

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

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

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

2. I have in mind Randy Barnett's characterization of passengers on board United Flight 93 on September 11, 2001 as (unorganized) militia members (a statutory truism for those who were males between 18 and 45, but one practically without meaning) and their resistance to the hijackers that lead to the downing of the plane in Pennsylvania as Second Amendment protected activity. Barnett does not belabor the fact that these passengers were unarmed. His point in arguing that the passengers' resistance constituted Second Amendment protected activity is not entirely clear, but the implication appears to be that if they and other commercial airline passengers were allowed to carry their personal weapons on board, we need not fear further hijackings. See Randy E. Barnett, *Saved by the Militia: Arming an Army Against Terrorism*, *NAT'L REV. ONLINE*, Sept. 18, 2001, <http://www.nationalreview.com/comment/comment-barnett091801.shtml>. With Jim Chen (writing under the pseudonym Gil Grantmore), I view Barnett's vision as a recipe for disaster not dictated by nor even reasonably related to any tenable reading of the Second Amendment. See Gil Grantmore, *The Phages of American Law*, 36 *U.C. DAVIS L. REV.* 455, 477-88 (2003).

against the culture of would be “gun grabbers.”³

Disputes over the Second Amendment have taken a cultural turn—or indeed, have been in large measure culturally inspired, or even culturally determined from the beginning.⁴ This observation holds whether we trace the onset of controversy to the origins of the Amendment itself during the late eighteenth century, or to debates over federal gun policy in the late 1960s, or to the more recent upsurge in scholarly publication on the Amendment, first chiefly in the form of essays by advocates in the 1980s, and then, starting around 1989, in think pieces and monographs authored by established and budding legal and historical academics.⁵ But to the extent that writing on the

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

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

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

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

Among historians, intellectual history of the constitutional era now embraces not just the writings of lawyers and political leaders, but the opinions of the people out of doors and the man and woman on the streets, the latter group perhaps even holding pride of place over their more powerful and privileged contemporaries.⁷ These historical inquiries could quite naturally map onto the original understanding queries of judicial interpretivists of an Antonin Scalia stripe, whose quest for legitimizing constitutional meaning prompts them to seek out the significance the ratifiers attached to constitutional text at its origins, at the moment We The People delegated our collective, sovereign authority to our constitutionally appointed agents.⁸ But, alas (for the popular cultural historian of constitutional thought craving direct contemporary relevance), Justice Scalia prefers dictionaries of the times and well known and widely distributed elite writings such as *The Federalist Papers* and Blackstone's *Commentaries* as sources of enlightenment respecting open-ended

law reviews than the initiatives of the 1980s. That said, there were far fewer journals in which to publish in the 1930s and 1940s.

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

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

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

phrases and ambiguous terms whose meaning does not plainly emerge from the constitutional text itself.⁹ Instead, culturally focused Second Amendment musings relate to the constitutional mainstream in the legal academy because emphasis on social movements and cultural evolution (probably most famously and paradigmatically in the work of Bruce Ackerman)¹⁰ dominate recent articulations of the constitutional narrative, especially in so far as that narrative strives to situate an account of constitutional change not just within the shifting ideological fashions of the lawyerly and judicial elite, but within the far broader evolution of thought within the democratic polity.¹¹

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

9. *Id.* at 38, 130.

10. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998). *But see* Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 *YALE L.J.* 2003 (1998) (making the point that Ackerman's "popular" history actually relies mainly on inside Washington sources and that his interpretation of constitutional change during the Civil War and Reconstruction is seriously flawed in its neglect of the abolitionist movement's transformative impact on constitutional thought).

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

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

13. On Second Amendment writing's frequently vitriolic and unscholarly character, even in (legal) academic journals, *see, e.g.*, Cornell, *supra* note 4; Saul A. Cornell, "Don't Know Much About History:" *The Current Crisis in Second Amendment Scholarship*, 29 *N. KY. L. REV.* 657 (2002); Rakove, *supra* note 4; Spitzer, *History, Politics, or Theory*, *supra* note 5; Spitzer, *Lost and Found*, *supra* note 5. My own optimistic impression is that over the last few years, Second Amendment scholarship has actually become less savage and more thoughtful, with more academics joining advocates in the arena, and those academics devoting more serious and nuanced reflection to the subject than scholars did in the 1990s. That said, the Second Amendment game is still unusually brutal, and, apparently,

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

Back in 1989, in a piece that helped make the Second Amendment a respectable topic for academic discussion at academic institutions, Sandy Levinson poignantly mapped out the cultural conflict over gun ownership and regulation even as he called for academics to think more seriously about the merits of the NRAs individualistic reading of the right to arms.²⁰ The conflict was well-defined then and has only intensified since, with no signs of abatement on the horizon. Scholarly writing on the Second Amendment during 1990s was certainly inspired and shaped by the gun culture wars, and the two opposing cultural camps each had an allied school of Second Amendment interpreters: the individual rights writers (arguing that the Amendment protected a private right to arms for a broad array of purposes not necessarily linked to militia service) embraced by the gun culture, and the states' rights theorists (arguing that the Amendment protected state militia against federal disarmament) endorsed by the anti-gun culture.²¹ Yet published analysis of the right to arms during that period did not dwell heavily on cultural concerns as such, but rather engaged the subject on grounds of textualism and originalism.²² In terms of sheer numbers of publications and volume of print,

uncommonly attractive to hacks and charlatans of various stripes.

14. WILLIAMS, *supra* note 1.

15. Grantmore, *supra* note 2.

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

17. Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889 (2001).

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

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

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

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

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

the individual rights school (partly financed by generous grants from the NRA)²³ opened up a substantial lead, but by the beginning of the new century the states' rights school (partly financed by generous grants from at least one organization that did not share the NRA's ideals) was closing the gap, and historians, who had entered the field later than legalists, were lining up in opposition to the individual rights reading.²⁴

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

Amendment, 62 TENN. L. REV. 461 (1995); Van Alstyne, *supra* note 4.

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

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

25. RICHARD PRIMUS, *THE AMERICAN IDEA OF RIGHTS* 102-03 (1999); UVILLER & MERKEL, *supra* note 12; Saul A. Cornell, *A New Paradigm for the Second Amendment*, 22 L. & HIST. REV. 161 (2004); David T. Konig, *The Persistence of Resistance: Civic Rights, Natural Rights, and Property Rights in the Historical Debate Over "The Right to Keep and Bear Arms,"* 73 FORDHAM L. REV. 539 (2004).

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

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

28. See, e.g., David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991) [hereinafter *Civic Republicanism*];

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

In addition to the growing camp in the middle of the Second Amendment field, there is now much fissuring and flowering at the fertile and fascinating margins. Without too much straining, one could fairly easily tally up at least six variants of Second Amendment thought prominently debated in recent literature. The familiar two models of states' rights and private rights and the emerging centrist path describing a personal liberty that has meaning and substance only in the social context of civic obligation carried out within a public organization have at least three rivals. There is the highly distinct variant of the states right model put forward by Carl Bogus, in which the right to arms is tainted by its linkage to slavery and the "hidden" purpose of protecting the slave patrols of the South against Federal disarmament.³¹ The private rights reading, for its part, may or may not emphasize a right to insurrection allegedly attendant to the right to arms. (As discussed below respecting David Williams' recent work, the same holds for the centrist model.) And finally, several interesting attempts have been made to explore the impact of the Fourteenth Amendment on the Second Amendment, including, most prominently, Akhil Reed Amar's argument that the individualistic Privileges and Immunities Clause of the Fourteenth Amendment severed the right to arms from its communal roots in the militia, thereby creating a purely private right designed to allow the freed people of the South to protect themselves against racist reprisals by discontented ex-Confederates reorganized into the Ku Klux Klan and other hate groups.³²

Like Second Amendment writings of the early and mid nineties, much of the work just described focuses on originalist concerns. But the overall emphasis is clearly shifting from textualist originalism to purposivist

David C. Williams, *The Militia Movement and the Second Amendment: Conjuring with the People*, 81 CORNELL L. REV. 879 (1996) [hereinafter *Militia Movement*]; David C. Williams, *The Unitary Second Amendment*, 73 N.Y.U. L. REV. 822 (1998) [hereinafter *Unitary Second Amendment*].

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

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

31. Bogus, *supra* note 22.

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

originalism, and hence from dictionaries to cultural context, from parsing constitutional language to pondering cultural sources of meaning and even purpose. No recent scholar of the Second Amendment has taken so pointedly a cultural perspective as David C. Williams. In this respect, Williams was very much ahead of the curve, focusing on the cultural context of the Amendment at its origins and in its operation in modern times in a series of law review pieces he authored in the nineties while most commentators in the field were still busily milking familiar parcels of original source material with dogged determinism and stoic disregard for their own historical ignorance.³³ But his major monograph of 2003 does much more than sum up and reiterate his earlier work. *Mythic Meanings of the Second Amendment* develops the premise that national constitutions do more than create structures and enumerate rights and powers, they also embody the foundation mythology of the constitutional orders they establish. Especially in the United States, the Constitution is a constitutive element not just of organic law, but of organic nationhood. And when definitions of nationhood are contested as they are in the United States today, rival constitutional mythologies join battle in a struggle to define cultural legitimacy. Bedrock America, largely conservative and anti-cosmopolitan, places an individualistic Second Amendment at the center of its foundation narrative of self-reliance; elite America, blind and often hostile to provincial ways, relegates armed individualism to an atavistic past that constitutional democracy was designed to overcome.³⁴

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

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

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

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

Because you can't stomp us out and you can't make us run,

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

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

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

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

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

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

otherwise irremediable oppression.³⁶

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

Williams' analysis is so interesting in part because it dwells on the right to revolution to the exclusion of all other considerations. But it is also one-sided. In our book, Richard Uviller and I may have understated the revolutionary purpose of the right to arms, but surely, David Williams overstates it in his. Williams and I would agree that the Amendment is not at its core about hunting, or defending the home against burglars, but about enabling the militia, and the individuals who comprise the militia. Williams, however, hones in only on the final purpose of the militia in the event all else fails and the constitutional order itself collapses, leaving no other remedies to an aggrieved people but to turn against the government. And doubtless there are, even today, eager souls attending watchfully for the fateful moment when just such a scenario comes true, so that they may strike a hero's pose in the final chapter of the American constitutional saga. But such was not the vision of the Philadelphia conventioners who wove our constitutional fabric.

To be sure, the founders saw the power to raise and maintain a standing army as a necessary evil, and this of all powers they would not leave unchecked.⁴⁰ Many of the founders, and more of the Anti-Federalists, who agitated for a Bill of Rights,⁴¹ preferred that the nation place its first reliance on

36. *See id.* at 121-28.

37. *See id.* at 271-72.

38. *See id.* at 57-58.

39. *See id.* at 420-26.

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

41. *See id.* at 78-91. Williams may lay too much stock in the utterances of Anti-Federalists as he assesses the original meaning of the Second Amendment. As Paul Finkelman insightfully argues, the Anti-Federalists were crushed in the elections for the First

local citizen militia rather than professional soldiery. What they stressed, and what Williams plays down, is that the very presence of a useful militia made tyranny less likely. With a militia available to provide initial defense, and the new nation protected by a vast ocean separating it from the major powers of the day, there was little reason to maintain a professional army large enough to tempt an aspiring tyrant in the capital into moving against the legislature, the states, or the people. And so long as the nation stayed out of the business of overseas empire-building, there would likely never be a need to form so large an army.⁴²

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

Congress under the Constitution. Thus, the Congress that proposed the Second Amendment, and to a very large degree the state legislatures that ratified it, did not share the views of the opponents of ratification. Madison's articulated rationale for the Bill of Rights—that it would win over well meaning and reasonable Anti-Federalists—can hardly be read as a concession that the new national government would fashion policy and amend the Constitution to secure the goals of the most hardened opponents of the newly established federal power. Finkelman, *supra* note 26, at 214-18.

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

43. See *id.* at 56-58.

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

to natural law, and to Heaven.⁴⁵

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

There is, however, another strategy for reanimating the civic culture so much desired by the framers of the Second Amendment, and Williams hints at it in his coda and explores it more fully in his earlier writing. Militia-equivalent mandatory public service might not stave off tyranny, but it would engender popular engagement with common concerns, and this would foster a culture less likely to empower or tolerate political leaders likely to become usurpers.⁴⁸ But there is another, and perhaps more powerful, Second-Amendment-style remedy to the nation's arguable ills, and this plank of a civic restoration agenda Williams does not pursue. I have in mind forsaking what the framers of the Second Amendment viewed as the core evils to be contrasted with the republican militia. These baneful things include the overlarge standing army and all its corollary perils—the army contractors, the heavy taxes to pay them and support the soldiers, the deficit spending, the civilian officials too beholden to the army's bidding, the temptation to empire, glory, and overseas adventures, the officer corps eager to push the cause for intervention and engagement.⁴⁹ To be overly enthusiastic about the Army (or an army, before we were reconciled to the Army)—and certainly to be inspired by the prospect of the Army's overseas deployment—was once highly suspect, dare I say, conspiratorial, monarchical, un-Jeffersonian, almost un-American. Times have surely changed.

Ultimately, Williams and I both acknowledge that the passing of the culture of the framers makes this oddest of amendments difficult to apply in modern times. But we profoundly differ over what it is that fundamentally differentiates our society from the culture that spawned the constitutional right

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

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

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

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

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

to arms. Williams points to greater pluralism. I counter that the real difference is that today we are enamored of the standing army. As a people, we prefer power to virtue. We have grown to like military contractors and overseas military adventures and to live with high taxes and huge deficits. We want military bases in our neighborhoods. We fight to keep them from closing just as New Englanders of 1775 fought to shut them down. Williams and I concur only insofar as we both recognize that deep down, the Second Amendment speaks somehow to profound changes in this nation's culture; we differ over what those relevant changes are, and over what remedies the second article of the Bill of Rights inspires.

To Jim Chen, the Second Amendment illustrates not so much that American culture on the whole has lost its moorings, but that legal academic culture is profoundly out of whack. We split into camps and reason in isolation, divorced from the social reality that the law reform we debate might one day shape. Writing as Gil Grantmore, Chen satirizes the Second Amendment disputes in the legal academy to brilliant effect in his article *The Phages of American Law*.⁵⁰ Apart from playing on Grant Gilmore's *Ages of American Law*,⁵¹ the cryptic title suggests that the Second Amendment is operating like a virus of illogic to eat up what remains of reason within the legal academy. His point is trenchant. It's also very funny, and quite humbling. This admittedly gullible writer worked his way two-thirds through the piece with mounting frustration, making copious notes in the margins attacking this point or that on grounds of alleged overstatement, before the veil dropped and I reconciled myself to the experience of a most enjoyable satire. But Chen writes not just to amuse; he raises at least two substantive issues about the Second Amendment that merit serious reflection here.⁵²

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

50. Grantmore, *supra* note 2.

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

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

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

Amendment rights in the process.⁵⁴ Since even the Emerson Court allows that the Second Amendment right is subject to searching regulation,⁵⁵ the benefits attendant to a revitalization of the militia appear costly indeed, given the severe diminution in autonomy that freedom-loving Americans would suffer in exchange for a limited right to own and carry firearms. “Minutemen” offering their services as self-appointed border vigilantes might accordingly wish to think twice before convincing congresspersons or state legislators that their labors really amount to militia duty contemplated in the rubric of the Second Amendment.⁵⁶

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

Indeed, there are probably a great many people who would not think of getting on a plane if commercial airliners became the gun culture’s Elysium. My own intuitions are that for every would-be terrorist thwarted by decent red-blooded travelers, there would be hundreds if not thousands of random victims of high-strung, officious, airborne gun slingers. Every one of us would be at risk of becoming the next nervous Brazilian on the London Underground who overstayed his student visa and paid the ultimate price for society’s frayed nerves.⁶¹ As a former insurance lawyer, I would certainly counsel against underwriting coverage for any South Asian or Arab-looking person seeking to fly if Professor Barnett’s vision were implemented. And as a pragmatic

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

55. See *United States v. Emerson*, 270 F.3d 203, 261-64 (5th Cir. 2001).

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

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

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

59. See Barnett, *supra* note 2.

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

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

objection to his proposed constitutionally mandated reform, there remains the technical problem illustrated by the unforgettable image of Goldfinger being sucked out the window of the plane he had just shot out with his gold-handled gun in the third Bond film.⁶² With pilots any less skilled than Pussy Galore at the helm, otherwise innocent libertarians who had defiantly unbuckled their seatbelts might well suffer defenestration of truly Praguean moment just because the strapped militia man in the next row took exception to a fellow passenger of Muslim countenance.⁶³

Chen's lampoon of methodologies should be widely read for its salubrious effect on legal thinking. My encounter with Chen's wit caused me to revisit my objections to a peculiar sort of speciousness long rife in the legal academic community, plain meaning style textualism. Few legal tropes escape Chen's incisive critique, but, in truth, he (like the ever charitable David Williams) goes far too easy on the casual, untenable history that underlies much Second Amendment writing. The legal academy perhaps conditions its members to lay more stock on cleverness than empirical accuracy. And the cultural history now in fashion is by its nature less verifiable than document-based political or intellectual history. Still, much of the history that supplies the allegedly empirical basis for Second Amendment theorizing cannot be taken seriously on its own terms, and would be censured in any vigorous undergraduate program even in an educational milieu otherwise committed to positive reinforcement. Nowhere is this more true than in the case of textualist investigations which resort to historical materials wrested from context only to illustrate the "plain meaning" of isolated terms not adequately elucidated by Dr. Johnson or Noah Webster.⁶⁴

Granted, historical truth is non-ascertainable. And granted too that multiple perspectives have their validity. But demonstrable historical falsehood is a recognizable beast, and one of its favorite stomping grounds is textualist inspired Second Amendment theory. If originalism is to have a greater claim to legitimacy than the parlor game of naked textualism with its dictionaries and offhand references to the Federalist and Blackstone merits on its own,⁶⁵ if inquiry into meaning and purpose is more than a semantic exercise for armchair (as opposed to laboring)⁶⁶ philosophers, if fidelity to constituted text involves

62. GOLDFINGER (MGM 1964).

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

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

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

66. I have in the back of my mind the Monty Python sketch involving the football

some duty to attempt to come close to figuring out what the originators and ratifiers of that text actually thought they were doing, then there is a need to call out implausible and preposterous historical assertions premised on a-contextual and misinformed readings of documentary fragments by persons lacking any perspective and grounding in the thinking of the founding period.

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

From Erwin Chemerinsky's keynote address through panels on historical, legal, public policy, and cultural perspectives, the Fordham symposium on the Second Amendment was dominated by consciousness of the cultural situation in which gun rights-related discourse has been articulated.⁶⁷ For constitutional historians working in history faculties, and constitutional theorists and doctrinalists working in law schools, this reflects a remarkable shift in emphasis from elite to popular perspectives that has radically transformed both professions in the last generation, and, more particularly, in the last decade. Yet this transition from elite-focused to popular and culturally inflected constitutional history should not serve as a license to invent narratives the record will not bear, at least as long as the root purpose of the inquiry remains a quest for legitimacy beginning in some form of original meaning and understanding. Unlike much Second Amendment literature, each of the three

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

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

historical papers offered at Fordham—by Saul Cornell and Nathan DeDino, James A. Henretta, and David Thomas Konig (none of whom, to my knowledge, is a committed originalist) —demonstrate painstaking and admirable efforts to remain faithful to the past.

Cornell and DeDino took aim squarely at untenable and a-contextual historical assertions common in the Second Amendment writings of individual rights theorists including Randy Barnett and Don B. Kates, Eugene Volokh, Joyce Lee Malcolm, David I. Caplan, and David B. Kopel.⁶⁸ In endeavoring to resurrect the statutory context and cultural assumptions that enveloped the right to arms written into the Second Amendment, Cornell and DeDino stress the point that “the ideal of liberty at the root of militia was not part of a radical individualist and anti-statist ideology.”⁶⁹ Instead, the right to arms found expression in a world much more deeply committed to communal, civic obligations than our own, in which liberties and duties intertwined in a fashion difficult for adherents of postmodern radical individualism to accept. Cornell and DeDino pay close attention to the Pennsylvania Declaration of Rights of 1776, which contains the first American reference to the right to arms and is often cited by individualists to support a private rights interpretation. Article XIII of the Declaration provided that “the people have a right to bear arms for defence of themselves and the state,” but adjoining passages in that Article and other passages in Article VIII illuminate the civic, corporate context in which this right was asserted. Not only was the language just quoted from Article XIII coupled with an admonition not to keep up standing armies and to maintain civilian supremacy over the military, but Article VIII also set out an obligation of civilian military service to the state and a conscientious objector proviso, pointedly stressing the connection between civic obligation and arms bearing.⁷⁰

One of the most intriguing points Cornell and DeDino made at Fordham concerns the pervasiveness of regulations pertaining to gun use and ownership in colonial, revolutionary, and early national periods. James Madison, principal draftsman of the Second Amendment, favored toughening Virginia’s game laws to increase penalties for using guns for nonmilitary purposes outside of one’s own enclosed grounds.⁷¹ A popular founding-era guidebook for sheriffs, constables, and justices of the peace contained detailed procedures for disarming individuals who broke the peace.⁷² Militia regulations concerning arms were extensive, reaching confiscation of weapons belonging to persons

68. See Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 496, 498, 502-03 (2004).

69. *Id.* at 494.

70. *Id.* at 495-96.

71. *Id.* at 500.

72. *Id.* at 501.

who declined to take loyalty oaths to the new American governments.⁷³ Gun powder storage was closely policed in the eighteenth century, and by the early nineteenth century, local and state laws prohibited carrying concealed weapons.⁷⁴ Other laws of the early national period banned shooting in cities and along public roads.⁷⁵

To contemporaries and near contemporaries of the framers and ratifiers of the Second Amendment, the right to arms was thus not only more civic than privatistic, it also happily existed alongside a wide array of regulations and restrictions pertaining to arms possession and use. But perhaps this is not the whole story, and it may be that Cornell and DeDino will not have the last word in this never-ending dispute. As Robert Churchill maintains in an upcoming article in *Law and History Review*, regulation is one thing, and prohibition—and especially prohibition reaching loyal, law-abiding white citizens—another.⁷⁶ And as James Henretta (anticipating Churchill) pointed out in rebuttal to Cornell and DeDino at Fordham, some voices celebrated a mixed private/public and perhaps in some cases purely private right to arms in the eighteenth century, and their chorus quickened (or so the argument goes) as the new nation expanded.⁷⁷ Then again, as David Thomas Konig trenchantly remarked closing out the historical discussion at Fordham, not every strain of radical, populist, agrarian, anti-statist, and indeed anti-legal thought that at various times gained currency on the eighteenth or nineteenth-century American periphery ripened into accepted constitutional principle. Antinomian gun wielding was in fact not elevated to sanctity in higher law by good faith participants in the constitutional process, because they, like Locke and Jefferson, realized that those rare revolutionary reversions to the state of nature brought on by extraordinary oppression must give way quickly to constituted and ordered liberty, and not become recipes for eternal, fatal disorder.⁷⁸

73. *See id.* at 505-08.

74. *See id.* at 510-15.

75. *See id.* at 515-16.

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

77. *See* James A. Henretta, *Collective Responsibilities, Private Arms, and State Regulations: Toward the Original Understanding*, 73 *FORDHAM L. REV.* 529 (2004). Henretta concedes that the evidence he relies on is not unambiguous, but since his principal aim was to show that Cornell and DeDino did not rely on unambiguous evidence either (and since it is often the very same evidence they discuss), this concession is hardly fatal to Henretta's argument. Henretta also draws fairly heavily on failed legislation and unratified proposals to suggest a private rights valence, and while his overall assessment that arms-related discourse in the founding period was at once civic and individualistic is thoughtful and measured, I think he lays too much stress on the private sounding voices.

78. Konig, *supra* note 25.

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

THE RIGHT TO ARMS AND THE FOURTEENTH AMENDMENT

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

Inspired in part by Robert Cottrol and Raymond Diamond's call for an Afro-centrist reconsideration of the right to arms,⁸¹ Amar first articulated his

79. Simon, *supra* note 16.

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

81. Cottrol & Diamond, *supra* note 19.

argument in two articles in the *Yale Law Journal* in the early 1990s,⁸² and then, in synthesized form in his book *The Bill of Rights: Creation and Reconstruction* in 1998. Richard Uviller (with some minor contributions from me) engaged Amar's central themes in our book, *The Militia and the Right to Arms*, in 2002.⁸³ I was not yet aware when we submitted our book manuscript that Professor Amar had offered an even more refined version of Fourteenth Amendment take on the right to arms. In a lecture delivered in Salt Lake City and reprinted in the *Utah Law Review* in 2001,⁸⁴ Amar incorporated new angles and turns into his original theory which are at once fascinating and ingenious. But Amar's revised version of the refined right depends on three gigantic leaps of faith, all of which may be misguided, and only two of which have been even tentatively embraced by jurists other than Justice Thomas and academicians other than Amar himself.

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

The case he builds is the same case Justice Black asserted in favor of total incorporation in *Adamson* in the face of Justice Frankfurter's argument in favor of a go-slow approach, premised on a Due Process inquiry into which rights and principles were fundamental to ordered liberty.⁸⁶ That is, it is almost the same argument. It lacks Black's normative claim that Frankfurter's formula was dressed-up natural law, and a recipe for judicial law making. It relies entirely on Black's originalism side of the argument, on the claim that total

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

83. UVILLER & MERKEL, *supra* note 12, at 202-09.

84. Amar, *supra* note 17.

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

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

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

Principal problems with Amar's major premise include these:

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

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

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

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

89. See *id.* at 30-69, 155-189, disputing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1997); see also MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); Amar, *Fourteenth Amendment*, *supra* note 82; but see Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993). See also Adamson, 322 U.S. 46 (1947) (Black dissenting); Cottrol & Diamond, *supra* note 19; William W. Crosskey & Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority, 22 U. CHI. L. REV. 1 (1954).

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

the putative right against monopolies does not appear conceptually linked to the Bill of Rights at all.⁹¹

3. In 1875, James G. Blaine of Maine (Speaker of the House, who had been a member of Congress in 1866 when the Fourteenth Amendment was debated and passed) proposed an amendment to bar state establishment of religion. No one rose to say “Blaine, we’ve already made the First Amendment applicable to the states via the Fourteenth.” Instead, the House discussed anti-Catholicism—specifically the dangers of state support for Catholic schools—on its merits.⁹²

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

Amar’s history of Reconstruction is more intriguing, more novel, more clever, more morally inviting, and more in tune with our times than Fairman’s. And ultimately, Amar is hardly wrong that the job of living participants in our constitutional democracy is not to recapture Reconstruction as it was (or was intended to be), but to use it as a guide to applying the text the Reconstructionists bequeathed to problems they did not foresee or wish to resolve. And this is a task to which he turns with more logic, faith, and fidelity but no less concern for humane outcomes than Chief Justice Warren, who in *Brown v. Board of Education* chose to ignore the intent of the framers altogether, because—so says the opinion—it was unfathomable, and unascertainable, or—so we suspect—because the new Chief (rightly) deemed it unpalatable and unjust.⁹³

Professor Amar also relies on the assumption that individual self-defense was deemed more desirable than collective self defense under color of law during Congressional Reconstruction, as Republicans looked southward from

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

92. See *id.* at 464.

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

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

Inspired by Singletary's forgotten history and Amar's intriguing suggestions regarding the relevance of the Second Amendment to integration of police forces today, I would like to proffer my own modest proposal for recasting Reconstruction as it might (and should) have been. Like Amar, and more expressly like Cottrol and Diamond, my proposal is for an Afro-centric reconsideration of the incorporationist possibilities of federal imposition of the right to bear arms on the states. In this respect, Cornell and DeDino (as well as Carole Emberton, in her engaging contribution to this symposium assessing "The Battle of Liberty Place" waged between white Democratic and black Republican militia for control of New Orleans in 1874)⁹⁶ have stolen some but not quite all of my thunder.

Cornell and DeDino analyze the South Carolina Ku Klux Klan trials of 1871-72, in which U.S. Attorney Daniel Corbin asserted Fourteenth Amendment claims (this was before the Civil Rights Cases of 1883 limited the Fourteenth Amendment's prohibitions to state actors) against members of the Klan for violating black persons' right to arms guaranteed by the Second Amendment.⁹⁷ This appears to buttress Amar's claim that incorporation was in the air during Reconstruction (but I would counter by asking whether it was meant to be selective or total, to proceed by means of Due Process or Privileges or Immunities, and whether it was endorsed by a scattered few or a constitutional majority of ratifiers). Crucially however, as Cornell and DeDino stress, the disarmament in question was visited not on isolated individuals, but on militia members. The right the U.S. Attorney sought to vindicate through the Fourteenth Amendment was indeed the right to armed defense against the Klan, but it was a militia-focused right, not a private liberty. To these insights of Cornell and DeDino I'd like to add that this course – application of a right to

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

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

96. See Carole Emberton's essay in this volume.

97. Cornell & DeDino, *supra* note 68, at 522-525.

bear arms in the militia – is perhaps the path not taken that would have changed Southern history immeasurably for the better. An enforceable (and there's the rub) constitutional mandate to integrate the organs of state power—first militia, and then, in the years to come the state troopers of the South—would have put the brakes on Redemption, Jim Crow, and Lynch Law, and made far more difficult the violent resistance to federal imposition of a new Civil Rights regime under the Second Reconstruction.

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

One gay rights angle I have not seen discussed at all respecting the Second Amendment directly concerns individual, private liberty rather than military service. *Lawrence v. Texas* had its beginnings when the police in Harris County, Texas responded to a tip concerning a gun violation in an apartment in November, 1998. When the officers arrived on the scene they found John Lawrence and Tyron Garner engaged in the very act Justice Kennedy described with nearly lyric appreciation in the majority opinion of the Supreme Court.¹⁰⁰ Lawrence and Garner were arrested and spent a night in jail well before the Fifth Circuit recognized a private right to arms under the Second Amendment, but their appeal was still pending when Emerson was working its way up the

98. See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 105 *Yale L.J.* 1225 (1999) (criticizing Amar's intratextualism as overly narrow). _____

99. H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 *CHI.-KENT L. REV.* 403, 504 n.429 (2000).

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

federal courts.¹⁰¹ By the time the Fifth Circuit panel announced its *Emerson* decision, the appellants in *Lawrence* therefore had a colorable claim that their sodomy bust was fruit of a violation of their federal right to arms! Perhaps the Supreme Court of the United States might have clarified the right to arms at the same time it recognized the right to same sex intimacy in *Lawrence*, but, alas, this greatest of cultural ironies was not to be.¹⁰²

Professor Amar's work focuses on the impact of the right to arms on historic outsiders, on African Americans, on women, on gays and lesbians. But those who are widely perceived as the most adamant champions of a vigorous, private right to arms are outsiders of a different stripe, rural white men, rustic individualists, disenchanted with elite America, with the mainstream, and for many years, with the federal government. For a generation, the NRA has been their voice, but now the NRA has a seat in government, and gun rights are no longer outside the mainstream, but part of the federal executive's agenda. One wonders whether the basic background assumptions behind David Williams' complex portrait of the cultural wars still hold. The Euro-centric, Atlantic elitist big government faction that America's modern militia men so much loathe has, after all, to all appearances, been routed. So what will become of Williams's long time outsiders, now that the NRA has friends in high places, and its old enemies stand on the sidelines lacking any clear sense of purpose? Will the rural militiamen still fear confiscation? Perhaps, emboldened now that more sympathetic minds hold the reins of power, they will focus less on their vaunted rights to possess their weapons, but rather will cast an eye towards reanimating their militia, and come out of hiding. They may demand to return to duty, as minute men on the border, serving a government they no longer fear.

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

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

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

CONCLUSION

The gun cultural wars inform academic debate on the Second Amendment, and do a great deal to explain why so much is at stake in judicial exposition of the right to arms. But there is, I suspect, another powerful reason besides antipathy towards the coastal, cosmopolitan elite that explains why bedrock America covets a definitive Supreme Court reinterpretation of the right to arms. Religiously and politically, a great many Americans view this as a covenanted nation. This notion has a powerful pedigree running back through Lincoln's Gettysburg Address and the origins of the Republic, to John Winthrop's homily on the City on a Hill and the origins of the nation. The Declaration of Independence, the Constitution, and the Bill of Rights (or at least the Free Exercise Clause, and the Second, Ninth, and Tenth Amendments, with the lesser elements of the first ten and perhaps all subsequent Amendments forming a disputed and dubious apocrypha) are sacred secular texts in this tradition. They express a bond between the originators of the American republic and future generations, and witness to an obligation the inheritors of constitutional liberty owe to the founders as a debt to their sacrifice.¹⁰³ In short, it is the secular equivalent of blasphemy—or perhaps, quite blasphemously, blasphemy itself—to denigrate, disobey, or ignore the precepts and commands that these texts enjoin. Nor does their inspired language, according to this covenant tradition, admit of interpretive freedom; the language is plain, and its commands exacting.

In this belief system, there are several non-negotiable articles of faith. These include that the Republic was born of violent resistance to oppression. This heroic resistance was carried out by uncompromising individualists, acting collectively for the greater good and for the future of individualism. By exercising their right to self-defense against tyranny, they established the constitutional tradition protecting our right to self-defense. This right they preserved for the ages in the Second Amendment. Thus, in a contemporary light, mere recognition that gun possession is safe because a popular or legislative majority favors it falls far from the constitutionally and covenantally required mark. Likewise, new state constitutional amendments or even a new federal amendment securing an unrestricted liberty to own and carry guns are neither needed nor desired (although the state amendment might be useful in

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

the short term, pending recognition of incorporation in the great High Court opinion to come). Ultimately, nothing short of penitent confession that the eternal Second Amendment of 1789 has always and always shall guarantee a private right to arms in its original language will suffice to achieve the desired rebirth of American freedom. This conversion rite and no watered down substitute is what bedrock America demands the Supreme Court to perform.

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

As Erwin Chemerinsky, Calvin Massey, and others remarked at the Fordham symposium,¹⁰⁵ and as Adam Winkler especially has elucidated here,¹⁰⁶ perhaps the important practical question is not whether the right to arms extends to all individuals, but what existing or potential regulation is likely to fall if and when the right is reconstrued by the Court. The answer may well be that most politically feasible restrictions or controls on gun ownership or use would pass muster under inexacting scrutiny, as the challenged provision did in *Emerson*, when the Fifth Circuit became the first federal court of appeals since *Miller* to hold that the right does apply to private persons.¹⁰⁷

Perhaps then, there need be no sense of panic or imminent doom among persons and sub-cultures favoring tighter control of guns, even when the rapture comes. Still, the rapture likely will come, and come fairly soon. Jonathan Simon, I suspect, is wholly correct in his linkage of popular fear of crime to rising calls for a vigorous enforcement of a robust right to arms, and accurate also, to predict that, following Bruce Ackerman's paradigm, these demands will lead to a judicial reconceptualization of constitutional norms.¹⁰⁸ But the history of constitutional norms and doctrines ebbs and flows. Dual

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

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

106. See Adam Winkler's essay in this volume.

107. *Emerson*, 270 F.3d at 261-264.

108. Simon, *supra* note 16.

federalism, pronounced dead in the first edition of the *Oxford Companion to the Supreme Court* in 1992, is now alive and well.¹⁰⁹ The Marshall Court's vigorous construction of national powers, abandoned by the Courts of Taney, Fuller, White and Taft, experienced a rebirth under the Chief Justiceships of Stone, Warren, Burger, and even Rehnquist. If the right to arms is now about to decouple from its textual linkage to the well regulated militia, the new learning may not endure for all time. That the champions of the decoupled right rely on palpably false history suggests they are not infallible. And if it is not infallible, perhaps even the NRA may not prove invincible in the long run. Maybe a lone dissenter, or the author of a dissent joined by a small band, will write in a few years time of a decision announcing a broad right to arms under the Second Amendment that "the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case."¹¹⁰ Perhaps that lone voice, or minority voice, will prophesy accurately that the new learning will one day be disowned and forsaken.

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

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