

# Retail Rebellion and the Second Amendment<sup>†</sup>

DARRELL A.H. MILLER\*

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*When, if ever, is there a Second Amendment right to kill a cop? This piece seeks to answer that question. In District of Columbia v. Heller, the Supreme Court held that the Second Amendment codifies a natural right to keep and bear arms for self-defense. That right to self-defense extends to both private and public threats, including self-defense against agents of a tyrannical government. Moreover, the right is individual. Individuals—not just communities—have the right to protect themselves from public violence. Individuals—not just militias—have the right to defend themselves against tyranny. In McDonald v. City of Chicago, the Court went further, explaining that the right extends to state actors in large part due to the necessity that freedmen be able to defend themselves from tyrannical local law enforcement.*

*But how is this right administered? If the Second Amendment protects an individual right to defend against tyranny, what does such a right look like? What does the Second Amendment say about retail forms of rebellion: threatening police officers, resisting an illegal arrest, cop killing? And how does it square with originalism, which rejects case-by-case balancing of government interests, and instead looks to history—a history that for centuries protected a right to violently resist unlawful arrest and which placed guns in the hands of freedmen specifically to challenge unreconstructed Southern law enforcement?*

*These questions are especially pertinent now, as individuals bring handguns to town hall meetings and assault rifles to presidential addresses, and as the Court held in McDonald that the right extends to all levels of government and to all levels of law enforcement.*

*As Justice Breyer remarked in his Heller dissent, “to raise a self-defense question is not to answer it.” This piece attempts to formulate answers to the questions that the Second Amendment raises and will continue to raise in the area of self-defense against the police. And it concludes that for the problem of retail rebellion there is a solution: retail justice.*

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\* Associate Professor of Law, University of Cincinnati College of Law. J.D., Harvard Law School; B.A., M.A., Oxford University; B.A., Anderson University. Thanks to Chris Bryant, Jenny Carroll, Brannon Denning, Ray Diamond, Mark Godsey, and Alice Ristroph for helping me refine these ideas. Thanks to Lori Heilman, Paul Budnick, and Diane Kendall for excellent research assistance. Thanks to Karyn for her support and patience. The opinions herein are my own, and do not necessarily represent those of the persons who helped me.

## INTRODUCTION

*Without a gun and a badge, what do you got?  
A sucker in a uniform waiting to get shot  
By me, or another nigga  
And with a gat it don't matter if he's smaller or bigger.<sup>1</sup>*

Rebellion is sold wholesale, but delivered retail. Broadsheets roar with peals of natural liberty and inalienable rights; speeches trumpet the bravery of patriots who rail against the forces of tyranny and oppression. But revolutionary acts are often brutal and pedestrian: a bullet shot into the body of law enforcement.<sup>2</sup>

In *District of Columbia v. Heller*,<sup>3</sup> the Supreme Court held that the Second Amendment preserves a right to keep and bear firearms for individual self-defense. In *McDonald v. City of Chicago*,<sup>4</sup> the Court held that this right applies to state and local governments.<sup>5</sup> That right may extend to forms of self-defense against the government—both federal and state. Portions of *Heller* seem giddy with revolutionary fervor: “[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny”;<sup>6</sup> “the natural right of resistance and self-preservation”<sup>7</sup> is a right “protecting against both *public* and private violence.”<sup>8</sup> Moreover, if *Heller* is taken at face value, the Second Amendment right of self-defense is primarily an *individual* right.<sup>9</sup> Individuals—not just communities—have the right to protect themselves from government violence. Individuals—not just the militia—have the right to defend themselves against tyranny.<sup>10</sup>

But *Heller*'s right of self-defense against tyranny suffers from a serious implementation problem.<sup>11</sup> As Justice Breyer remarked in dissent, “to raise a self-

1. N.W.A., *Fuck tha Police*, on STRAIGHT OUTTA COMPTON (Ruthless Records 1988). Compare “God created men—Colonel [Sam] Colt made them equal,” an anonymous frontier saying. GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 156 (Aldine Transaction 2009) (1991).

2. “The bayonet, the butt of the rifle, the sabre, the pike, were in full play . . . [Colonel Friedrich] Baum [was] shot through the body by a rifle ball, [and] fell mortally wounded . . .” CHRISTOPHER HIBBERT, REDCOATS AND REBELS: THE AMERICAN REVOLUTION THROUGH BRITISH EYES 177 (W.W. Norton & Co., Inc. 2002) (1990) (internal citations and quotation marks omitted) (contemporary description of the death of a German officer fighting for the British during the Revolutionary War).

3. 554 U.S. 570 (2008).

4. 130 S. Ct. 3020 (2010) (plurality opinion).

5. *Id.* at 3050.

6. *Heller*, 554 U.S. at 598.

7. *Id.* at 594 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*136, \*139).

8. *Id.* (emphasis added).

9. *Id.* at 594–95.

10. For a discussion of the potential Second Amendment rights of collectives, including corporations, see Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. (forthcoming 2011).

11. For another discussion of the implementation problem, see Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1313–59 (2009).

defense question is not to answer it.”<sup>12</sup> “[T]he details”<sup>13</sup> are what distinguish a successful doctrinal apparatus from an unsuccessful one.<sup>14</sup> If the Second Amendment protects an individual right to defend against tyranny, what does such a right look like? And how is it administered? How does it square with the originalist methodology insisted upon by the *Heller* majority? Specifically, what does the Second Amendment say about retail forms of rebellion: threatening police officers, resisting arrest, cop killing?<sup>15</sup>

An anecdote crystallizes the problem: During the hot summer of 2009—as Americans brought their pistols to town-hall meetings<sup>16</sup> and their assault rifles to presidential addresses<sup>17</sup>—the Second Amendment blogosphere crackled with indignation over a particular traffic stop in Shreveport, Louisiana.<sup>18</sup> The story, as reported by a local news station, concerned a citizen who was pulled over by the police, asked about weapons in the vehicle, and then had his pistol and its ammunition seized and sequestered during the course of the stop.<sup>19</sup> According to blog accounts, the stop was politically motivated, pretextual, and wholly unconstitutional.<sup>20</sup> The story wouldn’t have garnered so much as a blurb in a news crawl, except that the citizen was so upset by the stop that he phoned the mayor’s office to complain and recorded the call.<sup>21</sup> During the exchange, the mayor of Shreveport told the man that his Second Amendment rights were “suspended” during the stop.<sup>22</sup>

This is the Second Amendment in miniature. Taking the reports as accurate, here we have a representative of the government (the officer) acting tyrannically (an unconstitutional search and seizure motivated by political animosity), and demanding surrender of the citizen’s firearm (disarmament). What is the citizen to

12. *Heller*, 554 U.S. at 687 (Breyer, J., dissenting).

13. *Id.*

14. See Richard H. Fallon, Jr., *The Supreme Court, 1996 Term: Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 62 (1997) (“[S]ome constitutional norms may be too vague to serve directly as effective rules of law. . . . [I]n shaping constitutional tests, the Supreme Court must take account of empirical, predictive, and institutional considerations that may vary from time to time.”).

15. When I use the term retail rebellion, I mean individual or small-group acts of resistance to persons acting under color of law in response to or in anticipation of actual or perceived affronts to individual liberty or safety. The term is an allusion to retail as distinct from wholesale politics.

16. See Gail Collins, *Gunning for Health Care*, N.Y. TIMES, Aug. 13, 2009, at A27.

17. *Gun-Toting Protesters, Including One with Assault Weapon, Mill Outside Obama Speech in Arizona*, NYDAILYNEWS.COM (Aug. 18, 2009), [http://www.nydailynews.com/news/national/2009/08/18/2009-08-18\\_guntoting\\_protesters\\_including\\_one\\_with\\_assault\\_weapon\\_mill\\_outside\\_obama\\_speech.html](http://www.nydailynews.com/news/national/2009/08/18/2009-08-18_guntoting_protesters_including_one_with_assault_weapon_mill_outside_obama_speech.html).

18. See *Mayor Opposed to Guns and Civil Rights*, NAGR GUN RIGHTS BLOG (June 25, 2009), <http://nationalgunrights.org/blog/?p=95>.

19. Carolyn Roy, *Traffic Stop Raises Gun Rights Question, Mayor Responds*, KSLA NEWS (posted July 6, 2009; updated July 21, 2009), <http://www.ksla.com/Global/story.asp?S=10652408>.

20. See *Mayor Opposed to Guns and Civil Rights*, *supra* note 18.

21. Roy, *supra* note 19.

22. *Id.*

do? The citizen could surrender his weapon. But that puts him at the mercy of the government representative.<sup>23</sup> He is now comparatively defenseless should the police offer unreasonable force. Plus, according to the most libertarian reading of the Second Amendment, the citizen has now capitulated to the very kind of violation the amendment was designed to prevent—disarmament of individual citizens by government agents.

Alternatively, he could refuse to surrender his weapon. And if the police officer, as he is duty bound to do,<sup>24</sup> pressed on with the stop, would the citizen have a Second Amendment right to escalate the confrontation? If the police officer raised his firearm to force compliance, did the citizen have a Second Amendment right to draw his own firearm in response? Did he have a right to fire on the officer to defeat this usurpation? Did others, upon seeing the confrontation, have a right to descend upon the scene with their own arms to thwart the arrest?<sup>25</sup>

The problem appears scholastic,<sup>26</sup> until one considers that the Court's originalist methodology relies on history, and history gives retail rebellion some constitutional purchase. The *Heller* majority strove to adhere to a strict original public understanding methodology. That methodology attempts to fetter judicial discretion by forcing judges to imagine what the words of the Constitution would have meant to an ordinary person at the time they were ratified.<sup>27</sup> In *Heller*, that interpretive mode required a technical and frequently paradoxical investigation into

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23. As the man stated, "I told [the mayor] that I was very uncomfortable standing on a busy street without my hand gun . . ." *Id.*

24. See, e.g., *Nash v. United States*, 897 F. Supp. 180, 183 (E.D. Pa. 1994) (stating that law enforcement officers making an arrest were under no state-law obligation to retreat from an armed citizen); *Fields v. Dailey*, 587 N.E.2d 400, 406 (Ohio Ct. App. 1990) ("When effecting a lawful arrest, a police officer is under no obligation to retreat. Rather, the officer is *required* to make arrests." (emphasis added) (citations omitted)); *State v. Dunning*, 98 S.E. 530, 532 (N.C. 1919) ("The law does not require an officer with a warrant for an arrest for an offense to retreat or retire, but he must stand his ground and perform his duty . . ." (quoting defendant's prayers for instructions)); see also ARK. CODE ANN. § 5-2-607 (2006).

25. This scenario, resistance to an arrest perceived as biased or unlawful, has been the spark for more than one riot in American history. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 69–70, 93, 157–59 (1968) (Kerner Report) (discussing rioting in urban areas, and stating that "[a]lmost invariably the incident that ignites disorder arises from police action"). But resistance was also a well-accepted part of the common law at the time of the Founding. See *infra* Part II.

26. In fact, there has been at least one post-*Heller* case in which a defendant asserted a Second Amendment right to resist an unlawful arrest. *People v. Srnec*, No. 286528, 2010 WL 292782, at \*4 (Mich. Ct. App. Jan. 26, 2010). The Michigan court denied this defense with a terse one-sentence conclusion: "Defendant's argument fails because the Second Amendment does not give any citizen a constitutional right to use deadly force to resist an unlawful arrest or seizure." *Id.*

27. As Larry Solum observed, the term "originalism" is itself subject to dispute. See Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 411–16 (2009) (discussing debate over the meaning of originalism and offering a definition). My goal here is not to recapitulate these arguments, but to observe that the originalism articulated in *Heller*, whatever family of originalism it belongs to, appears to create principled but potentially untenable results.

seventeenth-, eighteenth-, and nineteenth-century texts.<sup>28</sup> Moreover, originalism disdains, and frequently derides, “balancing tests” that weigh constitutional commands against judicially idiosyncratic estimates of government interest.<sup>29</sup> As Justice Scalia said in *Heller*, “[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”<sup>30</sup> Instead, history is to be our guide.

But at the time the people ratified the Second Amendment, violent, sometimes even deadly, resistance to an unlawful arrest had long been an established part of Anglo-American jurisprudence. In fact, according to some cases, even technical defects with an arrest could strip the law officer of his authority and leave him in no better position than a common assailant.

*Heller’s* brand of originalism is made even more complicated by the Court’s plurality decision in *McDonald v. City of Chicago*.<sup>31</sup> In *McDonald*, a majority of the Court held that the Second Amendment restrains states and localities to the exact same degree as the federal government.<sup>32</sup> The right to keep and bear arms for self-defense is fundamental, a right “deeply rooted in [our] history and tradition.”<sup>33</sup> Among the *McDonald* Court’s reasons was a recognition that, during Reconstruction, local law enforcement was, in fact, behaving tyrannically.<sup>34</sup> Local police and recalcitrant state militias terrorized freedmen, sometimes alone, sometimes in collusion with unofficial citizen patrols and groups like the Klan.<sup>35</sup> If one of the principal aims of the Civil Rights Act of 1866 and the Fourteenth Amendment was to allow freedmen to arm themselves in order to repel unreconstructed Southern law enforcement, then it seems that modern individuals would enjoy a constitutional right to publicly arm themselves in case they need to threaten, to resist, or even to fire upon police officers who violate the law.

Far from a scholastic exercise, what is at stake is the constitutional sufficiency of most police-protecting laws and doctrines throughout the legal canon. Fourth Amendment jurisprudence rests upon a web of assumptions that emphasize

28. See Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1557–65 (2009) (exploring paradoxes and ironies in the Court’s application of originalism in *Heller*).

29. See *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (“We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.”); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 579–80 (1991) (Scalia, J., concurring) (“[W]e should avoid wherever possible . . . a method of analysis that requires judicial assessment of the ‘importance’ of government interests . . .”).

30. *Heller*, 554 U.S. at 634 (emphasis in original).

31. 130 S. Ct. 3020 (2010) (plurality opinion).

32. *Id.* at 3050; see also *id.* at 3058–59 (Thomas, J., concurring in part and concurring in the judgment). On the narrow point of the applicability of the Second Amendment to the states, Justice Thomas concurred, making a majority.

33. *Id.* at 3036 (plurality opinion) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

34. See *id.* at 3039–40 (discussing parties of Southern state militias disarming blacks); see also *id.* at 3059–60 (Thomas, J., concurring in part and concurring in the judgment) (discussing massacre of black militia members by white citizen militia).

35. See *id.* at 3039–40 (plurality opinion); see also *id.* at 3059–60 (Thomas, J., concurring in part and concurring in the judgment).

protection of police from potentially armed individuals.<sup>36</sup> Nearly two-thirds of the states criminalize resistance to even an *unlawful* arrest;<sup>37</sup> others make it a crime to refuse to surrender a firearm during an investigatory stop;<sup>38</sup> numerous jurisdictions treat the murder of a police officer as a crime deserving of especially severe punishment, including the death penalty.<sup>39</sup> And yet, with *Heller* and *McDonald* the Court has seemingly collapsed the distinction between self-defense against criminals and self-defense against unconstitutional law enforcement.

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36. *United States v. Robinson*, 414 U.S. 218, 234 (1973) (“The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial.”); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (establishing that protective stop-and-frisk is not a Fourth Amendment violation) (“[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.”); *see also Maryland v. Wilson*, 519 U.S. 408, 412–13 (1997) (holding that police may order passengers out of a vehicle in a traffic stop because of the danger to officers and citing criminological statistics on officer assaults during traffic stops).

37. ALASKA STAT. § 11.81.400(a)(1) (2010); ARIZ. REV. STAT. ANN. §§ 13-2508(A), 13-404(B)(2) (2010); ARK. CODE ANN. § 5-2-612 (2006); CAL. PENAL CODE § 834a (West 2008); *People v. Curtis*, 450 P.2d 33, 35–36 (Cal. 1969); COLO. REV. STAT. ANN. § 18-8-103 (West 2004); CONN. GEN. STAT. ANN. § 53a-23 (West 2007 & Supp. 2010); DEL. CODE ANN. tit. 11, § 464(d) (2007); FLA. STAT. ANN. § 776.051(1) (West 2010); HAW. REV. STAT. § 703-304(4)(a) (West 2008); *State v. Richardson*, 511 P.2d 263, 267 (Idaho 1973); 720 ILL. COMP. STAT. ANN. 5/7-7 (West 2002); *Row v. Holt*, 864 N.E.2d 1011, 1017 (Ind. 2007); IOWA CODE ANN. § 804.12 (West 2003); KAN. STAT. ANN. § 21-3217 (2007); KY. REV. STAT. ANN. § 503.060(1) (LexisNexis 2008); ME. REV. STAT. tit. 17, § 108(1-A) (2006 & Supp. 2010); MASS. ANN. LAWS ch. 268, § 32B (LexisNexis 2002); *People v. Ventura*, 686 N.W.2d 748, 752 (Mich. Ct. App. 2004); *State v. Sanders*, 1991 Minn. App. LEXIS 84, \*9 (Minn. Ct. App. 1991); MO. ANN. STAT. § 575.150 (West 2003 & Supp. 2010); MONT. CODE ANN. § 45-7-301 (2010); NEB. REV. STAT. ANN. § 28-1409(2) (LexisNexis 2009); *State v. Lisenbee*, 13 P.3d 947, 950–51 (Nev. 2000); N.H. REV. STAT. ANN. § 594:5 (2001); N.J. STAT. ANN. § 2C:3-4(b)(1)(a) (West 2005); OR. REV. STAT. § 161.260 (2009); *State v. Tavarozzi*, 446 A.2d 1048, 1051 (R.I. 1982); S.D. CODIFIED LAWS § 22-11-5 (2006); TENN. CODE ANN. § 39-16-602 (2010); TEX. PENAL CODE ANN. § 38.03 (West 2003); *American Fork City v. Penaflores*, 2002 UT 131, ¶¶ 6–7, 63 P.3d 675, 678–79 (Utah 2002); *State v. Bradley*, 10 P.3d 358, 361–62 (Wash. 2000); *State v. Hobson*, 577 N.W.2d 825, 837 (Wis. 1998); *see also* MODEL PENAL CODE § 3.04(2)(a)(i).

38. *See* WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 1.13 (4th ed. 2004 & Supp.); *cf.* N.M. STAT. ANN. § 30-14-4 (West 2003) (requiring surrender of firearms at police officer’s request for any person occupying or using public property under the authority of a permit); OHIO REV. CODE ANN. § 2923.163 (West 2010) (discussing police right to request surrender of firearm and allowing for its return).

39. *See, e.g.*, 21 U.S.C. § 848(e)(1)(B) (2006) (authorizing the death penalty for an individual who “counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer’s official duties”); ARK. CODE ANN. § 5-10-101(a)(3) (2006 & Supp. 2009); CAL. PENAL CODE § 190.2 (West 2008); MISS. CODE ANN. § 97-3-19 (West 2005).

Put bluntly, when, if ever, is there a constitutional right to kill a cop? The short answer is that there is a right, but it is not enforced in the broad and prospective manner in which constitutional rights are typically vindicated, or in the sense that the Court at times speaks of the right to self-defense. Instead, the problem of retail rebellion has a solution: retail justice. This Article, a companion to my previous work in this area,<sup>40</sup> explores why.

Part I of this Article briefly summarizes the Court's apparent codification of the natural right to self-defense in the Second Amendment and the logical problems it creates with respect to government actors.

Part II connects retail rebellion to the common law right of self-defense against government agents, and especially common law self-defense in the form of resisting arrest.

Part III discusses the history of retail rebellion in light of the realities of Reconstruction violence, especially as it pertains to police violence against freedmen.

Part IV explores the complexities of Reconstruction violence and how the retail side to justice can implement the natural right of rebellion against government agents.

#### I. THE PROBLEM OF RETAIL REBELLION

*Heller* concerned a civil rights challenge to the District of Columbia's severe restrictions on firearms within the District. Dick Anthony Heller, a federal judicial center special police officer, brought suit against the District and its agents under 42 U.S.C. § 1983, alleging that the District's regulations violated the Second Amendment.<sup>41</sup> Among those unconstitutional requirements were that firearms be equipped with a trigger lock or be disassembled when in the owner's house.<sup>42</sup> After Heller lost in the district court<sup>43</sup> and won in the court of appeals,<sup>44</sup> the Supreme Court of the United States granted certiorari. Justice Scalia wrote for the five-member majority and overturned the law, including the trigger lock requirement.<sup>45</sup>

The majority opinion aspires to an unsullied application of original public understanding methodology. According to the majority, the Second Amendment's text, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed,"<sup>46</sup> was understood by the people in 1791 to codify a preexisting right to keep arms for the "central component" of self-defense.<sup>47</sup> This right to self-defense is a natural right, manifested in the English Bill of Rights and contained in the Second Amendment, but existing prior to them.<sup>48</sup> The right is individual, unconnected with participation

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40. See Miller, *supra* note 11.

41. *District of Columbia v. Heller*, 554 U.S. 570, 575–76 (2008).

42. *Id.* at 576.

43. See *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 109–10 (D.D.C. 2004).

44. See *Parker v. District of Columbia*, 478 F.3d 370, 401 (D.C. Cir. 2007).

45. *Heller*, 554 U.S. at 635–36.

46. U.S. CONST. amend. II.

47. *Heller*, 554 U.S. at 592–95.

48. See Michael Steven Green, *Why Protect Private Arms Possession? Nine Theories of*

in any official state militia or, in fact, any collective whatsoever.<sup>49</sup> Also, the right to self-defense applies whether the source of confrontation is public or private.<sup>50</sup> In this, the Court seems to tacitly concur with the view that

[t]he Framers of the Constitution and the Second Amendment saw community defense against a criminal government as simply one end of a continuum that began with personal defense against a lone criminal; the theme was self-defense, and the question of how many criminals were involved (one, or a standing army) was merely a detail.<sup>51</sup>

But details matter. And it is details that bedevil *Heller*.<sup>52</sup> Of course, says the Court, there is no constitutional right to wage war.<sup>53</sup> There is no right to a machine gun (no matter how effective such a weapon would be against government despots).<sup>54</sup> There is no right to carry a gun into a school, police station, or courthouse.<sup>55</sup> Presumably, one still can be prosecuted for refusing to surrender a firearm during a traffic stop, or for brandishing a weapon in front of a sheriff, or firing on a police officer making an arrest<sup>56</sup>—even an unconstitutional one. But *Heller* provides no clue as to why this should be, other than an unsatisfactory “because we say so.”

With *Heller*, Justice Scalia created his own Brobdingnagian. From a distance, *Heller* is a colossus of principle, the most fully realized expression of originalist methodology in the canon, a “triumph.”<sup>57</sup> Yet, examined closely, *Heller*, like Jonathan Swift’s race of giants, is marred by inconsistency and blemished by illogic. Its most unsightly wart is this wholly unreasoned caveat:

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*the Second Amendment*, 84 NOTRE DAME L. REV. 131, 136 (2008) (observing that Justice Scalia recognized a preexisting right to bear arms, a “natural right [that] would have limited the government’s authority even if the Founders had failed to recognize it in the Constitution”).

49. The *Heller* Court reaches this conclusion by holding that the portion of the amendment pertaining to the militia is merely “prefatory” to the latter, “operative,” portion of the amendment. *Heller*, 554 U.S. at 577–78.

50. *Id.* at 594.

51. David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1454 n.358; see Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87, 93 (1992) [hereinafter Kates, *Ideology*] (“Whether murder, rape, and theft be committed by gangs of assassins, tyrannous officials and judges or pillaging soldiery was a mere detail . . .”).

52. See *Heller*, 554 U.S. at 687 (Breyer, J., dissenting).

53. *Id.* at 586 (majority opinion).

54. See *id.* at 627.

55. See *id.* at 626–27 (regulations keeping arms out of “sensitive places” presumably constitutional).

56. The Court has defined an arrest as the application of physical force to restrain, however slight, and irrespective of its success, or submission by the arrestee to the authority of the officer. *California v. Hodari D.*, 499 U.S. 621, 624–25 (1991).

57. Winkler, *supra* note 28, at 1557 & n.30 (discussing academic and popular reactions to *Heller*); see Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 249 (2008) (“*Heller* is a thoroughly originalist opinion—a significant development, and one that is at least potentially important for the future, certainly of the Second Amendment, and perhaps more generally.”).



[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>58</sup>

But for this thin line of *ipse dixit*, since reiterated in *McDonald*,<sup>59</sup> the opinion's sweeping natural law rhetoric pulses with anarchy. *Heller* and *McDonald* appear to suggest that the people ratified both the Second Amendment and the Fourteenth Amendment with the understanding that they codify a previously natural, individual right to arm oneself in self-defense against government threats, and not only to arm oneself, but to use those arms in opposition to tyranny.

As explained in Parts II and III, below, the Court's methodology leads to unanticipated results when viewed in light of the history of self-defense against law enforcement during the Founding and Reconstruction. It could sanction individual acts of armed rebellion against a police officer whenever that officer exceeds his authority in a way that a person construes as despotic or tyrannical. It could be cited even to support efforts to cow, or even kill, law enforcement.<sup>60</sup> I venture the Justices would blanch at this interpretation of the amendment. But squeamishness is not a reasoned rejection for its application, any more than the Court's *ipse dixit* is a reasoned ground to hold that government can restrict sales of M-16s. What is needed is a theory that addresses these Second Amendment "details."

Part IV of this Article aims to supply at least a portion of such a theory. It explains how Reconstruction's complexity, its gradual distrust of natural law arguments in favor of equality and process-based arguments, tames this retail rebellion problem in ways that are both manageable and in keeping with current doctrines on self-defense, but also potentially revolutionary in themselves.

## II. RETAIL REBELLION IN ACTION: THE LAW OF RESISTING ARREST

N.W.A. snarled the lines of this Article's epigraph in the 1980s. But the sentiment would have been familiar to the Framers of the Second Amendment. In the tradition of Anglo-American common law, a police officer acting without legal authority was nothing more than a common trespasser, a "sucker in a uniform," and

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58. *Heller*, 554 U.S. at 626–27. This passage has been particularly galling to those who seek a principled originalist doctrine of the Second Amendment. See Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1357–58 (2009) (questioning the methodological source of these exceptions); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 273 (2009) (noting that the *Heller* Court is not interested in dealing with the "unpleasant consequences" of the Second Amendment right to bear arms).

59. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3060 (2010) (plurality opinion).

60. The Court could simply decree, as it did in *Heller*, that the Second Amendment does not lead to these politically disfavored results. See *Heller*, 554 U.S. at 626–27. But doing so may open the Court to claims that it is engaging in naked power politics, not legal principle. See *infra* text accompanying notes 245–47.

could be resisted as such—by either the subject of the arrest alone or with the aid of others.<sup>61</sup>

The same four generations of Englishmen that recognized the right to bear arms recognized the right of persons to use force to resist an illegal arrest.<sup>62</sup> Initially, the theory was one of “provocation.”<sup>63</sup> A person arrested illegally (or who witnessed such an illegal arrest) was “provoked” by the threat to liberty and had a right to respond with force.<sup>64</sup> The right to resist an illegal arrest provided a complete defense to criminal liability when the person resisted with proportional nonlethal force.<sup>65</sup> But even deadly force could be excused. A person who killed an officer could have the murder charge reduced to manslaughter,<sup>66</sup> or even pardoned altogether, if he could show that he was resisting an illegal arrest. As the English common law developed in America, the understanding turned away from “provocation” theories and more to theories of self-defense.<sup>67</sup> The following discussion tracks this history.

As far back as the seventeenth century, jurists recognized a right to resist arrest. In 1666, for example, in *Hopkin Huggett's Case*<sup>68</sup> the judges of the King's Bench considered that a man who killed an officer serving an imperfect government warrant could not be guilty of murder, but only manslaughter.<sup>69</sup> John Berry and two other men were walking through London when they seized an unidentified man to

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61. See Paul G. Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128, 1129 (1969) (“An action by an official in excess of his authority was a trespass that could be resisted by physical force. The cases frequently treated the trespass as a ‘provocation,’ which would justify an assault, or, if the officer were killed, would reduce the crime from murder to manslaughter.”). For previous work on the history of resisting arrest, see *id.*; Craig Hemmens & Daniel Levin, “Not a Law at All”: *A Call for a Return to the Common Law Right to Resist Unlawful Arrest*, 29 SW. U. L. REV. 1 (1999); Andrew P. Wright, *Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom?*, 46 DRAKE L. REV. 383 (1997).

62. According to *Heller*, the English codified a right to bear arms during the late Stuart age and continuing through the reign of Queen Anne. See *Heller*, 554 U.S. at 592–93 (discussing development of English right to bear arms). As discussed below, the English common law right to resist unlawful arrest developed in tandem to this right.

63. See Hemmens & Levin, *supra* note 61, at 6.

64. Hemmens & Levin, *supra* note 61, at 6; see also Chevigny, *supra* note 61, at 1129.

65. See *People v. Dillard*, 321 N.W.2d 757, 758 (Mich. Ct. App. 1982) (“The traditional common law rule has been that, short of killing the arresting officer, a person has the right to resist an unlawful arrest.” (citing *Queen v. Tooley*, (1709) 92 Eng. Rep. 349 (K.B.); 2 Ld. Raym. 1296)); HARVEY CORTLANDT VOORHEES, *The Law of Arrest*, in CIVIL AND CRIMINAL ACTIONS § 86 (2d ed. 1915) (discussing the right to resist unlawful arrest with such force as is reasonably necessary to regain liberty).

66. See Chevigny, *supra* note 61, at 1129.

67. Hemmens & Levin, *supra* note 61, at 6.

68. (1666) 84 Eng. Rep. 1082 (K.B.).

69. The opinion, after fashion of the time, is not clear either in its conclusion or the number of persons who subscribed to the opinion. It appears that in the lower court eight named judges believed the case to involve manslaughter and four believed it to involve murder, but that a majority upon certiorari to the King's Bench thought it murder. See *id.* at 1082–83.

impress into the King's military.<sup>70</sup> Huggett and three others overtook Berry and his companions, as well as the impressed man, and demanded to see their warrant.<sup>71</sup> Berry produced a paper "which Hopkin Huggett and the [three] others said was no warrant; and immediately . . . drew their swords to rescue" the impressed man.<sup>72</sup>

During the ensuing fight, Huggett killed Berry.<sup>73</sup> Eight of the judges initially stated that the death of Berry was not murder, for "if a man be unduly arrested or restrained of his liberty," even if he offers no resistance himself, "yet this is a provocation to all other men of England, not only his friends but strangers also for common humanity sake."<sup>74</sup> It was thus no crime to try to rescue the victim of the unlawful arrest<sup>75</sup> because each individual Englishman is appointed guardian of his fellows' rights as Englishmen.<sup>76</sup> Eventually, however, the same judges appear to have been convinced that it would be of

dangerous consequence to give any encouragement to private men to take upon themselves to be the assertors of other men's liberties . . . especially in a nation where good laws are for the punishment of all such injuries, and one great end of law is to right men by peaceable means, and to discountenance all endeavors to right themselves, much less other men, by force.<sup>77</sup>

Despite the confused rationale of *Hopkin Huggett's Case*, by 1709 the English courts had ensconced the common law right to resist an unlawful arrest and traced its roots to the fundamental laws of England.<sup>78</sup> In *Queen v. Tooley*,<sup>79</sup> Constable Samuel Bray arrested Anne Dekins for disorderly conduct, although this charge was found to be insufficient.<sup>80</sup> A group of men, including Tooley, assaulted Bray with swords drawn.<sup>81</sup> Bray "shewed his constable's staff, and declared he was about the Queen's business."<sup>82</sup> The group disbursed, only to return again with

70. *Id.* at 1082.

71. *Id.*

72. *Id.* The majority of the court concluded that it "ought appears to us" that Berry and his company did not have a warrant, but it is not clear whether the warrant was defective, or absolutely absent. *Id.*

73. *Id.*

74. *Id.*

75. In modern law, an arrest can be unlawful if (a) executing an arrest under a facially defective warrant; (b) executing an arrest under a facially valid, but unlawfully issued, warrant; (c) executing an arrest without a warrant and without probable cause; or (d) executing an arrest that is otherwise lawful with excessive force. Penn Lerblance, *Impeding Unlawful Arrest: A Question of Authority and Criminal Liability*, 61 DENV. L.J. 655, 662–63 (1983).

76. See *Hopkin Huggett's Case*, 84 Eng. Rep. at 1082–83.

77. *Id.* at 1083.

78. Chevigny, *supra* note 61, at 1129–30.

79. (1709) 92 Eng. Rep. 349 (K.B.); 2 Ld. Raym. 1296.

80. *Id.* at 350.

81. *Id.*

82. *Id.*

drawn swords to where the constable was holding Dekins.<sup>83</sup> The group demanded her release.<sup>84</sup> Bray called for help from a fellow constable, and when that fellow arrived he was killed by the accused.<sup>85</sup> The Queen's Bench held that the defendants had not committed murder, but manslaughter only.<sup>86</sup> They were apparently pardoned.<sup>87</sup>

The defendants claimed that Bray had acted outside his jurisdiction and without a warrant.<sup>88</sup> As such, they argued, "he did not act as a constable, but a common oppressor."<sup>89</sup> The defendants had been "provoked" to violence by the sight of such oppression, for "it is a sufficient provocation to all people out of compassion; much more where it is done under a colour of justice, and where the liberty of the subject is invaded, it is a provocation to all the subjects of England."<sup>90</sup> For, as the court concluded, if anyone "imprisons a man" against the law, "he is an offender against Magna Charta" and can be resisted as a tyrant.<sup>91</sup>

Even technical defects in the arrest, a missing staple or a mistaken pen stroke, could dispel the law's protection over an officer and transform him into a rogue. In *Sir Henry Ferrers's Case*,<sup>92</sup> an officer named Stone came to arrest Sir Henry Ferrers for a debt.<sup>93</sup> Ferrers's servant, seeking to rescue his master, killed the officer.<sup>94</sup> The government indicted Ferrers on a charge of aiding and abetting in the murder.<sup>95</sup> The court held that the warrant for Ferrers's arrest was defective: the warrant said "Sir Henry Ferrers, Knight" when it should have said "Sir Henry Ferrers, Baronet."<sup>96</sup> This variance meant the servant's killing of Stone could not be murder, because there was "no good warrant."<sup>97</sup> This formalist nicety remained persuasive to some courts even as late as the early nineteenth century. In *Rex v.*

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83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 353.

87. *Id.* There is some ambiguity in the opinion as to what happened to the defendants after the court deemed them covered by a general Act of Pardon. *Id.*

88. *Id.* at 351.

89. *Id.* at 352.

90. *Id.*

91. *Id.* at 353; *see also* *Rex v. Adey*, (1779) 168 Eng. Rep. 205 (K.B.); 1 Leach 206. In *Adey*, a woman who killed an officer who came to arrest a man on an insufficient warrant was discharged after eighteen months. *Id.* at 208. The court speculated that if a man had killed officers who with insufficient warrant came to arrest him, "the homicide would have been lessened to the crime of manslaughter," and acknowledged the precedent of *Huggett* and *Tooley*. *Id.* at 207.

92. (1634) 79 Eng. Rep. 924 (K.B.); Cro. Car. 371.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* *But see* *Mackaley's Case*, (1611) 79 Eng. Rep. 239 (K.B.) 240; Cro. Jac. 279, 280 (finding no defense on basis of error or mistake in process and sentencing the defendant to execution). Eventually, both English and American common law held that a *technically* defective warrant would *not* excuse resistance to an arrest. *See* *R v. Davis*, (1861) 169 Eng. Rep. 1305 (Carmarthen Assizes); Le. & Ca. 64.

*Mead*,<sup>98</sup> the court acquitted a man of attempting to murder a bailiff while resisting arrest because the bailiff could only produce the arrest warrant, but not the underlying writ.<sup>99</sup> As such the bailiff “must be considered as a trespasser.”<sup>100</sup>

The English common law right to resist an illegal arrest persisted in American jurisprudence for nearly two hundred years after independence, eventually taking on a more explicit self-defense cast. In the Massachusetts case *Commonwealth v. Drew*,<sup>101</sup> Drew killed a deputy sheriff attempting to arrest him in his place of work.<sup>102</sup> Drew cited in his defense *Sir Henry Ferrers’s Case*, *Hopkin Huggett’s Case*, and *Tooley*, among other English precedents, alleging among other factors that the deputy did not have legal authority to effect the arrest.<sup>103</sup> The Supreme Judicial Court of Massachusetts concurred that “if any man, under color or claim of legal authority, unlawfully arrest, or actually attempt or offer to arrest another, and if he resist [and kill] the aggressor, it will be manslaughter” and that any person coming to the aid of such a person would also be guilty only of manslaughter.<sup>104</sup> The jury, based on this instruction, acquitted Drew of murdering an officer in execution of his office, but, paradoxically, found him guilty of murdering Drew as an ordinary citizen.<sup>105</sup>

Later, that same court granted a new trial to a group of citizens who repelled officers attempting an arrest without a good warrant. In *Commonwealth v. Crotty*,<sup>106</sup> officers attempted to arrest Crotty on a general warrant.<sup>107</sup> Crotty resisted, and his fellow defendants came to his aid.<sup>108</sup> The entire group was charged with riot.<sup>109</sup> Because the warrant was defective, the officer “acted without warrant and was a trespasser.”<sup>110</sup> The court concluded that the alleged rioters in resisting the officer “were guilty of no improper or excessive force or violence” and could not be guilty of riot.<sup>111</sup>

98. (1817) 171 Eng. Rep. 621 (K.B.); 2 Stark. 205. The prosecution claimed that “it was the duty of a party . . . to submit himself [to arrest] in the first instance” and only afterwards to “obtain redress by means of a civil action” if the arrest was not lawful. *Id.* at 622. The prisoners were acquitted. *Id.*

99. Another feature of the case might have been defects in the scope of the jurisdiction granted by the writ. *See id.* at 622.

100. *Id.*; *see also* Chevigny, *supra* note 61, at 1129–31 (discussing unlawful arrest as sufficient provocation).

101. 4 Mass. (4 Tyng) 391 (1808).

102. *Id.* at 392–94.

103. *Id.* at 394.

104. *Id.* at 397–98.

105. *See id.* at 391, 398.

106. 92 Mass. (10 Allen) 403 (1865).

107. *See id.* at 403. The warrant did not name Crotty, but used the term “John Doe” or “Richard Roe.” *Id.* The arresting officers said they did not rely upon the warrant, but upon other information. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 405.

111. *Id.*

Threatening an officer with arms could be excused, if the officer acted without proper authority. In *United States v. Goure*,<sup>112</sup> a defendant, John Goure, was convicted for “with force and arms . . . threaten[ing] to kill” two constables who attempted to arrest him illegally.<sup>113</sup> The constables had acted upon an information, but without a warrant.<sup>114</sup> The court held that Goure must be released.<sup>115</sup> Although the United States had charged that Goure had “intend[ed] to intimidate” the officers, because they were not acting upon a good warrant, Goure could not have committed a crime,<sup>116</sup> and was within his rights to resist them.

Half a century later, American courts could still exonerate a person for resisting an unlawful arrest. In 1900, in *Bad Elk v. United States*,<sup>117</sup> the United States Supreme Court granted another trial for a man sentenced to death for killing a police officer while resisting arrest.<sup>118</sup> The Court, after reciting the long history of the common law right to resist an illegal arrest, concluded:

[T]he law looks with very different eyes upon the transaction, when the officer had the right to make the arrest, from what it does if the officer had no such right. What might be murder in the first case might be nothing more than manslaughter in the other, or the facts might show that no offence had been committed.<sup>119</sup>

State courts throughout the nation concurred with this understanding. Many came to shift focus from provocation to the self-defense origins of the right to resist arrest.<sup>120</sup> Some states went so far as to permit deadly force to resist an illegal arrest, even if the only threat to the individual was loss of liberty, rather than loss of life.<sup>121</sup> However, no Supreme Court decision has ever held that the right to defend

112. 25 F. Cas. 1381 (C.C.D.C. 1834) (No. 15,240).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. 177 U.S. 529 (1900).

118. *Id.* at 530, 538.

119. *Id.* at 537–38.

120. *See, e.g.*, *State v. Oliver*, 7 Del. (2 Houst.) 585, 604–06, 608 (Del. Super. Ct. 1863); *Perdue v. State*, 63 S.E. 922, 923–25 (Ga. Ct. App. 1909); *Simmerman v. State*, 17 N.W. 115, 116–17 (Neb. 1883); *see also* Hemmens & Levin, *supra* note 61, at 6. Hemmens and Levin suggest that the courts began to switch emphasis from a provocation rationale to a self-defense rationale in the early twentieth century. Hemmens & Levin, *supra* note 61, at 6. It is not apparent that this distinction would have been recognized in the eighteenth century, nor is it apparent that the rationale, whether couched as self-defense to an officer’s assault or as provoked resistance to a perceived usurpation, makes much difference in terms of whether the person has a right to resist.

121. *See* *State v. Bethune*, 99 S.E. 753, 754 (S.C. 1919) (upholding “[t]he right of a person to resist an unlawful arrest, even to the extent of taking the life of the aggressor, if it be necessary, in order to regain his liberty”); *see also* *Perdue*, 63 S.E. at 924 (“We do not think that a person would have a right to kill an officer who attempted to commit a trespass upon his person and nothing more. The degree of force used to resist an illegal arrest would depend upon that used or attempted by the officer; and where a person resists an officer attempting to arrest him without legal authority, and the resistance is only proportionate to

against an unlawful arrest is a *constitutional* as opposed to a mere *common law* right.<sup>122</sup> Whether *Heller* and *McDonald* changed that is the crux of this Article.

The common law right to resist an illegal arrest, as a species of self-defense, went into steep decline in the latter half of the twentieth century. The decline began in the 1950s and 1960s, with the drafting of the Uniform Arrest Act and the Model Penal Code.<sup>123</sup> Today, only thirteen states allow a person to resist an illegal arrest.<sup>124</sup> The modern trend is to forbid resistance to an arrest, “which the arrestee knows is being made by a peace officer, even though the arrest is unlawful.”<sup>125</sup> Even in those jurisdictions with a right to resist arrest, almost none of them allow resistance to a *Terry*-style stop-and-frisk,<sup>126</sup> even though courts rely on “policy arguments used elsewhere to support abolition of the common law [right to resist arrest] itself.”<sup>127</sup>

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the assault, and is provoked by it, and the killing is without malice, it is neither murder nor manslaughter.”); *Simmerman*, 17 N.W. at 117 (“[W]here A. unlawfully attempts to arrest B., B. is justified in resisting; and if A. so presses B. as to make it necessary for him to choose between submission and killing A., then the killing A. is not even manslaughter.”) (quoting FRANCIS WHARTON, A TREATISE ON THE LAW OF HOMICIDE IN THE UNITED STATES § 227 (2d ed. 1875)).

122. The closest the Court has come has been in dicta and in dissent. See *United States v. Di Re*, 332 U.S. 581, 594 (1948) (“One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases.”); see also *Wainwright v. City of New Orleans*, 392 U.S. 598, 613 (1968) (Douglas, J., dissenting from dismissal of certiorari as improvidently granted) (“[T]he principle that a citizen can defy an unconstitutional act is deep in our system.”). The distinction is important as the common law may be abrogated by statute or overturned by later decision, whereas a constitutional right cannot be directly altered except through the amendment process.

123. See *Hemmens & Levin*, *supra* note 61, at 18–24.

124. Those states are Alabama, Georgia, Louisiana, Maryland, Mississippi, New Mexico, New York, North Carolina, Pennsylvania, South Carolina, Virginia, West Virginia and Wyoming. ALA. CODE § 13A-3-28 (LexisNexis 2005); *Ex parte Wallace*, 497 So. 2d 96, 97 (Ala. 1986); GA. CODE ANN. § 16-10-24 (2007); *Long v. State*, 583 S.E.2d 158, 160 (Ga. Ct. App. 2003); LA. REV. STAT. ANN. § 14:108 (2004 & Supp. 2010); *State v. Ceaser*, 2002-3021 (La. 10/21/03); 859 So. 2d 639, 643; MD. CODE ANN., CRIM. LAW § 9-408(b) (LexisNexis 2002 & Supp. 2010); *Lamb v. State*, 786 A.2d 783, 800–01 (Md. Ct. Spec. App. 2001); *Chambers v. State*, 973 So. 2d 266, 271 (Miss. Ct. App. 2007); *State v. Phillips*, 203 P.3d 146, 149–50 (N.M. Ct. App. 2008); *People v. Jensen*, 654 N.E.2d 1237, 1240 (N.Y. 1995); *Commonwealth v. Jackson*, 924 A.2d 618, 620 (Pa. 2007); *State v. McGowan*, 557 S.E.2d 657, 661 (S.C. 2001); *Messier v. Commonwealth*, No. 1956-06-2, 2007 Va. App. LEXIS 201, \*2 (Va. Ct. App. May 15, 2007); *State v. Mullins*, 62 S.E.2d 562, 564–65 (W. Va. 1950); *Mickelson v. State*, 906 P.2d 1020, 1023 (Wyo. 1995); *Van Horn v. State*, 802 P.2d 883, 885 (Wyo. 1990). Two states’ laws, Ohio and Vermont, are ambiguous. OHIO REV. CODE ANN. § 2921.33 (LexisNexis 2010); *City of Columbus v. Fraley*, 324 N.E.2d 736, 739–40 (Ohio 1975); *State v. Durham*, 2007-Ohio-6262, at ¶ 12 (Ohio Ct. App. 2007); VT. STAT. ANN. tit. 13, § 3017 (2009); *State v. Peters*, 450 A.2d 332, 333–35 (Vt. 1982).

125. Dag E. Ytreberg, Annotation, *Right to Resist Excessive Force in Accomplishing Lawful Arrest*, 77 A.L.R.3d 281 § 2[b] (1977).

126. *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968) (establishing the lawfulness of the stop-and-frisk).

127. LAFAVE, *supra* note 38; see also *United States v. Dawdy*, 46 F.3d 1427, 1431 (8th Cir. 1995) (“[A] defendant’s response to even an invalid arrest or *Terry* stop may constitute

The only universal exception is that a person may resist an officer who uses such excessive force as to threaten immediate death or injury. But even then, the person is obliged to defuse the confrontation. Where the police officer is using excessive force—as, for example, holding someone at gunpoint for a parking ticket—the individual must submit to the arrest if he knows, or has reason to know, that by submitting the police officer will relent in his excessive use of force.<sup>128</sup>

Courts and commentators offer a number of process- and law-and-order-based justifications to abrogate the common law right to resist arrest.<sup>129</sup> Whereas at one time arrest could lead to indefinite detention in squalid conditions, today, effective post-arrest remedies and more humane terms of confinement have rendered the necessity of resisting arrest dangerously anachronistic.<sup>130</sup> Courts frequently pair these arrestee-focused justifications with the specter of violence and chaos threatened by self-help,<sup>131</sup> especially in an era of heavily armed law enforcement.<sup>132</sup>

independent grounds for arrest.”); *Hicks v. State*, 984 A.2d 246, 253 (Md. Ct. Spec. App. 2009) (“There is no privilege to resist either an unlawful *Terry* stop, or an unlawful frisk.” (citation omitted)). The Supreme Court of Louisiana, which *does* allow resistance to an unlawful *arrest*, distinguished resistance to a stop-and-frisk this way:

Extending the rule that a citizen may resist an unlawful arrest to an unlawful stop-and-frisk would belie the paramount purpose of ensuring officer safety by encouraging the use of force on police officers. Law enforcement officials are called upon in the field to make split-second decisions regarding their own safety, and whether the officer did, in hindsight, possess articulable suspicion to justify the frisk should be resolved in the courtroom rather than in the streets.

*State v. Sims*, 2002-2208, p. 11 (La. 6/27/03); 851 So. 2d 1039, 1046–47.

128. Ytreberg, *supra* note 125, § 8.

129. See Wright, *supra* note 61, at 389–401, for one summary of such reasons.

130. See, e.g., *People v. Hess*, 687 P.2d 443, 446–47 (Colo. 1984) (remarking on the improved post-arrest remedies available to a defendant); *Ellison v. State*, 410 A.2d 519, 525 (Del. Super. Ct. 1979) (“Where society has provided its members with a reasonable means to obtain prompt and impartial review of their legal disputes, the necessity for resort to self-help remedies is radically dissipated and society need no longer tolerate such efforts.”); *State v. Richardson*, 511 P.2d 263, 267 (Idaho 1973) (resisting arrest is “clearly not favored in this modern era where a defendant has the protections and benefits of liberal bonding policies, appointed counsel[,] . . . and the opportunity to be taken before a magistrate for immediate arraignment and preliminary hearing”); *Commonwealth v. Moreira*, 447 N.E.2d 1224, 1227 (Mass. 1983) (noting that liberal bail, right to counsel, right to remain silent, right to cut off interrogation, and speedy arraignment and trial all justify abrogation of the common law right to resist illegal arrest); *American Fork City v. Pena-Flores*, 2002 UT 131, ¶¶ 13, 15, 63 P.3d 675, 679 (noting increased availability or procedural protections); *State v. Hobson*, 577 N.W.2d 825, 834–36 (Wis. 1998) (noting similar reasons); Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 315 (1942) (noting conditions of jails and paucity of procedural protections).

131. See, e.g., *Miller v. State*, 462 P.2d 421, 426 (Alaska 1969) (noting danger of escalation of violence when a citizen resists arrest); *State v. Mitchell*, 62 P.3d 616, 619 (Ariz. Ct. App. 2003) (“The purpose of the resisting arrest statute is to protect peace officers and citizens from substantial risk of physical injury.”); *People v. Curtis*, 450 P.2d 33, 36 (Cal. 1969) (noting resistance to armed police heightens potential for violence); *People v. Villarreal*, 604 N.E.2d 923, 929 (Ill. 1992) (noting that self-help would “create havoc, and substantially hinder our police forces’ ability to keep the peace”); Sam Bass Warner, *Investigating the Law of Arrest*, 26 A.B.A. J. 151, 154 (1940) (observing that because of



Finally, courts have suggested that Fourth Amendment protections have obviated the need for self-help. Doctrinal rules such as the exclusionary rule, the prohibition on deadly force to arrest a fleeing suspect, and damage actions for illegal arrest under § 1983 have undermined the urgency of resort to self-defense or the defense of others to retain liberty.<sup>133</sup>

All of these reasons to abrogate the right to resist arrest seem sensible. But modern changes in the law, no matter how sensible, cannot contravene constitutional commands. As Paul Chevigny observed half a century ago, “[t]he right to resist unlawful arrest memorializes one of the principal elements in the heritage of the English revolution: the belief that the will to resist arbitrary authority in a reasonable way is valuable and ought not to be suppressed by the criminal law.”<sup>134</sup> Both the right to resist arrest and the right to keep and bear arms for self-defense are products of our English common law traditions.<sup>135</sup> If the common law right of self-defense is now a constitutional imperative, and if resisting arrest (not to mention lesser defensive activity, such as carrying a weapon into a tax assessor’s office) is merely self-defense against specific government threats to liberty, then it cannot be abrogated by common law decision making or legislation, no matter how much it makes good policy. As the Court has insisted, the enumeration of a right “takes certain policy choices off the table.”<sup>136</sup> And if Americans understood themselves to have a constitutionally guaranteed right to defend themselves and others against illegal arrest in 1791, then the gradual decline and abolition of the right in the subsequent two centuries should be inconsequential, however justifiable.<sup>137</sup> That all the whelks and pimples of

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firearms “the right to resist by force an illegal arrest . . . is a right which is calculated, if exercised under modern conditions, to increase rather than alleviate the mass of human suffering”).

132. *Curtis*, 450 P.2d at 36 (noting better armament of police). For discussions of the militarization of law enforcement, see David B. Kopel & Paul M. Blackman, *Can Soldiers Be Peace Officers?: The Waco Disaster and the Militarization of American Law Enforcement*, 30 AKRON L. REV. 619 (1997); Karan R. Singh, Note, *Treading the Thin Blue Line: Military Special-Operations Trained Police SWAT Teams and the Constitution*, 9 WM. & MARY BILL RTS. J. 673 (2001).

133. See *Hobson*, 577 N.W.2d at 836 (noting availability of exclusionary rule and damage actions in lieu of armed resistance); see also *Moreira*, 447 N.E.2d at 1227 (noting that procedural protections have made right to resist unlawful arrest “anachronistic”).

134. Chevigny, *supra* note 61, at 1137.

135. Compare *id.* with *District of Columbia v. Heller*, 554 U.S. 570, 592–93 (2008) (discussing the rights of the English under the Declaration of Right).

136. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (quoting *Heller*, 554 U.S. at 636).

137. Paul Chevigny speculated that “the right to resist may be viewed as a common law right as well as a constitutional right.” Chevigny, *supra* note 61, at 1139. Given that the Court has constitutionalized other common law doctrines in the Fourth Amendment, Fifth Amendment, and Sixth Amendment contexts, it seems plausible that *Heller* could do something similar with the Second Amendment. Cf. David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1808 (2000) (describing Justice Scalia’s Fourth Amendment originalism as “constitutionalized common law”); *id.* at 1757 (describing Justice Scalia as proposing “that eighteenth-century common law should be the measure of Fourth Amendment protection”).

eighteenth-century formalism encrust the right to self-defense is simply the price paid for constitutional principle.<sup>138</sup>

Moreover, states have abrogated the common law right to resist arrest on policy grounds specifically counter-indicated by both *Heller* and *McDonald*. Take, for instance, the argument that it is futile and dangerous to resist a heavily armed policeman.<sup>139</sup> The California Supreme Court made the point this way: “In a day when police are armed with lethal and chemical weapons, and possess scientific communication and detection devices readily available for use, [it is] highly unlikely that a suspect, using *reasonable* force, can escape from or effectively deter an arrest.”<sup>140</sup> But the *Heller* Court specifically rejected this type of argument from futility. Supporters of the District argued that the Second Amendment right could not be individual because employing small arms against a standing army equipped with “modern-day bombers and tanks” would be well-nigh useless.<sup>141</sup> The Court breezily dismissed that point, stating that the individual right had not lapsed simply because the “fit” between the right and its actual effectiveness had loosened in the past two centuries.<sup>142</sup>

Similarly, states have abolished the right to resist arrest because police and jailors are better trained and because the incarcerated enjoy numerous levels of procedural protections. But the Court shot down a similar argument in *Heller*. Even if the modern standing army were more reliable, “the pride of our Nation,” rather than a threat, and even if the police were “well-trained” and provided “personal security,” even then it was not for the Court to render the Second Amendment “extinct.”<sup>143</sup> The Court did not think these changed circumstances had any bearing on the Second Amendment’s effect on self-defense against the military; why should they have any bearing on the right to self-defense against the police? Moreover, in *McDonald*, the Court specifically identified the ill-treatment of freedmen by local law enforcement as *the* reason the right is incorporated against the states.<sup>144</sup>

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138. On the challenge that public-understanding originalism need not consider the formalism of its source material, see ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (1997) (“The rule of law is *about* form.” (emphasis in original)); Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 199 (2005) (“Where the text and historical record disclose a bright-line rule, the originalist approach leads one to a formalistic rule.”); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 122 (2006) (“[S]ome originalists have argued that the provisions [incorporating common law principles] must be understood according to common law rules that prevailed when the Constitution was adopted.”); see also *Minnesota v. Carter*, 525 U.S. 83, 95 (1998) (Scalia, J., concurring) (interpreting the Fourth Amendment text in light of “the common law background against which it was adopted”).

139. *People v. Curtis*, 450 P.2d 33, 36 (Cal. 1969).

140. *Id.* (emphasis in original). *But see McDonald*, 130 S. Ct. at 3045 (refusing to construe the Second Amendment right differently than other constitutional rights due to its public safety implications).

141. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

142. *Id.*

143. *Id.* at 636.

144. *McDonald*, 130 S. Ct. at 3037–42; see also *infra* text accompanying notes 156–241.

This methodological support for strong protection of retail rebellion is strengthened by the Court's occasionally reflexive incorporation of natural law philosophy.<sup>145</sup> Second Amendment crusaders often advance the proposition that the natural right of self-defense is preeminent among all other rights.<sup>146</sup> Not only is the right preeminent, but inalienable. Frequently, the rhetoric contains heady libertarian strains:

[T]he Founding Fathers and the natural-rights philosophers they followed (Hobbes, Locke, Blackstone, and Montesquieu, among others) enthusiastically embraced the right of personal self-defense. It bears emphasis that self-defense had a broader meaning than it is usually conceived of having today. Self-defense included not only defense against apolitical crime but also against assassination, genocide, and other politically-motivated oppressions—what Algernon Sidney called “the violence of a wicked magistrate who, ha[ving] armed a crew of lewd villains,” subjects the people to murder, pillage, and rape.<sup>147</sup>

Hobbes went so far as to argue that the natural law of self-preservation *requires* an individual to resist arrest, even if the arrest was wholly lawful.<sup>148</sup> The individual encounter between the sovereign (in the form of the officer) and the accused presented what Alice Ristroph has identified as the “specific state of nature.”<sup>149</sup> The “specific state of nature” is nothing more than a “conflict between two mere mortals in the state of nature [where] both the sovereign and the criminal . . . have equal rights of self-preservation, and the criminal has as much right to resist punishment as the sovereign has to impose it.”<sup>150</sup> This right to resist is an inalienable natural right. As Ristroph writes, “[s]ince ‘a man cannot lay down the

145. See, e.g., *McDonald*, 130 S. Ct. at 3036 (calling self-defense a “basic” right); *Heller*, 554 U.S. at 595 (“Americans understood the ‘right of self-preservation’ as permitting a citizen to ‘repe[l] force by force’ when ‘the intervention of [the] society in his behalf, may be too late to prevent an injury.’” (first alteration in original, second alteration added) (quoting 1 BLACKSTONE’S COMMENTARIES 145 n.42 (St. George Tucker ed., 1803))).

146. See, e.g., Stephen P. Halbrook, *The Right of Workers to Assemble and to Bear Arms: Presser v. Illinois, One of the Last Holdouts Against Application of the Bill of Rights to the States*, 76 U. DET. MERCY L. REV. 943, 950 (1999) (discussing common law recognition of use of deadly force against a law officer’s excessive force); Kates, *Ideology, supra* note 51, at 101 (noting that the founders thought that “every free man has an inalienable right to defend himself against robbery and murder—or enslavement, which partakes of both,” including a right to defend himself against tyranny); see also *McDonald*, 130 S. Ct. at 3036 (calling self-defense the “central component” of the Second Amendment right (emphasis omitted) (quoting *Heller*, 554 U.S. at 599)).

147. Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1345 (2009) (first alteration added, second alteration in original) (footnote omitted) (quoting 2 ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 246 (1805)). For an account of such behavior, see *infra* Part III (discussing police violence during Reconstruction).

148. See Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CALIF. L. REV. 601, 615–18 (2009).

149. *Id.* at 614.

150. *Id.* at 615.

right of resisting them, that assault him by force,' no one can be understood to have abandoned or transferred the right to resist 'wounds, chains, and imprisonment.'"<sup>151</sup>

The *Heller* and *McDonald* Courts do not state that resisting arrest is a natural right; but neither do they make any meaningful distinction between the natural right of self-preservation when the attacker is a criminal as opposed to a police officer, nor does the Court's appeal to eighteenth-century history and natural law help to craft such a distinction. Instead, the theoretical basis of abrogating the right to resist an illegal arrest seems to "reflect[] a shifting preference . . . for order over liberty."<sup>152</sup> But, as the Court has suggested more than once, those preferences were already fixed at the Founding, so any shift should be irrelevant. Further, abrogation of the right to resist such an assault to liberty would seem to "criminalize[] the natural defensive human reaction"<sup>153</sup> the Second Amendment is supposed to protect.<sup>154</sup>

The *Heller* methodology, perhaps unwittingly, incorporates a formalist and natural law history of self-defense that is alien to most modern understandings of law enforcement. But, if self-defense against police in 1791 included these formal and natural law elements, then they should form a part of the original public understanding of what the Constitution protects today in individual encounters with the police. And yet little of the existing scholarship actually addresses the consequences of this methodology. Instead, the literature tends to resort to glittering generalities that some kind of lawful right to resist arrest exists, but does not adequately explain from whence it comes, or the nature of its limitations.<sup>155</sup>

Further, as Part III explores, this eighteenth-century problem of retail rebellion is magnified by congressional debates concerning the arming of freedmen during Reconstruction.

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151. *Id.* at 617 (quoting THOMAS HOBBES, *LEVIATHAN* 93 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651) (spelling, punctuation, and capitalization modernized)). A slightly different version of this idea appears in Green's concept of "state-of-nature pockets," areas in which "we are released from the authority of the government when faced with imminent violence" and the government cannot—or will not—assist. Green, *supra* note 48, at 170.

152. Hemmens & Levin, *supra* note 61, at 3.

153. Lerblance, *supra* note 75, at 682. Nicholas Johnson put it this way: "In its immediate and most essential form, self-defense is not something government really can stop. If a psychopath kicks down my door, nothing anyone in Washington can say or do will keep me from going at him with something heavy or sharp." Nicholas J. Johnson, *Self-Defense?*, 2 *J.L. ECON. & POL'Y* 187, 194 (2006).

154. For more on self-defense as a constitutional guarantee, see Johnson, *supra* note 153.

155. See, e.g., Halbrook, *supra* note 146, at 950 (remarking on the common law right to use deadly force to resist police threatening excessive force); Kates, *Ideology*, *supra* note 51, at 93 (noting philosophical antecedents of the right to resist "tyran[n]ical officials"); Kopel, *supra* note 51, at 1454 n.358 (discussing self-defense as a continuum—from an individual's right to protect himself against a criminal individual to an individual's right to protect himself against a criminal government).

## III. RETAIL REBELLION REPRIS: SOUTHERN RECONSTRUCTION

*Heller's* retail rebellion problem is compounded by a brute fact: there *is* such a thing as lawless law enforcement.<sup>156</sup> The professional police force is of recent vintage.<sup>157</sup> Early law enforcement was “a community affair,”<sup>158</sup> with a rotating detail of night watchmen raising a “hue and cry” in case of trouble, to which every adult male was required to respond.<sup>159</sup> Well into the nineteenth century, law enforcement continued as a patchwork of hired retainers, private collectives, community regulators, militia members, and detachments of military officials.<sup>160</sup> Unfortunately, for much of this period, law enforcement was poorly paid (if paid at all), corrupt, and inept.<sup>161</sup> To the Founding generation, “[g]enerally . . . there was no difference in character among rioters, felons and soldiers,”<sup>162</sup> and, one might add, police.

Lawless law enforcement persisted into the nineteenth century. America's experience with Reconstruction was proof. In fact, the development of the professional urban police department coincided with the turmoil of the Civil War and Reconstruction. As the *McDonald* Court observed, during the nineteenth century, freedmen and Union sympathizers had as much to fear from Southern law enforcement as they did from terrorist organizations like the Klan.<sup>163</sup> Often, it was difficult to distinguish between the two. To paraphrase a colleague: sometimes the sheriff wore a badge, sometimes he wore a sheet.<sup>164</sup> Prior to the passage of the Fourteenth Amendment, but contemporaneously with its model, the Civil Rights Act of 1866, police departments on at least three occasions joined with white rioters to disarm, assault, and kill freedmen, Union sympathizers, and black federal

156. The United States Department of Justice compiles statistics of police misconduct. During 2002, citizens filed over 25,000 complaints of use of force; of these, approximately eight percent were meritorious. See MATTHEW J. HICKMAN, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: CITIZEN COMPLAINTS ABOUT USE OF FORCE 1 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ccpuf.pdf>.

157. For a general survey of the history of the police, see David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999) [hereinafter Sklansky, *Private Police*]. See also Kates, *Ideology*, *supra* note 51, at 92 (“The notion that the truly civilized person eschews self-defense . . . would never have occurred to the Founders since there were no police in eighteenth century America and England.”).

158. Sklansky, *Private Police*, *supra* note 157, at 1197 (internal quotation marks omitted).

159. *Id.*

160. See HARLAN HAHN & JUDSON L. JEFFRIES, URBAN AMERICA AND ITS POLICE 3–4 (2003); Sklansky, *Private Police*, *supra* note 157, at 1197–98.

161. Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566, 580–82 (1936) (noting the prevalence of bribery in early law enforcement); Sklansky, *Private Police*, *supra* note 157, at 1198–1200.

162. Kates, *Ideology*, *supra* note 51, at 99.

163. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3038–42 & n.20 (2010); see also *id.* at 3081–83 (Thomas, J., concurring in part and concurring in the result).

164. Thanks to Chris Bryant for this pithy remark. See also *id.* at 3039 (majority opinion) (describing a town marshal in the South who took arms from freedmen and summarily shot them).

troops.<sup>165</sup> In fact, from one perspective, congressional protections of freedmen's rights to arms could be read to facilitate just the type of armed standoff that the Shreveport, Louisiana hypothetical suggests.

But as Part IV argues, those who extrapolate from Reconstruction an unqualified vindication of freedmen's inalienable right to self-defense obscure a far, far more nuanced and fractious history. Reconstruction was a quagmire. Brittle antebellum assumptions that had unified Americans on issues of natural rights, self-defense, common law, federalism, and the police power broke open and swallowed the nation in the confused post-War reality. Reconstruction was a slough of conflicting motivations and justifications, where police and law enforcement were variously characterized as despots, racist thugs, preservers of the peace, or anti-tyranny crusaders, depending on one's political sympathies. To simplify this narrative into the unalloyed vindication of self-protection is shallow and tendentious.

The post-War South jangled with paranoia and rumor.<sup>166</sup> Children playing with wooden swords became seeds for fantastic stories of incipient campaigns of black vengeance.<sup>167</sup> White Southerners harangued the Freedmen's Bureau and federal troops to disarm the freedmen.<sup>168</sup> When they did not respond, white citizens mobilized themselves into informal "citizen patrols," a "people's militia"<sup>169</sup> to defend against phantom armies of freedmen marauders.<sup>170</sup>

Unhappy with informal efforts, Southerners petitioned for the national government to restore the official state militia to enforce the law.<sup>171</sup> Although federal authorities throughout the South strongly opposed the reorganization of the state militias,<sup>172</sup> the Southern provisional governments prevailed. Southern militias re-formed with the authority "to apprehend criminals, suppress crime, and protect the inhabitants."<sup>173</sup> As opponents predicted, the first post-War militias were nothing more than ex-Confederates with a badge.<sup>174</sup> They were thugs in uniform, engaged in a campaign of terror "aimed directly at Negroes who displayed a tendency to

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165. See *infra* text accompanying notes 179–234; see also *McDonald*, 130 S. Ct. at 3087 (noting that private violence, "often with the assistance of local governments," helped subjugate the freedmen).

166. GEORGE C. RABLE, *BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION* 26 (2007). For much of the history of this period I am indebted to Rable's book and research.

167. *Id.*

168. *Id.* at 27.

169. *District of Columbia v. Heller*, 554 U.S. 570, 599–600 (2008).

170. RABLE, *supra* note 166, at 27. The retail problems with this idea of the "people's militia" during Reconstruction are hard to overstate. No doubt the Framers of the Second Amendment accepted the idea of a nascent people's or citizens' militia designed to protect against tyrannical government. But when that people's militia was actually mobilized during Reconstruction, it simply turned into a tool of terror and oppression.

171. *Id.*

172. OTIS A. SINGLETARY, *NEGRO MILITIA AND RECONSTRUCTION* 4–5 (1957).

173. *Id.* at 5.

174. *Id.*

assert their newly granted independence.”<sup>175</sup> And among their most urgent goals was to disarm freedmen.<sup>176</sup>

Civilian law enforcement—to the extent it existed apart from the militia<sup>177</sup>—was no better. The history of early Reconstruction law enforcement is a history of incompetence, corruption, and death. Southern cities exploded in racial violence no less than three times in 1866 alone. And, in a scene repeated for over a century, often the precipitating event was the violent encounter between a white police officer and a black citizen.<sup>178</sup> The port city of Norfolk, Virginia, erupted in April 1866 after a policeman fired on a group of blacks assembled to celebrate Congress’s passage of the Civil Rights Act.<sup>179</sup> A band of blacks estimated to be between two hundred and a thousand strong, some armed, assembled in the rain and endured a hail of jeers and bottles from white onlookers as they moved through the streets in celebration.<sup>180</sup> As the assembly reached a speaker’s stand, a policeman cursed them and shot a youth.<sup>181</sup> In the ensuing riot, one of the white rioters and his mother were killed.<sup>182</sup> That night, “roving bands of whites, including police and firemen,” coursed through the city, vowing revenge.<sup>183</sup> Only the force of the United States Army turned them back.<sup>184</sup>

Less than a month later, a riot consumed Memphis, Tennessee. Again, confrontations between black citizens and white officers sparked the violence. Memphis was already prone to thuggish behavior and lawlessness, with shots fired throughout the night and heavily armed youth roaming the streets.<sup>185</sup> City efforts to outlaw slingshots and brass knuckles, as well as coordinate sweeps of the town for publicly armed civilians, did not help restore order.<sup>186</sup> The local police force, dominated by Irish immigrants, was regarded as corrupt and inept.<sup>187</sup> Their vice

175. *Id.*

176. *Id.* Rable notes that the freedmen were disarmed of even the most useless antique firearms. RABLE, *supra* note 166, at 27.

177. The distinction was not always clear; state police forces and state militia forces could at times be identical. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3039 & n.20 (2010) (identifying state militia, police, and private actors as sources of freedmen repression).

178. RABLE, *supra* note 166, at 33 (noting that riots in the Reconstruction South became “the prototype for twentieth century race riots”).

179. *Id.* at 31.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* For a discussion of the role of the United States Army in these events, see ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789–1878, at 273–74 (1988).

185. RABLE, *supra* note 166, at 33.

186. *Id.* at 34–35. Compare this attitude with Miller, *supra* note 11, at 1345–48 (discussing the ambivalent nineteenth-century attitudes towards the public carrying of weapons).

187. RABLE, *supra* note 166, at 35. The chief of police admitted that he did not have any written regulations for police conduct, and that the force was not in fact entirely under his control. *See* H.R. REP. NO. 39-101, at 326 (1866).

frequently targeted the swelling black population of Memphis.<sup>188</sup> Of particular irritation was the presence of black Union troops.<sup>189</sup> One witness testified that “[w]hen the police arrested a colored man they were generally very brutal towards him.”<sup>190</sup> The witness had personally “seen one or two arrested for the slightest offence, and instead of taking the man quietly to the lock-up . . . I have seen [the police] beat him senseless and throw him into a cart.”<sup>191</sup> Police routinely beat or indiscriminately shot black citizens who fled or resisted arrest.<sup>192</sup>

The majority acquiesced to this brutality.<sup>193</sup> Worse, local papers frequently fanned the flames of racial grievance and suspicion.<sup>194</sup> The previous fall, the media had “made the citizens believe that the negroes were all going to rise before Christmas” and had advised the citizens that, should the riot begin, they should “clean [the negroes] out.”<sup>195</sup> The local papers “were constantly stirring up the people in this way.”<sup>196</sup>

On May 1, 1866, a mix of demobilized black Union soldiers and other blacks drinking on Memphis’s South Street interfered in an altercation between two horse-team drivers, one white and one black.<sup>197</sup> When the local police arrived, black soldiers turned them away with gunfire and killed one of the officers.<sup>198</sup> The police returned that night in larger numbers and with a whites-only posse comitatus in tow.<sup>199</sup> By the evening, what started out as a police action had degenerated into a pogrom.<sup>200</sup> For the next two days Memphis police and white civilians went on a rampage. In the words of the congressional investigating committee: “The proportions of what is called the ‘riot,’ but in reality the massacre, proved to be far more extended . . . than the committee had any conception of before they entered upon their investigation.”<sup>201</sup> Whole families saw their homes burned to the

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188. RABLE, *supra* note 166, at 35–36.

189. *Id.* There is some evidence that some of these troops did engage in petty larceny and other crimes. *Id.*

190. H.R. REP. NO. 39-101, at 156.

191. *Id.*

192. RABLE, *supra* note 166, at 36.

193. *Id.* (“The public showed little inclination to prosecute the policemen . . . especially in cases of brutality against blacks.”).

194. The managing editor for the *Memphis Daily Argus* published a piece in April 1866 stating, “‘Would to God, they (meaning the negroes) were back in Africa, hell, or some other sea-port town, *anywhere* but here.’” H.R. REP. NO. 39-101, at 328 (emphasis and parenthetical in original). The managing editor denied having published this opinion piece knowingly. *Id.*; see also ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877, at 262 (1988).

195. H.R. REP. NO. 39-101, at 158.

196. *Id.*; see also RABLE, *supra* note 166, at 37 (noting that the conservative press often denounced the presence of black troops in highly charged language).

197. RABLE, *supra* note 166, at 38.

198. *Id.*

199. COAKLEY, *supra* note 184, at 276; RABLE, *supra* note 166, at 38.

200. COAKLEY, *supra* note 184, at 276 (stating that the white police and sheriff’s posse engaged in “what may best be described as a pogrom against blacks generally”).

201. H.R. REP. NO. 39-101, at 5.



ground;<sup>202</sup> a laborer coming home with groceries was shot by police in the gutter;<sup>203</sup> a cobbler was robbed of his entire savings by a group of men that included several armed policemen, who broke into his house searching for arms;<sup>204</sup> policemen and their accomplices raped black women at gunpoint.<sup>205</sup> The duly elected city recorder urged his white fellows to arm themselves and “kill[] every God-damned nigger.”<sup>206</sup> As an incentive, he promised not to fine anyone who carried a concealed weapon during the riot.<sup>207</sup> After the savagery had ended, forty-six blacks and two whites lay dead; five black women had been raped; and ninety-one homes, four churches, and twelve schoolhouses burned.<sup>208</sup> The congressional investigators castigated the fact that these atrocities were “led on by sworn officers of the law composing the city government” and that the mob had found itself “under the protection and guidance of official authority.”<sup>209</sup>

In midsummer of that same year, New Orleans’s police conducted their own outrage. This time, however, the violence against African Americans was married with specific political opposition to pro-Unionist policies and a perceived usurpation of the political process by Republican factions.<sup>210</sup> In sum, the local police participated in an antigovernment political uprising as much as a race riot.<sup>211</sup>

Tensions began to rise during the spring of 1866, after New Orleans residents elected conservative former Confederate John T. Monroe as mayor.<sup>212</sup> Among his first official acts was to appoint a new police chief<sup>213</sup> and to purge the New Orleans police force of pro-Union officers.<sup>214</sup> Estimates of former Confederates in the police ranks ranged from two-thirds to four-fifths.<sup>215</sup> Armed bands began to roam the streets.<sup>216</sup> The New Orleans police used vagrancy laws as pretexts to harass and arrest blacks.<sup>217</sup>

What sparked the riot, however, was not an archetypical encounter between black citizens and police. Instead, New Orleans erupted as a result of pro-Union attempts to reconvene a constitutional convention to allow black suffrage, disenfranchise rebels, and create a new state government.<sup>218</sup> Conservatives and

202. *Id.*

203. *Id.* at 9.

204. *Id.* at 10.

205. *Id.* at 13–14.

206. *Id.* at 24.

207. *Id.*

208. *Id.* at 36.

209. *Id.* at 5.

210. RABLE, *supra* note 166, at 43.

211. See FONER, *supra* note 194, at 262 (noting that the New Orleans riot “arose directly from Reconstruction politics”); RABLE, *supra* note 166, at 43.

212. RABLE, *supra* note 166, at 44.

213. *Id.*

214. *Id.* at 45 (“Even conservative sources indicated that Monroe had been quick to dismiss Union men from the force and fill the department with Confederate veterans.”).

215. H.R. DOC. NO. 39-68, at 72, 277 (1867).

216. RABLE, *supra* note 166, at 44.

217. *Id.* at 45.

218. FONER, *supra* note 194, at 263; RABLE, *supra* note 166, at 45. The history as to why the convention had to be reconvened, as opposed to called directly, as well as the strange

former Confederates bitterly denounced the convention as an unconstitutional Republican power-grab.<sup>219</sup> The mayor threatened to arrest the convention-goers as disturbers of the peace.<sup>220</sup> A local ex-Confederate judge issued grand jury charges prior to the riot, calling the convention organizers criminals,<sup>221</sup> perjurers,<sup>222</sup> and persons who “boldly assert they are to receive the aid of arms of the United States to assist them in usurping the right to alter the fundamental law of the State of Louisiana.”<sup>223</sup>

On July 30, twenty-six convention delegates—less than a quorum—assembled at the Mechanics’ Institute for opening prayer.<sup>224</sup> Sometime between noon and one, approximately one hundred black supporters, some armed, marched behind an American flag towards the Mechanics’ Institute in support of the convention.<sup>225</sup> Well-armed whites and former Confederates met them around Canal Street, and the first shots were fired.<sup>226</sup>

The black marchers fled towards the Mechanics’ Institute and barricaded themselves, along with the delegates, inside.<sup>227</sup> Uniformed New Orleans police officers arrived and encircled the building, with plainclothes officers and ex-Confederates forming an outer ring.<sup>228</sup> Uniformed police stormed the building with the mob in tow, firing at the trapped delegates and their supporters.<sup>229</sup> Any distinction between the mob and the police dissolved in the melee.<sup>230</sup> Desperate men jumped from second- or third-story windows, only to be shot and hacked to death by police and rioters below.<sup>231</sup> Congressional investigators pulled no punches; the riot was a “work of massacre . . . pursued with a cowardly ferocity unsurpassed in the annals of crime.”<sup>232</sup> Although conservatives claimed that the entire event was planned by Republicans in Washington, D.C. to discredit them,<sup>233</sup> “the coordinated actions of the police and mob lent some credence to the charge

alliances that it produced are as Byzantine as any in Louisiana politics. For a discussion, see RABLE, *supra* note 166, at 46–58.

219. RABLE, *supra* note 166, at 47.

220. H.R. DOC. NO. 39-68, at 85; RABLE, *supra* note 166, at 49.

221. H.R. DOC. NO. 39-68, at 73–74.

222. *Id.*

223. *Id.* at 74.

224. FONER, *supra* note 194, at 263; RABLE, *supra* note 166, at 51.

225. COAKLEY, *supra* note 184, at 283; RABLE, *supra* note 166, at 51.

226. COAKLEY, *supra* note 184, at 284; RABLE, *supra* note 166, at 52. It is unclear who fired first, a problem that tends to frustrate theories of the Second Amendment that include a right for people to assemble armed under the theory of defense of self or of others. See Miller, *supra* note 11, at 1334–35 (“Whatever Reconstruction lawmakers thought about the Second Amendment, they did not understand it to facilitate a guerilla campaign between southern factions, resolved solely by ex post litigation over who had shot first.”).

227. COAKLEY, *supra* note 184, at 284; RABLE, *supra* note 166, at 52.

228. COAKLEY, *supra* note 184, at 284.

229. *Id.*

230. H.R. DOC. NO. 39-68, at 74 (1867); *id.* at 40 (“[T]he police appeared to be under no control . . . but acted as with the mob.”); RABLE, *supra* note 166, at 52.

231. H.R. DOC. NO. 39-68, at 40; COAKLEY, *supra* note 184, at 284; RABLE, *supra* note 166, at 53.

232. H.R. DOC. NO. 39-68, at 40.

233. RABLE, *supra* note 166, at 56–58.

that the New Orleans riot was a preconcerted plot to massacre Union men and blacks."<sup>234</sup>

Prior to *McDonald*, most of the Second Amendment literature paid scant attention to these specific instances of police repression.<sup>235</sup> *McDonald* made African American self-defense against private and public threats during Reconstruction the centerpiece of its holding that the Second Amendment is incorporated against the states. These outrages seem to bolster the conclusion that Reconstruction Congress and Reconstruction America were firmly behind a right for freedmen to arm themselves to deter and, if necessary, resist the depredations of the police.

Stephen Halbrook, who has written extensively on Reconstruction-era attitudes, argues that Republican sentiment, and the Fourteenth Amendment, "championed the right of freedmen to keep arms in opposition to searches and seizures of arms by state militias."<sup>236</sup> Indeed, when it came down to local law enforcement and the right to bear arms, Halbrook states that Congress was willing to completely disband state militias "to protect freedmen from deprivation of this right [to armed self-defense]."<sup>237</sup> David Kopel has summarized congressional attitudes towards self-defense in the run-up to the Fourteenth Amendment as "plainly a concern about the self-defense rights of individual citizens, especially freedmen."<sup>238</sup> Kopel goes on to argue that "[i]t would be ludicrous to attempt to explain the record of the Reconstruction Congresses as anything but strong support for a personal right to arms for self-defense."<sup>239</sup> *McDonald* seems to confirm this understanding of Reconstruction history. The right to keep and bear arms is fundamental, and we know this because Congress and Reconstruction Americans expected the freedmen to have arms to defend themselves against lawless local government.<sup>240</sup> To paraphrase Kopel, America's understanding at Reconstruction, if not earlier, was that acts of self-defense against a lone criminal, a lone criminal officer, or a platoon of criminal law enforcement officials are simply variations on the same theme of self-defense.<sup>241</sup>

234. *Id.* at 52.

235. As of September 4, 2010, a search in the Westlaw Journals and Periodicals database for "Second Amendment" and then "riot" within two words of "Memphis," "Norfolk," or "New Orleans" returned only five hits.

236. STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876, at 69 (1998).

237. *Id.* at 115. *McDonald* wholly embraced this point. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3041 n.25, 3043 (2010).

238. Kopel, *supra* note 51, at 1454. Kopel's view is written mostly in the now settled issue of individual versus collective rights; however, the logic of his position would seem to support a fairly strong view of the right to self-defense against law enforcement.

239. *Id.*

240. *McDonald*, 130 S. Ct. at 3042, 3044.

241. Kopel, *supra* note 51, at 1454 n.358.

## IV. RETAIL REBELLION AND RETAIL JUSTICE

*We do not need citizen avengers who are authorized to respond to unlawful police conduct by gunning down the offending officers.*<sup>242</sup>

So, when, if ever, is there a constitutional right to kill a cop? Well, there is a right, but it is not implemented in the broad and preemptive sense that some champions of the Second Amendment may think and certainly not in the manner in which most other constitutional rights are vindicated. Instead, just as rebellion can be delivered retail, so can constitutional justice. The problem of retail rebellion has a retail solution.

As discussed, originalist methodology potentially commits the Court to an outcome that is both logically consistent and practically unsavory. The Court's originalism seems to demand that the 1791 formalism of illegal police action and the 1868 object of protecting freedmen overwhelm whatever rules of modern law enforcement have developed within the last half-century. In both cases, the Second Amendment becomes a license for anarchy: The people have a right to bear arms, in public, specifically to intimidate the police, and to use those weapons against the police in circumstances in which they perceive their constitutional rights or the constitutional rights of others to have been violated, subject only to post-confrontation resolution by a court. But this undermines the entire philosophy behind almost every state law that bans arms in government buildings, that requires persons to surrender arms while in custody, and that punishes resistance to even an illegal arrest. It also calls into question the underpinning of the Court's entire Fourth Amendment jurisprudence, beginning with *Terry v. Ohio*,<sup>243</sup> that the safety of law enforcement officials justifies restrictions on liberty.<sup>244</sup>

Certainly, the Court could decide that retail rebellion is not a problem at all. It could simply hold that Second Amendment self-defense is no respecter of persons, and unlawful confrontation is the same whether the assailant flashes a badge and a gun, or just a gun. But it is unlikely the Court would sacrifice half a century of police-protective doctrine on the altar of Second Amendment absolutism.<sup>245</sup> Alternatively, the Court could solve the problem of retail rebellion by judicial fiat.

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242. *United States v. Johnson*, 542 F.2d 230, 233 (5th Cir. 1976).

243. 392 U.S. 1 (1968).

244. For some work on the consequences of *Heller* and *McDonald* on police enforcement and Fourth Amendment protection, see George M. Dery III, *Unintended Consequences: The Supreme Court's Interpretation of the Second Amendment in District of Columbia v. Heller Could Water-Down Fourth Amendment Rights*, 13 U. PA. J.L. & SOC. CHANGE 1 (2009) (discussing the effect of strong Second Amendment rights on Fourth Amendment protections); Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun-Control Laws?*, 105 NW. U. L. REV. COLLOQUY 85, 88–89 (2010), <http://www.law.northwestern.edu/lawreview/colloquy/2010/24/LRColl2010n24Rosenthal&Malcom.pdf> (discussing cases in light of ability of law enforcement to conduct a stop-and-frisk).

245. *McDonald* is a case in point. Despite decades of originalist disapproval of selective incorporation, a plurality of the *McDonald* Court flinched when it came to driving a stake in the heart of this method of incorporation. See, e.g., *McDonald*, 130 S. Ct. at 3030–31 (declining to revisit whether incorporation through the due process clause is appropriate).

It could simply add to its expanding list of *ipse dixit* that the Second Amendment does not cover prohibitions on resisting arrest. But then the Court begins to look less like a government body whose power is reason and more like a government body whose power is power. Alternatively, the Court could designate resisting arrest as an exercise of the Second Amendment subject to some low level of scrutiny. But both *Heller* and *McDonald* indicate strongly that standards of scrutiny are just shorthand for unguided interest balancing.<sup>246</sup> The balancing is supposed to have been accomplished in the very enactment of the right. None are ideal solutions. And the last two alternatives expose the *Heller* majority to accusations—seemingly underscored by *McDonald*<sup>247</sup>—that its methodology is instrumental, and that originalism is simply a historical rouge applied to a base policy preference.

An alternative way out of the mire, which I advance in this Part, is to acknowledge the complexity of history, and to conclude that the right to self-defense against police officers is a codified natural right, but a very thin one.<sup>248</sup> The right to self-defense against government does not include a right to publicly arm oneself in order to thwart police misconduct in general; neither does it include a right to publicly arm oneself in anticipation of a confrontation with a rogue police officer; neither does it include a right sufficient to sustain a facial challenge if a state or municipality has gone to the absurd length as to abolish self-help against police altogether. Instead, the Second Amendment right to retail rebellion is directly tied to the ephemera of circumstance.<sup>249</sup> It preserves a right to present to an impartial jury the circumstances under which an individual defendant believed it necessary to exercise a natural right to self-preservation against a police officer in an individual case.<sup>250</sup>

I do not mean to suggest that this thin conception of Second Amendment self-defense is a ceiling—far from it. It is a floor. States, exercising their judgment, and within the bounds of equal protection and due process, have as much power as they wish to extend the right, whether through affirmative legislation or through interpretation of their own constitutions. They may allow for reasonable (or perhaps even unreasonable) use of force in resistance to law enforcement; they may allow concealed or unconcealed arms anywhere subject to their control, even into

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246. *Id.* at 3047 (expressly rejecting interest balancing); *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008) (same).

247. *See supra* note 245.

248. The reason for the distinction between public arms and private arms is explored in my previous work. *See generally* Miller, *supra* note 11.

249. *See* Brannon P. Denning, *In Defense of a “Thin” Second Amendment: Culture, the Constitution, and the Gun Control Debate*, 1 ALB. GOV’T L. REV. 419, 419 (2008). Of course, my proposal has the Second Amendment working at a much thinner level than Professor Denning has proposed; however, it does so with even more of a feeling that the history does not support a thick Second Amendment.

250. I reserve for others the more difficult issue of whether this restriction applies to resisting arrest in one’s home or residence. There is some support for special protection against illegal arrest in the home as opposed to outside the home. *See* *Sapen v. State*, 869 N.E.2d 1273, 1280 (Ind. Ct. App. 2007) (“We have recognized that a greater privilege exists to resist an unlawful entry into private premises than to resist an unlawful arrest in a public place.” (citing *Adkisson v. State*, 728 N.E.2d 175, 179 (Ind. Ct. App. 2000))); *Casselmann v. State*, 472 N.E.2d 1310, 1316 (Ind. Ct. App. 1985) (same).

the police precinct. Perhaps a state could even abolish its police force altogether and rely solely on citizen militias to enforce the law. But these are rights that derive from state legislation or state constitutions. They are not imposed by federal judicial interpretation of the Second Amendment.

This thin conception of self-defense against the police incorporates the complexity of history, without abandoning its guidance altogether. It preserves local discretion to adjust an optimal balance between policing by individual community members and policing by a professional force. It keeps the private ownership of firearms intact as a latent, but not an active, threat to government. Plus, it best marries the right of self-defense with the existing doctrinal structures that address fact-intensive constitutional challenges.

#### *A. Retail Justice and Historical Uncertainty*

The Court must get serious about the complexity of Reconstruction if its analysis is going to amount to anything more than a collection of carefully selected historical citations.<sup>251</sup> *Heller* is glib about Reconstruction's effect on the Second Amendment and the right to self-defense. The case acknowledges that Southern governments immediately after the Civil War attempted to disarm the freedmen and that the freedmen needed such arms for their protection.<sup>252</sup> It acknowledges that the Reconstruction theories of self-defense were shaped specifically by these state-sponsored atrocities.<sup>253</sup> *McDonald* is a vast improvement. It recognizes that Second Amendment values during the nineteenth century were shaped largely by the violence of Reconstruction.<sup>254</sup> It also acknowledges that the contours of the Second Amendment were delineated by the need to protect freedmen from terror—both official and unofficial.

But both *Heller* and *McDonald* still fail to fully engage with the interpretive problems of Reconstruction history. And these problems are profound. First, for every historical instance of a freedman fighting to defend his rights against an ex-Confederate police officer, there is an ex-Confederate who claimed that it was *his* rights that were under assault by the Union army and pro-Union militia. Indeed, whites-only citizen militias, whites-only rifle clubs, and whites-only paramilitary organizations consistently justified their existence on the belief that they had a right to defend themselves against the threat of overbearing pro-Union law enforcement and corrupt Republican governments.<sup>255</sup> Conservatives in the South simply would not acquiesce to the legitimacy of Reconstruction governments or law

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251. See Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 32, 35 (calling this collection a "snow job[]").

252. *District of Columbia v. Heller*, 554 U.S. 570, 615–16 (2008).

253. *Id.*

254. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3038–40 (2010).

255. A Klan uprising in South Carolina was sparked by professed fear that the Republican government was arming a "select militia" of loyal, mostly black, troops against the white South Carolina citizenry. PROCEEDINGS IN THE KU KLUX TRIALS AT COLUMBIA, S.C. IN THE UNITED STATES CIRCUIT COURT, NOVEMBER TERM 1871, at 425 (Benn Pitman & Louis Freeland Post eds., 1872); see also Miller, *supra* note 11, at 1332–33 (discussing implications of this history).

enforcement.<sup>256</sup> To them, the danger was not from the activity of the Klan, but “from [pro-Union] state militias.”<sup>257</sup> When Texas formed a militia, officially called the Texas State Police, violence erupted so often that the state government had to declare martial law.<sup>258</sup> The widespread refusal of Southerners to accept “the authority, much less the sovereignty, of the new state administrations seemed to reduce southern society to a Hobbesian state of nature.”<sup>259</sup> And yet, the existing scholarship, and certainly *Heller* and *McDonald*, provide no answers to the question of whether men who armed themselves in opposition to pro-Union police had a Second Amendment right to do so. And, if not, why not.

Second, the Court continues to ignore the reality that Reconstruction Americans were not wholly unbiased in their attitudes to self-defense. Reconstruction Americans wanted to arm pro-Union forces against anti-Union police and paramilitary organizations. They were not so interested in protecting the rights of anti-Union and anti-freedmen organizations to arm themselves against pro-Union law enforcement.<sup>260</sup> Bills that swept too broadly to disarm individuals were not necessarily wrong because they took away a constitutional right for citizens to *publicly* bear arms.<sup>261</sup> Instead, a broad-based resolution to take arms away crippled the ability of loyal Southerners to organize and “put down these rebel organizations.”<sup>262</sup> In fact, one senator said that he “should be very willing to favor *discriminating legislation* that would regulate the use of arms by the militia in the South.”<sup>263</sup> Another senator remarked that all the rebels should have been disarmed, even if the government “had to search every habitation in all the southern States.”<sup>264</sup> Newspapers viewed Southerners’ claims that they needed to protect

256. For just one example, see the remarks of a colonel in Kentucky reporting on freedmen’s affairs: “[I]t has been found impossible to make arrests. This is not strange in a country where hostility to the government is a rule; where they fortify their still-houses, defy revenue officers, and disarm and drive the United States deputy marshals from the country.” H.R. DOC. NO. 40-329, at 11 (1868).

257. RABLE, *supra* note 166, at 72.

258. *Id.* at 105.

259. *Id.* at 63. In fairness, some local authorities believed that the right to bear arms trumped even efforts to maintain civilian control. Governor Scott of South Carolina believed that it was a constitutional right to carry arms, even if it meant, in the words of George Rable, “brandishing shotguns and rifles at political rallies.” *Id.* at 72. Compare with law makers who forbade assemblages with arms. SINGLETARY, *supra* note 172, at 21 (noting a South Carolina decree that criminalized the drilling or parading with arms, except by the militia).

260. Except, perhaps, in the limited sense of allowing all individuals firearms in their homes. *Cf. McDonald v. City of Chicago*, 130 S. Ct. 3020, 3041 n.25 (2008); *see also* Miller, *supra* note 11, at 1334–35.

261. This is the conclusion that Halbrook appears to make. *See* HALBROOK, *supra* note 236, at 69.

262. CONG. GLOBE, 39TH CONG., 2D SESS. 1849 (1867) (remarks of Sen. Waitman T. Willey).

263. *Id.* (emphasis added). In response to the Memphis riots, for example, a witness claimed that military policy would have been to surround the armed mob and disarm them. *See* H.R. REP. NO. 39-101, at 230 (1866).

264. CONG. GLOBE, 41ST CONG., 2D SESS. 2744 (1870).

themselves from freedmen or pro-Union forces as pretexts for anarchy and crime.<sup>265</sup>

The existing scholarship provides few answers to these interpretive problems. That Congress wanted the people to extend the right of self-defense to freedmen is difficult to dispute. Scholars such as Diamond, Cottrol, Kates, Kopel, Halbrook, and others have persuasively made the case that freedmen self-defense was an animating issue in the debates over the Civil Rights Act of 1866 and the Fourteenth Amendment.<sup>266</sup> And now, with *McDonald*, arming freedmen is understood, correctly, as the foundation for incorporation. But conceding that freedmen had a right to arm themselves in defense against police violence gives us little information about the details of this right. What exactly did Reconstruction America think the freedmen were going to do with the guns once they had them? Were they going to form a counter-militia?<sup>267</sup> Under what circumstances was a freedman pulling a gun on a police officer a victim, as opposed to a criminal? Under what circumstances was a police officer effectuating an arrest a usurper, as opposed to a public servant? When are the members of the militia champions of freedom, and when are they tools of a hostile and repressive government? No existing treatment of either the Second Amendment or self-defense adequately answers these questions.

Reconstruction puts public understanding originalism on the horns of a dilemma: few adherents of public understanding originalism seriously think Reconstruction America understood ex-Confederates to have a Second Amendment right to publicly arm themselves to oppose pro-Union law enforcement; and yet, neither can it be that *only* those who support the policies and positions of the federal government enjoy a right to arm themselves for self-defense.<sup>268</sup> But if we anachronistically reject the partisan nature of self-defense during Reconstruction, then the consequences seem intolerably anarchic. It means that if America wanted the Second Amendment to guarantee the black and pro-Union citizens of Norfolk, Memphis, and New Orleans a right to arm themselves, organize, threaten, and, if necessary, kill oppressive police officers in 1866, then the same interpretation must apply to standoffs in Shreveport, Louisiana today.

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265. See *Excusing the Ku-Klux*, HARPER'S WKLY., Nov. 25, 1871, at 1098 (noting the "pretense [of] regard" for the Constitution from Klan defenders); H.R. REP. NO. 42-41, pt. 1, at 100 (1872) (calling these claims a "pretext for crimes and lawlessness" that could "end only in anarchy.").

266. See *supra* notes 236-41 and accompanying text.

267. For a discussion of such a history, see MICHAEL W. FITZGERALD, *THE UNION LEAGUE MOVEMENT IN THE DEEP SOUTH* 68-69, 220-33 (1989).

268. It does little good to shelter under the fiction that only those citizens who are arming themselves to defend the Constitution against aggressors have a Second Amendment right to publicly arm themselves and resist law enforcement. This is what David Williams calls "conjuring with the People." David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879 (1996). These were exactly the same arguments that the Klan employed to support their terrorist activities. For example, Nathan Bedford Forrest, the progenitor of the Klan, argued that he was preserving the "old Constitution" from the activity of Republican radicals and usurpers. See *"I Intend to Kill the Radicals": An Interview with N.B. Forrest (1868)*, reprinted in *RECONSTRUCTION, 1865-1877*, at 90, 92 (Richard N. Current ed., 1965).



Where the history is so muddled, the costs of a wrong conclusion so dear, and where the political branches are functioning adequately, courts should adopt a narrow approach.<sup>269</sup> A substantive Second Amendment right to arm oneself publicly, to resist arrest, and to kill law enforcement could not have survived the frenzy and confusion of Reconstruction intact. Many Reconstruction Americans, perhaps the majority, wanted to de-escalate the war of all against all in the South, not to inflame it.<sup>270</sup>

Instead of a free-floating right to resist the police, it is more likely that the people wanted freedmen to have equal access to whatever rights to self-defense were in place already.<sup>271</sup> This does not mean that history demands the now-rejected “equality only” theory of the right to keep and bear arms.<sup>272</sup> *McDonald* can accommodate both a theory of equal access to private firearms in public, and a substantive right to private firearms in the home.<sup>273</sup> So, where the state through its constitution or legislature has empowered individuals to publicly carry arms, to oppose state authority with arms, or to resist arrest with force, then these rights cannot be denied selectively based on race. But there is no substantive federal constitutional guarantee that a person be able to publicly carry arms to oppose state authority, or to resist arrest with force. There is some Reconstruction evidence to support this view. During military reconstruction of the South in 1867, the Fifth Military District issued an order that

no fire-arms will be permitted to be carried either openly or secretly, by any person in the city of New Orleans, except such as may be authorized or required by law to carry the same, in the execution of their official duties. The mayor of the city will give such instructions to

269. See, e.g., *NRA v. City of Chicago*, 567 F.3d 856, 860 (7th Cir. 2009) (suggesting that scholarship and politics should decide the relationship between guns and crime), *rev'd*, 130 S. Ct. 3020 (2010); Posner, *supra* note 251, at 34 (noting that *Heller* is wrong because it shortchanges the importance of local preference and federalism on gun issues); Wilkinson, *supra* note 58, at 264 (noting that where the history is unclear, the modest judge will defer to the political branches).

270. Halbrook and others seem to conclude that Reconstruction America believed the right to bear arms in public—even in the hands of former Confederates—was so sacrosanct that the only recourse for Reconstruction governments was to sponsor a counter-force of freedmen and pro-Union militias. See HALBROOK, *supra* note 236, at 68, 76-78, 115 (discussing rights of Confederates to keep and bear arms and ability of freedmen to form private militia groups). It is not impossible to come to this conclusion, but the level of certainty seems out of step with the historical record. Reconstruction violence can be viewed as an extreme form of the prisoner’s dilemma, in which everyone clamored for arms on the real or perceived threat to themselves by others. And “[s]ince a primary purpose of a government’s authority is overcoming prisoner’s dilemmas,” there is “no reason to think that [public] disarmament is beyond the government’s authority.” Green, *supra* note 48, at 152.

271. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1448-49 (1992).

272. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3042-43 (2010) (rejecting the argument that the Fourteenth Amendment does not guarantee the right to keep and bear arms in the states, but only an equal right to keep and bear arms in the states).

273. See Miller, *supra* note 11, at 1346-50.

the police as may be necessary to insure a strict enforcement of this order . . . .<sup>274</sup>

An African American pastor who witnessed the Norfolk riots testified to congressional investigators that he thought that if the authorities were “going to disarm the colored people he ought to disarm the whites also.”<sup>275</sup>

Hence, the ability to refuse to surrender a firearm when confronted by a law enforcement official can be granted by state law, but cannot be denied to a person on the grounds of race.<sup>276</sup> Similarly, to the extent that a license to carry such a firearm is granted, it could become a species of property protected by the Due Process Clause which cannot be rescinded without notice and an opportunity to be heard. In other words, the Constitution does not require that states permit their citizenry to publicly arm themselves in case of a confrontation with the police, nor does it prevent the police from disarming publicly armed citizens. But to the extent any state decides that it wants to permit its citizens to be publicly armed, that state-created right cannot be partially administered or arbitrarily abridged.<sup>277</sup>

Finally, some special solicitude applies to firearms in the privacy of the home as compared to in public.<sup>278</sup> It seems fairly clear that both eighteenth-century and nineteenth-century Americans believed that a person had a right to keep and bear arms in the home for self-defense.<sup>279</sup> As I have said, “[i]f the Second Amendment right means anything . . . it means that the government has no business telling a man he cannot have a gun to protect his home.”<sup>280</sup> As can be seen, however, that right becomes far more problematic when the question comes to the public bearing of arms. Don Kates, considered by many to be a dean of the Second Amendment rights movement, said this decades ago (a position he has since modified):<sup>281</sup>

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274. H.R. Doc. No. 40-342, at 166 (1868) (Special Order No. 45, Assistant Adjutant General George L. Hartsuff).

275. H.R. Doc. No. 39-72, at 38–39 (1867) (testimony of Rev. John M. Brown).

276. See Harrison, *supra* note 271, at 1448–49.

277. See Donofrio v. City of New York, No. 04-CV-3336, 2009 WL 6388381, at \*3–4 (E.D.N.Y. Sept. 24, 2009) (citing, inter alia, Fla. Retail Fed’n, Inc. v. Att’y Gen. of Fla., 576 F. Supp. 2d 1281, 1288 (N.D. Fla. 2008), and Bates v. City of San Jose, No. C-06-05302, 2008 WL 2694025, at \*3–4 (N.D. Cal. July 7, 2008)) (discussing property rights in handgun license); Brief of Thirty-Four Professional Historians and Legal Historians as Amici Curiae in Support of Respondents at 24–26, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521) (emphasizing that the Fourteenth Amendment passed to prevent disarmament of class of citizens, not restrictions on classes of weapons).

278. See McDonald, 130 S. Ct. at 3105 (Stevens, J., dissenting) (“The State generally has a lesser basis for regulating private as compared to public acts, and firearms kept inside the home generally pose a lesser threat to public welfare as compared to firearms taken outside.” (citing, inter alia, Miller, *supra* note 11, at 1321–36)).

279. See generally Miller, *supra* note 11.

280. *Id.* at 1301.

281. Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 149–50 (1986) [hereinafter Kates, *Second Amendment: A Dialogue*] (modifying his previous views on the public carrying of arms).

Largely as a result of gun-owner organizations' own legislative proposals, the laws of every state but Vermont prohibit at least the carrying of a concealed handgun off one's own premises. A common proposal, already the law in many jurisdictions, is to prohibit even the open carrying of handguns (or all firearms), with limited exceptions for target shooting and the like, without a permit. . . .

The constitutionality of such legislation under the amendment can be established on the same basis as the unconstitutionality of a ban on possession.<sup>282</sup>

Mr. Kates was too quick to relent. Using the home as the demarcation for the Second Amendment right, just as it is in the First, Third, and Fourth Amendments, would hardly be a radical or even a novel proposal.<sup>283</sup> If not implicit in the very concept of the right at the Founding, the turmoil of the Civil War and Reconstruction made it so.

Finally, this method of resolving incompatible natural law claims is a staple feature of American jurisprudence.<sup>284</sup> Natural law arguments tend to be

282. Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 267 (1983). Kates goes on to say:

research in seventeenth and eighteenth-century colonial statutes indicates that, while the statutes used “keep” to refer to a person’s having a gun in his home, they used “bear” only to refer to the bearing of arms while engaged in militia activities. Thus the amendment’s language was apparently intended to protect the possession of firearms for all legitimate purposes, but to guarantee the right to carry them outside the home only in the course of militia service. Outside that context the only carrying of firearms which the amendment appears to protect is such transportation as is implicit in the concept of a right to possess—*e.g.*, transporting them between the purchaser or owner’s premises and a shooting range, or a gun store or gunsmith and so on.

*Id.* at 267. *But see* Kates, *Second Amendment: A Dialogue*, *supra* note 281, at 149–50 (modifying this view). Although one could read *Heller* to suggest that reading “keep” and “bear” differently depending on public versus private keeping or carrying is an odd “hybrid” or “middle” position, *District of Columbia v. Heller*, 554 U.S. 570, 582–87 (2008), it is supported by at least one strand of history, and it respects the well-established institutional differences between private arms bearing and public arms bearing, between personal protection and collective protection.

283. David Kopel used the analogy of private sex acts to discuss the scope of the Second Amendment right. *See* Kopel, *supra* note 51, at 1532 n.724 (“A rule designed to protect people’s sensibilities in public spaces should not be applied to the mere possession of a weapon on private property. . . . Certain members of the public may be personally offended by the knowledge that someone else may be in private possession of a machine gun, just as other members of the public may be offended that someone may be engaged in a particular type of sex act.”). Professor Volokh appears to consider my elaboration of this analogy to be nonsensical. Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97 (2009), [http://www.columbia-lawreview.org/Sidebar/volume/109/97\\_Volokh.pdf](http://www.columbia-lawreview.org/Sidebar/volume/109/97_Volokh.pdf) (responding to Miller, *supra* note 11).

284. *Cf.* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 271 (1992) (“[I]n American history natural rights has equally served both abolitionists and the defenders of the right of ownership in human . . . property.”).

conversation stoppers.<sup>285</sup> In the case of Civil War and Reconstruction particularly, natural rights talk about the right to be free versus the right to hold human property easily transmuted into natural rights talk about the right to be free from the threat of Klan violence versus the right to be free from the threat of freedmen vengeance.<sup>286</sup> The history of American law has been to channel contested natural rights claims into debates over process, equality, and distinctions between public and private space.<sup>287</sup> Resolving the contested issue of a natural right to self-defense by reference to due process, equality, or the scope of privacy fits within this tradition.<sup>288</sup>

### B. Retail Justice and Doctrinal Consistency

But what of the extreme case: the person who encounters a rogue police officer and the choice is to kill or be killed? One could argue that the Second Amendment requires the states to make exceptions for that scenario. Therefore, any law that refuses to make such an exception must be facially invalid because there *may* arise a scenario in which a person must use force in order to resist the excessive force of a police officer. While such a rigid rule barring self-defense even against excessive force is foolish in the extreme, *facial* invalidity of such a rule is not necessarily required. Instead, the Second Amendment requires simply that any claim and evidence of self-defense in opposition to police be presented to the jury. The doctrinal structure to implement this right is already in place.

First, there is rarely a facial challenge to statutes that cover specific fact-intensive scenarios. The Fourth Amendment is a good example. An unconstitutional search and seizure is seldom adjudicated *ex ante*. “The Supreme Court . . . strongly disfavor[s] facial challenges in the Fourth Amendment context.”<sup>289</sup> Similarly, the necessity to use self-defense, even deadly self-defense against a police officer, cannot typically be adjudicated *ex ante*.

285. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 14 (1991) (“Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus . . .”); Stephen M. Bainbridge, *Corporate Decisionmaking and the Moral Rights of Employees: Participatory Management and Natural Law*, 43 *VILL. L. REV.* 741, 745 (1998) (observing generally that “[u]sing rights-based terminology to phrase the [legal] question . . . often impedes or even precludes meaningful analysis”); see also Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 *MINN. L. REV.* 2020, 2030 (2009) (referring to constitutional arguments as conversation stoppers).

286. As Harrison observed, “[e]veryone knows that the rhetoric of the Reconstruction era mixed references to equality and to natural rights.” Harrison, *supra* note 271, at 1468. For a discussion of this problem, see Miller, *supra* note 11, at 1332–36, 1346–49.

287. For an explication of this phenomenon, see HORWITZ, *supra* note 284, at 194, 206–08, 253–57.

288. Green suggests that one approach to the Second Amendment may be that “[c]itizens . . . retained some of the natural right to bear arms, provided it was carefully circumscribed to avoid too many of the inconveniences of the state of nature.” Green, *supra* note 48, at 161.

289. Orin S. Kerr, *Congress, the Courts, and New Technologies: A Response to Professor Solove*, 74 *FORDHAM L. REV.* 779, 788 (2005).

Second, the Court has already adopted stringent procedural barriers to enforcing constitutional norms that may arise only in specific case-by-case scenarios. These procedural barriers would seem to limit any broad or prospective protection of a right to resist law enforcement. Two cases dealing with prospective relief from potentially excessive force are particularly apt. *City of Los Angeles v. Lyons*<sup>290</sup> concerned the constitutional standing of a citizen who sought to enjoin the use of “chokeholds” by the Los Angeles Police Department (LAPD).<sup>291</sup> The facts were uncontroverted. In the early morning of October 6, 1976, two LAPD officers pulled over Adolph Lyons, a young black resident of the city, for a broken taillight.<sup>292</sup> Within five to ten seconds, and completely unprovoked, one of the officers “began to choke Lyons by applying a forearm against his throat.”<sup>293</sup> Even though he was cuffed, the police continued to choke Lyons until he lost all bladder and bowel control and blacked out.<sup>294</sup> After he came to, the officers issued a traffic citation and released him.<sup>295</sup>

Lyons was not the only individual to have suffered this treatment; no less than sixteen individuals had died from this hold.<sup>296</sup> Lyons sought relief for himself and all others similarly situated, including an injunction that no police should use the hold except where the target of the hold is “threatening the immediate use of deadly force.”<sup>297</sup> He also sought a declaration that “use of the chokeholds absent the threat of immediate use of deadly force is a *per se* violation” of the subject’s constitutional rights.<sup>298</sup> The majority held that Lyons had no standing to sue for such prospective relief.<sup>299</sup> The risk that Lyons would encounter another police officer who would “illegally choke him into unconsciousness without any provocation” or resistance on his part was so speculative and remote that it failed to amount to a real “case or controversy” that the Court could adjudicate.<sup>300</sup> To show an actual controversy, not only would Lyons have had to allege that he will encounter the police again, but also “make the incredible assertion either (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter . . . or (2) that the City ordered or authorized police officers to act in such a manner.”<sup>301</sup> The Court could not agree that the “odds” of Lyons’s encountering another police officer and subsequently suffering unconstitutionally excessive force rose beyond the level of “conjecture.”<sup>302</sup>

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290. 461 U.S. 95 (1983).

291. *Id.* at 95–96.

292. *Id.* at 114 (Marshall, J., dissenting).

293. *Id.* at 115.

294. *Id.*

295. *Id.*

296. *Id.* Of these sixteen, twelve were black males. *Id.* at 116.

297. *Id.* at 98 (majority opinion) (internal quotation marks omitted) (quoting complaint).

298. *Id.*

299. *Id.* at 111–13.

300. *Id.* at 105.

301. *Id.* at 105–06 (emphasis in original).

302. *Id.* at 108.

*Ashcroft v. Mattis*<sup>303</sup> is also illuminating. In *Mattis*, a father of an eighteen-year-old boy who was shot while fleeing the police sued for a declaration that Missouri's statute allowing deadly force in apprehending felons was unconstitutional.<sup>304</sup> The father amended the complaint and alleged that an injunction was necessary to protect his other son who, "if ever arrested . . . on suspicion of a felony, might flee or give the appearance of fleeing, and would therefore be in danger of being killed by these defendants or other police officers."<sup>305</sup> Again, the Court concluded that this allegation was so speculative that it could not be considered a live case or controversy.<sup>306</sup>

Finally, to the extent legislatures or state judges make poor judgments about the legality of self-defense against the police, the Constitution does provide a refuge—the jury. The jury is designed to serve as a check on other branches of government, including the judiciary. The jury box is the one place where natural law meets positive law.<sup>307</sup> Although there may be no affirmative constitutional requirement for there to be a self-defense exception written into the organic law of a state, the self-defense exception cannot be denied to a citizen tried for saving his life from a lawless police officer. The natural right to self-preservation can never be sequestered from the jury.

A plurality of the Court agrees. In *Montana v. Egelhoff*,<sup>308</sup> Justice Scalia, writing for a four-member plurality, suggested in dicta that the historical record may support the conclusion "that the right to have a jury consider self-defense evidence . . . is fundamental."<sup>309</sup> In *Egelhoff*, the Court addressed a Montana statute that stated that voluntary intoxication was legally irrelevant in determining the existence of the requisite mens rea for a crime.<sup>310</sup> After a night of heavy drinking, James Egelhoff was found shouting obscenities in the back seat of a station wagon.<sup>311</sup> In the front seat were the bodies of his two drinking companions and a freshly used .38 caliber handgun.<sup>312</sup> At issue was whether the common law defense of intoxication was "so rooted in the traditions and conscience of our people as to be ranked fundamental."<sup>313</sup> The Court, in a plurality decision written by Justice Scalia, held that the intoxication defense was not fundamental.<sup>314</sup> But the Court

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303. 431 U.S. 171 (1977).

304. *Id.*

305. *Id.* at 172 n.2 (emphasis omitted).

306. *Id.* at 172.

307. See, e.g., Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 *FORDHAM L. REV.* 407, 420 (1999) ("Eighteenth century writers grounded the power of the jury to decide the law on a theory of a natural law to which an ordinary man had access and that was preeminent over book law."); Jenny E. Carroll, *Of Rebels, Rogues and Roustabouts: The Jury's Second Coming* (Seton Hall Public Law Research Paper No. 1486188, 2010), available at <http://ssrn.com/abstract=1486188> (noting that the Framers saw the jury as a method of correcting for overreaching government).

308. 518 U.S. 37 (1996).

309. *Id.* at 56.

310. *Id.* at 39–40.

311. *Id.* at 40.

312. *Id.*

313. *Id.* at 43 (quoting *Patterson v. New York*, 432 U.S. 197, 201–02 (1977)).

314. *Id.* at 48.

speculated in its decision that self-defense may be so fundamental that it cannot be kept from the jury.<sup>315</sup>

These doctrinal solutions to addressing the problem of federal supervision over policing seem ready-made to address the problem of retail rebellion—even after *Heller* and *McDonald*.

#### CONCLUSION

Odds are the Court will leave self-defense against the police largely where the Justices found it.<sup>316</sup> The question is why. The pragmatic solution to retail rebellion is apparent, but the principled solution is not. It may be that *Heller* simply “is another example of the Court’s tendency to constitutionalize the national consensus on certain hot button issues and then enforce it against outliers.”<sup>317</sup>

But a methodology that must be abandoned as soon as its logic leads to politically unpalatable results raises questions about the soundness of the methodology in the first place. Several years ago, after another case with Second Amendment overtones, *United States v. Lopez*,<sup>318</sup> scholars asked, “what if the Supreme Court held a constitutional revolution and nobody came?”<sup>319</sup> The same thing could be happening to *Heller*.

Doubtless the people will continue to buy *Heller*’s brand of originalism for many years to come,<sup>320</sup> and people will celebrate the correctness of its conclusions and the soundness of its reasoning. And yet, one must ask whether they are buying a theory whose shelf life has already expired.

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315. *Id.* at 56. Further evidence that this procedural protection was within the comprehension of the Reconstruction Congress is the fact that the Civil Rights Act of 1875 forbade discrimination in jury selection by the states. See Harrison, *supra* note 271, at 1425.

316. In his dissent in *Heller*, Justice Breyer was puzzled why the Court did not simply read into the District regulation a self-defense exception. *District of Columbia v. Heller*, 554 U.S. 570, 692 (2008). The one issue that may still be excepted is the home, where more protection may be available to a person resisting arrest.

317. Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1260 (2009).

318. 514 U.S. 549 (1995).

319. Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 392–99.

320. For articles on the “branding” of originalism, see Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

