion from those with expertise in the history of the period and the meaning of the text to those who lived that history.<sup>11</sup>

Professor Tushnet may regard the issue of original meaning as a close question in part because of the way he frames the question. For Tushnet, the issue is whether the Second Amendment guarantees an "individual right" (and he describes various versions of that theory), or whether it creates a "collective right" or "states' right," i.e. "the right of the states to organize their own militias, roughly, the state-organized National Guard we now have" (48). The use of this terminology gives the "individual right" view an immediate advantage, because the text clearly grants the right to "the people," which intuitively means individuals, not states. Moreover, it places a difficult burden

8. Brief for English/Early American Historians as Amici Curiae Supporting Respondents, *McDonald* (No. 08-1521); Brief of Historians on Early American Legal, Constitutional and Pennsylvania History as Amici Curiae Supporting Respondent, *McDonald* (No. 08-1521). The scholarly literature also reflects the historians' hostility to the *Heller* majority's version of original meaning. *See, e.g.*, Saul Cornell, *Heller, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 *UCLA L. Rev.* 1095 (2009); 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); Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller,* 69 *Ohio St. L.J.* 625 (2008) [hereinafter *Originalism on Trial*].
9. *McDonald*, No. 08-1521, at 3 (Breyer, J., dissenting).
10. *Id.* at 5.
11. It could be argued that Tushnet's judgment that the original meaning of the Second Amendment is a close question was vindicated by the *Heller* Court's 5-4 vote, as well as by the sheer length of the majority's discussion of original meaning. As I have developed in more detail elsewhere, Justice Scalia's majority opinion is far more an exercise in ideology than in principled constitutional adjudication, even under the banner of originalism. *See* Dennis A. Henigan, *The Heller Paradox,* 56 *UCLA L. Rev.* 1171 (2009). As to the length of Scalia's opinion, I prefer the view of Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit and the most prolific conservative legal scholar of our time, who found the length of the opinion "evidence of the ability of well-staffed courts to produce snow jobs." Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control,* *The New Republic*, Aug. 27, 2008, at 32. For a provocative critique of *Heller* by another prominent conservative jurist, who denounced the opinion as "judicial lawmaking," see J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law,* 95 *Va. L. Rev.* 253 (2009).

on the advocate of a “collective right” interpretation to explain how a right granted to “the people” could be “collective,” but not be “individual” at all.

This Second Amendment issue need not, and should not, be framed in this way, although it often is, by courts and commentators.<sup>12</sup> There is no doubt that the text confers the right on “the people.” The issue is the nature and scope of the right conferred on “the people.” Is it a right to be armed for personal, non-militia purposes? Or is it a right to be armed only in connection with service in the organized militia of the states? One of the most appealing aspects of Justice Stevens’s *Heller* dissent is that it, at the outset, cuts through the misleading terminology:

The question presented by this case is not whether the Second Amendment protects a “collective right” or an “individual right.” Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.

Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it *does* encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case.<sup>13</sup>

With the issue posed in this way, the militia purpose view acquires new strength. Indeed, this reframing of the issue shifts the burden to proponents of the private purpose view to explain why the text begins with an assertion of the importance of a “well regulated Militia” if the people’s right to keep and bear arms is for purposes that may have nothing to do with militia service.

Apart from his framing of the issue, Tushnet’s assessment of text and original meaning as a close question suffers from his failure to do the more penetrating analysis needed to separate the strong arguments from the weak ones.

For example, Tushnet attaches unfortunate plausibility to the meaning of the phrase “well regulated Militia” advanced by the private purpose advocates. As he correctly describes it, their version of a “well regulated Militia” turns out to be not “regulated” at all. Citing 18<sup>th</sup> century sources referring to the militia as “composed of the body of the people,” Tushnet asserts\* that the militia “consisted of *every* able-bodied mature white male...[and] not an organization with a list of qualifications for membership, or indeed any sort of ‘organization’ at all” (10). If the “well regulated Militia” is simply a term for

12. For a discussion of the frequently misleading framing of the Second Amendment issue, see Dennis A. Henigan, *Self-Inflicted Wounds: The D.C. Circuit on the Second Amendment*, 18 *Geo. Mason U. Civ. Rts. L.J.* 209, 223 n.78, 225 n.84 (2008). *See also* David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 *Mich. L.Rev.* 588, 613-615 (2000).

13. *Heller*, 128 S.Ct. at 2822 (Stevens, J., dissenting).

the body of armed individuals who could be organized into a fighting force (but haven't been), there seems little tension between the use of that phrase and the guarantee of a right to possess guns for the private purposes of those same individuals. "As a matter of original understanding," Tushnet writes, "this interpretation seems unassailable" (10).

Actually, this interpretation of the "well regulated Militia" is quite assailable. There is no question that the militias of the founding era were composed of the vast majority of able-bodied males. However, the concept of an "unorganized militia" was foreign to that era.<sup>14</sup> Indeed, it is fair to say that a militia came into being only through individuals being organized into a militia.<sup>15</sup> As Justice Stevens's *Heller* dissent painstakingly shows, the pre-constitutional militias were organized by operation of state law.<sup>16</sup> In short, the "well regulated Militia" was a system of compulsory military service imposed on much of the adult male population. As Noah Webster described it in his legendary 1828 dictionary, "The militia of a country are the able bodied men organized into companies, regiments and brigades...and required by law to attend military exercises on certain days only, but at other times left to pursue their usual occupations."<sup>17</sup> Militiamen were ordinary citizens pursuing "their usual occupations," thus distinguishing the militia from the professional soldiers of what was then called the "standing army."<sup>18</sup>

After finding "unassailable" the idea that the "well regulated Militia" was simply the unorganized body of armed citizens, Tushnet struggles with the concept of the militia reflected in the body of the Constitution. The "militia clauses" of the Constitution, in Article I, Section 8, gave Congress new authority over the militia, which previously had been entirely state-organized. Congress

14. It is true that the definition of "militia" in current federal law distinguishes between the "organized militia" and the "unorganized militia." Under this provision, the "organized militia" is the National Guard and the "unorganized militia" is "all able-bodied males at least 17 years of age and...under 45 years of age..." who are not in the National Guard or the Naval Militia. 10 U.S.C. §311. However, this distinction between the "organized" and the "unorganized" militia was a creation of the Dick Act of 1903, which gave birth to the modern National Guard system. See generally Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. Dayton Law Rev. 5, 34-39 (1989) (discussing history of the militia). It was a distinction unknown to the Framers.
15. Tushnet finds the analogy between militias and juries to be instructive in several respects (35, 38). If we were to take the analogy seriously, however, it would seem to defeat any notion of the militia as being the unorganized body of the people. There is no legitimate use of the term "jury" that refers to the unorganized body of the people. The jury, like the militia, comes into being precisely by being organized according to the rules established by a system of law.
16. *Heller*, 128 S.Ct., at 2825 n.6 (Stevens, J., dissenting).
17. Noah Webster, *Noah Webster's First Edition of an American Dictionary of the English Language* (7th ed., Found. for American Christian Education 1993).
18. That the militia of the founding era consisted of most able-bodied males also distinguishes it from the National Guard, the closest modern analogue to the "well regulated Militia" of the 18<sup>th</sup> century, but hardly equivalent to it.

was given power to “provide for organizing, arming, and disciplining, the Militia,” as well as “calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasion.” The states retained the power to appoint militia officers and to train the militia “according to the discipline prescribed by Congress.”<sup>19</sup> Indeed, the animating concern leading to adoption of the Second Amendment was the fear of the Anti-Federalist opponents of the Constitution that the grant of power to Congress to organize and arm the militia amounted to an exclusive power to do so, thus giving Congress the power to destroy the state militias through federal hostility or neglect.<sup>20</sup> The Second Amendment was written to allay these concerns by making the keeping and bearing of arms in a state militia a “right of the people,” not dependent on federal action.<sup>21</sup> It ensured that the state militias would be armed, even if Congress abandoned them.

In the final analysis, to read the “well regulated Militia” in the Second Amendment to mean the unorganized body of armed citizens is necessarily to find that the Framers adopted an entirely different understanding of the militia in the Second Amendment than that embodied in the militia clauses of the Constitution. This seems unlikely, to say the least.

Tushnet recognizes the problem, commenting that “[r]eading the Second Amendment against the background of the original Constitution’s references to the militia, we might conclude that the Second Amendment’s preamble refers to the state-organized militia” (14). What was, a few pages before, the “unassailable” originalist view of the “well regulated Militia” as “unorganized,” now becomes “something of a stretch” (14), once the Second Amendment’s reference to the militia is interpreted in light of the original meaning of the militia clauses, in which the militia is a body organized at the direction of governmental authority. Tushnet is able to toggle back and forth between positions like this because he views his task as simply commenting on the various arguments, not making a serious effort to cut through the competing claims to discern the best answer. It is not clear, however, how the meaning of the “well regulated Militia” in the Second Amendment is a close question at all.

Although Tushnet, at one point, observes that “a lot will turn on what we understand...a militia to be” (8), he treats the possible relationship between the militia reference and the remainder of the Amendment in a way that provides an avenue for entirely ignoring the militia language. As he poses

19. U.S. Const., art I, §8, cl. 15-16.

20. As noted in Justice Stevens’s dissent, Anti-Federalist George Mason argued during the Virginia ratification debates that Congress’s new power would allow Congress to destroy the militia by “rendering them useless—by disarming them.... Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive power to arm them.” *Heller*, 128 S.Ct. at 2833 (Stevens, J., dissenting) (quoting 3 *Debates in the Several State Conventions, on the Adoption of the Federal Constitution* 379 (2d ed., Jonathon Elliot ed., Hein 1863)).

21. See Uviller & Merkel, *supra* note 7.



it, the question is whether the language about the “well regulated Militia” limits or places conditions on the scope of the right, or whether the militia reference merely explains why the right is placed in the Constitution (8). If the militia language “is simply an explanation and not a condition,” then, according to Tushnet, it may not matter whether the militia reference is to the same organized militia addressed in the separate militia clauses (15).

Tushnet presents the issue of “condition” vs. “explanation” as a close question only by ignoring what the Supreme Court has called “the first principle of constitutional interpretation.”<sup>22</sup> This principle—dating back to *Marbury v. Madison*<sup>23</sup>—is that the Constitution must be interpreted such that “real effect should be given to all the words it uses,”<sup>24</sup> and that interpretations rendering some of its words “mere surplusage” must be avoided.<sup>25</sup> Treating the militia language in the Second Amendment as merely “explanatory” violates this rule because the meaning and scope of the people’s right to keep and bear arms would be the same were the militia “explanation” to have been deleted.

The only way to read the Second Amendment consistent with this “first principle” is to regard the militia language as providing the context essential to understanding the meaning of the right guaranteed. It is surely instructive that nowhere else in the Bill of Rights did the Framers append similar non-functional, “explanatory” language. To adopt the private purpose view is to arbitrarily stipulate that the first thirteen words of the Second Amendment are the only words in the Bill of Rights that have no functional meaning. As Justice Stevens concludes: “*When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia.*”<sup>26</sup>

A final problem with Tushnet’s treatment is that he often does not distinguish between the relative importance of various evidence of original meaning. Some evidence is simply more persuasive than other evidence. A good example is the version of the Second Amendment text offered by its author, James Madison, to the First Congress:

The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; *but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.*<sup>27</sup>

22. *Wright v. United States*, 302 U.S. 583, 588 (1938).

23. 5 U.S. (1 Cranch) 137, 174 (1803).

24. *Myers v. United States*, 272 U.S. 52, 151–52 (1926) (citing *Prout v. Starr*, 188 U.S. 537, 544 (1903)).

25. *See* *Wright*, 302 U.S. at 588.

26. *Heller*, 128 S.Ct. at 2831 (Stevens, J., dissenting) (emphasis added).

27. *The Complete Bill of Rights, The Drafts, Debates, Sources, & Origins* 169 (Neil H. Cogan, ed., Oxford Univ. Press 1997) (emphasis added).

If the original meaning were to guarantee individuals the right to choose to have a gun (or not to have one), why would it have made any sense for Madison to include a conscientious objector clause? Tushnet himself observes that “[a] provision guaranteeing individuals the right to keep and bear arms wouldn’t have to contain an exemption for such objectors because they would simply choose not to own weapons” (49). The presence of the conscientious objector clause is powerful evidence that the author of the Second Amendment regarded it as solely about the possession and use of guns in an organized military force.

Moreover, the debates in the First Congress largely concerned the objection of some Anti-Federalists that the conscientious objector clause would be used to weaken the militia, an argument that presumably led to the clause’s deletion. Representative Elbridge Gerry, for example, argued that the clause would enable the government to “declare who are those religiously scrupulous, and prevent them from bearing arms.”<sup>28</sup> Gerry continued, “What, sir, is the use of the militia? It is to prevent the establishment of a standing army, the bane of liberty.”<sup>29</sup> This debate over the conscientious objector clause makes no sense if the Amendment is understood simply to guarantee individuals the right to have a gun for personal purposes unrelated to militia duty. Thus, the legislative history of the clause establishes that the First Congress had the same understanding of the text as did the drafter Madison. As Justice Stevens summarized the matter in his *Heller* dissent, “The ultimate removal of the clause, therefore, only serves to confirm the purpose of the Amendment to protect against congressional disarmament, by whatever means, of the States’ militias.”<sup>30</sup>

Though Tushnet cites the history of the clause, he nevertheless observes that though there were “scattered expressions during the run-up to the Second Amendment’s adoption” consistent with the view that the Amendment concerned only state militias, “you have to work pretty hard to elevate them into a position of primary importance” (49–50). The reader is left to wonder why the intense focus of the First Congress on whether conscientious objectors should be exempt from militia service is not of primary, if not decisive, importance in determining original meaning.<sup>31</sup>

28. Helen Veit, Kenneth R. Bowling, & Charlene Bangs Bickford, *Creating the Bill of Rights: The Documentary Record from the First Federal Congress 1782* (Johns Hopkins Univ. Press 1991).

29. *Id.*

30. *Heller*, 128 S.Ct. at 2836 (Stevens, J., dissenting).

31. It should be recognized that there is substantial disagreement among legal scholars and judges about the relevance of legislative history to constitutional interpretation, though Professor Tushnet does not enter that particular fray. Justice Scalia, for example, has long been associated with the view that the intentions of the Framers are largely immaterial, since the interpretive task is to determine the meaning of the text to, as he put it in *Heller*, “ordinary citizens in the founding generation.” *Heller*, 128 S.Ct. at 2788. The argument against considering legislative history often cites the difficulty of determining the intentions of the Framers with any certainty. In the case of the Second Amendment, however, that

Apart from the controversy over the meaning of the Second Amendment (which continues with vigor after *Heller*), there is the separate question of the significance of the private purpose view for gun control laws. Tushnet correctly points out that, for gun rights advocates, winning the battle over the meaning of the Second Amendment “doesn’t mean winning the war” because “[e]veryone agrees that legislatures have the power—sometimes—to regulate the exercise of individual rights” (118). The issue is: How much leeway will legislative bodies have to regulate guns after *Heller*?

Here Tushnet may well be prescient, when he comments that “substantial amounts of gun control are constitutionally permissible even if we accept the best versions of the arguments favored by gun-rights proponents” (xvi). There is, in fact, important language in *Heller* suggesting that a broad range of gun laws do not violate the newly discovered right. According to the Court “[T]he right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>32</sup> The Court then goes out of its way to offer the assurance that “nothing in our opinion should be taken to cast doubt” on several broad categories of gun control laws, which the Court said remain “presumptively lawful” under the Court’s ruling. These include “laws imposing conditions and qualifications on the commercial sale of arms” (a category broad enough to include background checks, waiting periods, licensing, registration, safety training, etc.), “prohibitions on carrying concealed weapons” (a more restrictive policy than simply requiring a license to carry concealed weapons), “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings,” and bans on “dangerous and unusual weapons” (which could include machine guns and semi-automatic assault weapons).<sup>33</sup> Significantly, the Court added that these “presumptively lawful regulatory measures” are given “only as examples” and that the list “does not purport to be exhaustive.”<sup>34</sup>

Although these comments are dicta, they have thus far proven to be extraordinarily influential in the lower courts in protecting federal gun laws from successful attack.<sup>35</sup> Essentially, they have functioned to provide “safe

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objection is far weaker because the legislative history so strongly supports one of the competing interpretations of the text. It raises the question: Is it defensible to give the Second Amendment a meaning entirely different from that understood by James Madison, its primary drafter, and by the First Congress that debated and ratified it? In any event, there is little evidence in the *Heller* majority opinion suggesting that “ordinary citizens” of that era interpreted “the right of the people to keep and bear Arms,” as concerning private self-defense, and not militia service, in a text that begins with a reference to the importance of the “well regulated Militia” to the “security of a free State.” One prominent historian has commented that “Justice Scalia’s brand of plain-meaning originalism is little more than a smoke screen for his own political agenda.” Cornell, *Originalism on Trial*, *supra* note 8, at 630.

32. *Heller*, 128 S.Ct. at 2816.

33. *Id.* at 2816–17.

34. *Id.* at 2817 n.26.

35. See Adam Winkler, *Heller’s Catch-22*, 56 *UCLA Law Rev.* 1551, 1565–1568 (2009).

harbors” for the categories of gun laws listed by the Court, as well as those that seem analogous to the listed categories. Although there is still substantial uncertainty about the impact of *Heller*, based on the decision alone, there is little reason to believe that gun restrictions short of the kind of handgun ban struck down in that case will be in serious jeopardy. As professor Adam Winkler of UCLA Law School has said, “the *Heller* case is a landmark decision that has not changed very much at all.”<sup>36</sup>

In *McDonald*, Justice Alito’s lead opinion restated the *Heller* assurances about the continued presumptive constitutionality of gun regulations, and added, “We repeat those assurances here.”<sup>37</sup> This strong endorsement of the *Heller* dicta suggests that it may well furnish “safe harbors” for a wide variety of strict state and local gun regulations that no doubt will be challenged in the wake of *McDonald*.

Before *Heller* and *McDonald*, gun control was a policy issue, not a constitutional issue. It may largely remain that way after those decisions.

### The Gun Policy Debate

In contrast to the Second Amendment issue, where Tushnet’s conclusions are fairly described as weak, his conclusions on gun policy are quite strong. In his view, the only gun control policy that “*might* have an impact on gun-related violence, at least eventually,” would be “a nationwide ban on the private ownership of guns coupled with a policy of confiscating all guns already in private possession” (77). As he accurately observes, “as a political matter there is no chance whatever that such a ban will be enacted” (77). After *Heller* and *McDonald*, of course, such a policy obviously would be unconstitutional as well. As to less restrictive policies, he concludes: “Here the evidence seems pretty clear that any gun-related policy likely to survive a political process deeply affected by the culture wars will not do much to reduce violence”<sup>38</sup> (xvii).

Tushnet offers no serious support for this sweeping dismissal of all gun control policies short of total confiscation. For example, he focuses on so-called “safe storage” laws enacted in many states that impose criminal penalties on gun owners when a shooting occurs because a loaded, unlocked gun is stored accessible to children. He dismisses the effectiveness of such laws by citing a case where a teenager unintentionally discharged a rifle at a raucous party, shooting another teen in the head and killing him (73-74). Because the shooter’s parent

36. Adam Liptak, Few Ripples from Supreme Court Ruling on Guns, *N.Y. Times*, Mar. 16, 2009 (quoting Winkler) available at <http://www.nytimes.com/2009/03/17/us/17bar.html> (last visited August 13, 2010).

37. *McDonald* No. 08-1521, at 39-40.

38. For Tushnet, this conclusion also applies to policies seeking to curb violence through the proliferation of firearms (xvii). Indeed, he devotes much space to an entertaining discussion of the statistical maze surrounding the controversial claim by John Lott that state laws making it easier to carry concealed weapons resulted in dramatic reductions in crime (79-98). My own discussion of Lott’s work may be found at Dennis A. Henigan, *Lethal Logic: Exploding the Myths that Paralyze American Gun Policy* 131-38 (Potomac Books 2009).

had been so irresponsible as to require the party's guests to supply money, alcohol, or drugs as the price of admission, Tushnet persuasively suggests that a law requiring safe storage of firearms likely would not have induced the parent to lock the household gun away (100). Of course, this proves only that safe storage laws will not cause every gun owner to be responsible. It hardly demonstrates that such laws are doomed to failure. Tushnet does not mention the studies indicating that such laws have reduced adolescent suicide rates,<sup>39</sup> as well as accidental shootings by children and teens.<sup>40</sup>

In his discussion of gun policy, Tushnet's greatest sin is one of omission. There is a vast scholarly literature supporting the effectiveness of gun control laws that Tushnet simply ignores.<sup>41</sup> Even setting aside the issues of suicide and unintentional shootings, and focusing on gun crime, the research literature supports several broad propositions suggesting that regulation of the legal market in guns can reduce access to guns by dangerous people, with the effect of lowering the incidence of homicides and gun injuries.

First, the experience of other western, industrialized nations strongly suggests that gun restrictions can reduce homicide rates by making guns less accessible to violent people. Here the pioneering work has been done by Professor Franklin Zimring of the University of California, Berkeley Law School, along with collaborator Gordon Hawkins. Zimring and Hawkins compared U.S. crime with that of other industrialized nations and found that the U.S. does not have significantly higher rates of crime, even violent crime. Rates for assault in the United States are actually lower than in Canada, New Zealand, and Australia and are nearly identical to those in Finland, the Netherlands, and Poland.<sup>42</sup> What distinguishes the U.S. from these other countries is that U.S. crime is far more lethal. The rate of assaults leading to death is several times higher in the U.S. than in Canada, New Zealand, and Australia. Homicide rates in Finland, the Netherlands, and Poland are

39. Daniel W. Webster, Jon S. Vernick, April M. Zeoli & Jennifer A. Manganello, Association Between Youth-Focused Firearm Law and Youth Suicides, 292 *JAMA* 594 (2004).
40. Daniel Webster & Marc Starnes, Reexamining the Association Between Child Access Prevention Laws and Unintentional Shooting Deaths of Children, 106 *Pediatrics* 1466 (2000).
41. This literature is ably presented by Dr. David Hemenway, Director of the Harvard University Injury Control Research Center, in his landmark work, *Private Guns, Public Health*. Hemenway finds that "there are scores of reasonable policies that could reduce U.S. firearm injuries while keeping almost all of the recreational and self-defense benefits of firearms." David Hemenway, *Private Guns, Public Health* 213 (Univ. of Michigan Press 2004).
42. Franklin Zimring & Gordon Hawkins, *Crime Is Not the Problem: Lethal Violence in America* 38 (Oxford Univ. Press 1997).

a fraction of the American homicide rate.<sup>43</sup> Moreover, only in the U.S. do firearms play a major role in violent crime. The U.S. is the only large industrial democracy that reports firearms as involved in a majority of its homicides.<sup>44</sup>

These other nations have gun control laws that are far stronger than in the U.S., although not nearly as strong as the “total confiscation” policy Tushnet believes to be the only alternative with any chance of success. The international crime data indicate that other countries have violent people who commit violent crimes, but their strong gun laws reduce their use of guns in crime, thus making crime far less lethal. Others may disagree with this interpretation of the data, but Tushnet can fairly be criticized for reaching his policy conclusions without accounting for them at all.

Second, the consistent pattern of interstate movement of guns used in crimes also argues against Tushnet’s argument for gun law futility, yet is ignored in his text. Generally speaking, in states with strong gun laws, guns used in crime are acquired from gun dealers in other states with weaker gun laws. Conversely, in states with weak gun laws, crime guns originate with dealers within that state. One Johns Hopkins study of crime guns in twenty-five American cities showed that in five cities in states with both licensing and registration laws, a mean of 33.7 percent of crime guns were first sold by in-state gun dealers, whereas in thirteen cities in states with neither licensing nor registration, 84.2 percent of crime guns originated with in-state dealers.<sup>45</sup>

What does this pattern tell us? There is no obvious reason for criminals to prefer out-of-state sources for their guns. The interstate movement of crime guns suggests that strong state regulation of the legal market in guns forces criminals to access guns in other states. It also supports the idea that strong federal regulation of the legal market could reduce criminal access to guns more effectively than state regulation by reducing the capacity of criminals to exploit weak state gun laws.

Third, the nation’s experience with the Brady Act, which mandates a background check on persons buying guns from licensed dealers, also suggests that even fairly modest gun restrictions can reduce the use of guns in crime. I have summarized the key data elsewhere:

Although, as the NRA often points out, violent crime rates began declining shortly before the Brady Act went into effect in 1994, the use of firearms in violent crime did not begin its sharp decline until that year. In the five years preceding Brady, the percentage of violent crimes committed with firearms increased every year. Beginning in 1994, a stunning reversal occurred. The proportion of nonlethal violent crimes committed with firearms declined by 45 percent from its high point in 1993 to 2004. Even more remarkable is

43. *Id.* at 39.

44. *Id.* at 109.

45. Daniel W. Webster, Jon S. Vernick & Maria T. Bulzacchelli, Relationship Between Licensing, Registration, and Other Gun Sales Laws and the Source States of Crime Guns, 7 *Injury Prevention* 184 (2001).

the decline in the absolute number of nonlethal violent gun crimes, from 1,054,820 in 1993 to 280,890 in 2004, a *drop of 73 percent*. During the same period, gun homicides dropped 37 percent, driving a 34 percent decline in all homicides. During those same years, an estimated 1,228,000 criminals and other prohibited purchasers were blocked by Brady background checks from buying guns from licensed gun dealers.<sup>46</sup>

Of course, there likely were a number of factors contributing to the sharp reduction in crime during that ten-year period. But the data certainly support an inference that the Brady Act played a role in reducing the use of guns in crime, with a resulting reduction in homicides.<sup>47</sup> The Brady Act record also supports extending Brady background checks to private sales at gun shows and elsewhere, as reflected in legislation currently pending in Congress. Without at least addressing the decline in gun crime following the Brady Act, Tushnet is far too quick to dismiss the possible impact of regulatory proposals that fall short of a broad gun ban.

Obviously Professor Tushnet did not set out to write the definitive treatise on gun control policy. *Out of Range*, including notes, is only 150 pages long. It is certainly Tushnet's prerogative to take an abbreviated stroll through the policy issues. Such an approach, however, should avoid the kind of strong conclusions that only a more comprehensive treatment could adequately support.

### The Future of the Gun Debate

Tushnet's view that no politically feasible gun laws will ever do much to reduce gun violence leads him to advocate avoiding the culture wars entirely by redirecting the debate over violence away from the gun issue altogether:

So maybe we should simply turn our attention to other policies that might be more effective in fighting crime and violence: more police on the streets, ensuring that young people have better access to education and jobs, more disparagement by leading public figures of violence on television and in movies, or whatever else serious inquiry into the causes of crime and violence reveals to be somewhat effective policies. This is not a book about such policies, and I don't know whether there are any decent effective ones. But, it seems, gun policies aren't all that effective, and fighting over them might simply be a diversion from efforts that *might* be more effective (131).

46. Henigan, *supra* note 38, at 44.

47. *But see* Philip Cook & Jens Ludwig, The Effects of the Brady Act on Gun Violence, in *Guns, Crime and Punishment in America* 283 (Bernard E. Harcourt, ed., NYU Press 2003) (finding no evidence that the Brady Law reduced lethal violence). The limitations of the Cook and Ludwig findings are discussed in Henigan, *supra* note 38, at 56-57. *See also* James M. LaValle, Rebuilding at Gunpoint: A City-Level Re-Estimation of the Brady Law and RTC Laws in the Wake of Hurricane Katrina, 18 *Crim. Justice Pol. Rev.* 451, 463 (2007) (finding, contrary to Cook and Ludwig, a statistically significant negative effect of the Brady Law on homicide rates and gun-homicide rates).

Obviously, there are many strategies for fighting crime and violence not involving gun control that should be explored and implemented (though Tushnet is willing to jettison gun control entirely while making no attempt to show the effectiveness of alternatives). Given the substantial evidence of the lifesaving benefits of gun regulation, however, it would be a tragic mistake to simply abandon that effort as a way of disarming the culture war. Indeed, the effectiveness of these other measures would certainly be compromised by a policy that, for example, continues to allow criminals to buy guns from gun shows with no questions asked. Does it make sense to put more police on the streets and yet allow criminals easy access to the weaponry that threatens the lives of those same police officers?

Whereas Tushnet is convinced that the gun issue inevitably provokes a divisive culture war that paralyzes effective action, I suggest a different perspective. There is no question that it is possible to frame the gun issue as primarily a cultural issue. Indeed, framing it in this way is highly beneficial to the gun lobby. If gun control is seen as an attack on the value systems of millions of gun-owning Americans, this allows the NRA to radicalize and mobilize gun owners to oppose even modest changes in our nation's gun laws.

However, framing the issue as primarily cultural is not inevitable. As Tushnet himself notes, quoting political scientist Morris Fiorina, "A solid majority of blue state voters support stricter gun-control laws, but so does a narrow majority of red state voters" (132). Recent polling data makes the point even more dramatically. A poll taken by Republican messaging guru Frank Luntz found that 86 percent of gun owners who do not belong to the NRA, and 69 percent of self-described NRA members, support closing the "gun show loophole" by extending Brady Act background checks to private sales at gun shows.<sup>48</sup> An op-ed by Luntz and Milwaukee's Democratic Mayor Tom Barrett reported that "the poll also found support among NRA members and other gun owners for numerous other policies to strengthen safety, security and law enforcement," including blocking gun sales to persons on the terrorist watch list, requiring gun owners to report lost and stolen guns, and providing more crime gun data to local police.<sup>49</sup> Indeed, there is a long history of polling showing that gun owners, by substantial majorities, support such policies as licensing and registration.<sup>50</sup> When significant proportions of supposedly opposing cultural groups support the same policies, then, as Luntz and Barrett suggest, "the culture war over the right to bear arms isn't much of a war after all."<sup>51</sup>

48. Frank Luntz & Tom Barrett, *New Poll at Odds with Gun Rhetoric*, Milwaukee Journal-Sentinel, Jan. 23, 2010, available at <http://www.jsonline.com/news/opinion/82436102.html> (last visited August 13, 2010).

49. *Id.*

50. See Henigan *supra* note 38, at 2.

51. Luntz & Barrett, *supra* note 48.



Recent history shows that it is possible to overcome the gun lobby's cultural framing and redirect the national conversation to the merits of specific gun control proposals. Indeed, President Clinton was a master at making the issue about public safety, not culture. He marshaled the support of law enforcement officials, who speak with ultimate credibility about the real world danger of easy criminal access to guns, but could hardly be accused of being "anti-gun." His skillful handling of the issue resulted in passage of the Brady Bill and the assault weapon ban (which, unfortunately, expired in 2004).

Ironically, the *Heller* decision, over the long run, may help to reduce the power of the gun lobby's cultural frame by reducing the impact of the "slippery slope" argument. Some years ago, the NRA's Wayne LaPierre described "the plan" which is "so obvious to all who would see: First Step, enact a nationwide firearms waiting period law. Second Step, when the waiting period doesn't reduce crime, and it won't, enact a nationwide registration law. Final Step, confiscate all the registered firearms."<sup>52</sup> This kind of slippery slope argumentation is how the NRA uses the fear of ultimate gun confiscation to rally gun owners against gun regulations they actually support on the merits.

What happens to the slippery slope argument after *Heller*? By creating a new personal right to a gun in the home for self-defense, the *Heller* Court, in Justice Scalia's words, took broad gun bans "off the table" as a policy alternative.<sup>53</sup> If broad gun bans are "off the table," there is reason to believe that, over the long term, it will be more and more difficult for the NRA to sell gun owners on the idea that any strengthening of our gun laws is but a step toward gun confiscation. I am not suggesting that the NRA will abandon that argument, or that the group will no longer be successful in motivating a segment of American gun owners to oppose sensible controls. However, it may be that, over time, those arguments will prove less and less effective, and the cultural framing of the issue will begin to dissolve. By the same token, *Heller* may enhance the efforts of gun control advocates to frame the debate in terms of public safety, not cultural norms, as well as making it harder for politicians to hide behind the slippery slope argument to justify their opposition to laws that make sense when considered on their merits.<sup>54</sup> A national debate on policy initiatives like mandating Brady background checks on private sales at gun shows, free from the fear that it may lead to gun confiscation, is far more fertile terrain for advocates of gun control.

52. Wayne LaPierre, *Guns, Crime and Freedom* 48 (Regnery Publishing Inc. 1994).

53. *Heller*, 128 S.Ct. at 2822.

54. For a fuller discussion of *Heller* as a paradox, in which the Supreme Court gave the gun lobby the meaning of the Second Amendment it had long sought, in a decision that may well weaken the gun lobby's capacity to block sensible gun laws over the long run, see Henigan, *supra* note 11.

Contrary to the picture Tushnet paints of the gun issue as an endless, pointless cultural battle, it is far closer to reality to see it as the strategic use of cultural appeals by a highly motivated and well-organized minority to frustrate the will of the majority to enact gun restrictions that reduce access to guns by dangerous people but allow the law-abiding to own them. We do need a new, national conversation about guns, but not one that surrenders to the cultural warriors all hope of bringing sanity to our nation's gun policy. And yes, Professor Tushnet, there is a great deal at stake: the safety of our children, our families and our communities.

*\*Editors' Note: The printed version of this book review inadvertently omitted the words, "Tushnet asserts," in the quotation at the bottom of page 326 referring to Tushnet's definition of a militia. We have corrected the error in this pdf and sincerely regret the omission.*