

THE LIVING CONSTITUTION AND THE SECOND AMENDMENT: POOR HISTORY, FALSE ORIGINALISM, AND A VERY CONFUSED COURT

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INTRODUCTION

How do we make sense of the Second Amendment? In *McDonald v. City of Chicago*, the current Supreme Court explained that “[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in [*District of Columbia v.*] *Heller*, we held that individual self-defense is ‘the *central component*’ of the Second Amendment right.”¹ The majorities in both *Heller* and *McDonald* seem

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¹ *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (footnote omitted) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008)).

utterly unconcerned that such a statement runs counter to the plain meaning of the text of the Amendment, which reads: “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.”² Nor is the Court concerned that virtually all of the serious historical scholarship on the Founding undermines its analysis.³

The current Court weaves a history of the Second Amendment that is based on books and articles that are accurately described as “[l]aw office history,”⁴ which is often sloppy and inaccurate in its facts, and sometimes mindless in its analysis.⁵ Oddly, while the Justices in the majority in these cases profess to believe in a jurisprudence of original intent, the Court’s historical analysis could not get a passing grade in any serious college history course.

In both *Heller* and *McDonald* the Court bases its conclusions on a false history⁶ that is, for the most part, a fantasy of the majority of the Court and opponents of reasonable firearms regulation.⁷ The Court majority relies on “scholars” who have often been funded by the National Rifle Association (NRA) or worked for the NRA, but hide these connections when offering their work to law reviews.⁸ While some

² U.S. CONST. amend. II.

³ As Michael Waldman notes, almost all historians reject the historical claims and analysis of National Rifle Association (NRA) sponsored law review articles as well as the assertions of the majority of the Court in the *Heller* and *McDonald* cases. MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* 98–99 (2014).

⁴ *Id.* at 100.

⁵ Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 103–05 (2000). Similarly, see Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 352–54 (2000), pointing out how supporters of an individual rights interpretation of the Amendment pull quotations out of context and present misleading or completely inaccurate assertions about their sources. Here, Spitzer notes how such an author pulled a single sentence out of a letter by Jefferson to mislead readers into thinking Jefferson supported the NRA position, and then declared it was a “recently discovered” letter, when in fact it has been in print and readily available for nearly a century. *Id.* at 352–53.

⁶ See WALDMAN, *supra* note 3 (describing the false history). Nathan Kozuskanich demonstrates that between 1763 and 1791 the use of the term to “bear arms,” almost always was in the context of the military. Kozuskanich found that in newspapers, pamphlets, and published political debates in Congress and other elected bodies, the term “bear arms” is found 267 times, and in 256 of those uses the term is “in an explicitly collective or military context.” Nathan Kozuskanich, *Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?* 10 U. PA. J. CONST. L. 413, 416 (2008).

⁷ WALDMAN, *supra* note 3, at 100–01.

⁸ *Id.* Robert J. Spitzer also points out that most of the individual rights advocacy has been published in law reviews, which are not subject to peer review, and which are edited by students who are not experts in the subject. Spitzer, *supra* note 5, at 376–78. Law reviews often focus on clever or exciting arguments, rather than serious scholarly research and analysis. Moreover, while law review editors are excellent at cite checking quotations, their editing process rarely goes to looking at what authors intentionally left out or misunderstood. The discussion of the letter of Thomas Jefferson illustrates this. See *infra* notes 37–38 and accompanying text. I

NRA partisans publish with well-respected university or scholarly presses,⁹ many publish with obscure presses or institutes where they are affiliated.¹⁰ This contrasts with the serious scholarship, published by major university presses, such as Saul Cornell's important book, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America*,¹¹ published by Oxford University Press, Lois Schwoerer's *No Standing Armies!*, published by Johns Hopkins University Press,¹² and other books published by important university presses or well-regarded commercial academic presses.¹³

I. ORIGINALISTS AND THE LIVING CONSTITUTION

The Court's originalist jurisprudence on the Second Amendment cannot pass muster among serious historians or political scientists. Curiously, however, the Court's conclusions might persuade some proponents of a "living Constitution" approach to the Constitution, most often associated with Justice William Brennan.¹⁴ The idea of a

realize this Article is appearing in a law review, and I do not intend to bite the hand that is feeding me. Indeed, because this issue is based on a symposium put together by serious scholars and faculty, the very nature of deciding what to publish is not the same as articles that simply are submitted to law reviews. This is also true for the issue of the *Chicago-Kent Law Review* that published Spitzer's article.

⁹ See, e.g., JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994), published by Harvard University Press.

¹⁰ For example, see STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED* (1984) (published by The Independent Institute); STEPHEN P. HALBROOK, *GUN CONTROL IN THE THIRD REICH: DISARMING THE JEWS AND "ENEMIES OF THE STATE"* (2014) (published by The Independent Institute); DON B. KATES, JR., *FIREARMS AND VIOLENCE: ISSUES OF PUBLIC POLICY* (1984); (published by Ballinger Publishing Company); DON B. KATES, JR. & GARY KLECK, *THE GREAT AMERICAN GUN DEBATE: ESSAYS ON FIREARMS & VIOLENCE* (1997) (published by Pacific Research Institute); DON B. KATES, JR., *RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT* (1979) (published by North River Press Publishing Corporation); DAVID B. KOPEL, *THE TRUTH ABOUT GUN CONTROL* (2013) (published by Encounter Broadside).

¹¹ SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006).

¹² LOIS G. SCHWOERER, "NO STANDING ARMIES!": *THE ANTIARMY IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND* (1974).

¹³ See, e.g., ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* (4th ed. 2007) (published by Congressional Quarterly Press); *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* (Timothy D. Lytton ed., 2005) (published by the University of Michigan Press); *THE SECOND AMENDMENT IN LAW AND HISTORY: HISTORIANS AND CONSTITUTIONAL SCHOLARS ON THE RIGHT TO BEAR ARMS* (Carl T. Bogus ed., 2000) (published by The New Press); *THE SECOND AMENDMENT ON TRIAL: CRITICAL ESSAYS ON DISTRICT OF COLUMBIA V. HELLER* (Saul Cornell & Nathan Kozuskanich eds., 2013) (published by the University of Massachusetts Press); H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002) (published by Duke University Press).

¹⁴ See William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law": The Forty-Second Annual Benjamin N. Cardozo Lecture*, 10 *CARDOZO L. REV.* 3, 12 (1988); Ruth Bader

“living Constitution” is of course an anathema to the conservative majority in *Heller*.¹⁵ Ironically, while utterly ignoring a serious historical analysis of the Second Amendment, the Court in *Heller* and *McDonald* actually adopted a thoroughly modern—and as Michael Waldman’s work demonstrates¹⁶—very recently created understanding of the Second Amendment, that is popular among some Americans. Thus, while the Court’s originalism is an intellectual failure, there might be an argument that what we are really witnessing in these cases is a deeply conservative “living Constitution” jurisprudence, masquerading (rather poorly) as an original intent jurisprudence. This is because the Court has essentially adopted the modern, ahistorical reinterpretation of the Second Amendment that its supporters arrogantly call the “Standard Model.”¹⁷ This is not an interpretation that any legal scholar or constitutional theorist would have recognized before the 1990s.¹⁸ And it is an interpretation that almost no serious historians have accepted.

Until the 1960s, almost no organization (much less any Court)¹⁹ had argued that the Second Amendment prohibited firearms regulations by either the national government or the states. Nor did the NRA believe this. In 1934 the chief lobbyist for the NRA asserted in testimony before Congress, “I do not believe in the general promiscuous toting of guns. I think it should be sharply restricted and only under licenses.”²⁰ Since the mid-1970s the NRA has rejected that view and has discovered (largely through the writings of lawyers often hired or funded by the NRA),²¹ that the Constitution provides a virtually ironclad protection for private gun ownership and, in the view of the NRA, prevents almost all regulations or limitations on owning guns or on where individuals can carry them. One example of the extreme position of the NRA and the politicians that support it is the assertion that people should be allowed to carry concealed weapons and other firearms into houses of

Ginsburg, *Closing Remarks for Symposium on “Justice Brennan and the Living Constitution”*, 95 CAL. L. REV. 2217, 2219 (2007); see also Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007).

¹⁵ The most famous critique of a “living Constitution” was by Justice William H. Rehnquist. See William H. Rehnquist, *Observation, The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

¹⁶ WALDMAN, *supra* note 3, at 82–91.

¹⁷ See *id.* at 98.

¹⁸ *Id.* (noting that in 1995 law professor Glenn Reynolds coined the phrase “Standard Model”).

¹⁹ See *United States v. Miller*, 307 U.S. 174 (1939) (upholding federal regulations banning sawed-off shotguns on the grounds they are not military weapons relevant to the militia).

²⁰ WALDMAN, *supra* note 3, at 88.

²¹ *Id.* at 97–98. Waldman notes, among other things, that “[t]he NRA paid one lawyer \$15,000 to write a harsh book review of Saul Cornell’s *A Well-Regulated Militia*.” *Id.* at 98.

worship and classrooms. Currently, eight states allow people to carry concealed weapons on the campuses of state universities and colleges.²²

The claim that the Amendment protects an individual right to own weapons is not supported by the history of the Founding or the “intentions” of James Madison or the other members of the First Congress, who wrote and passed the Amendment and then sent it to the states for ratification. In fact, in drafting the Amendment Madison emphatically and clearly ignored calls by disgruntled Antifederalists in Pennsylvania to amend the Constitution to protect an individual right to hunt, or fish, or carry arms.²³ This is not surprising, because shortly after the Pennsylvania ratifying convention adjourned, Madison noted that the Antifederalist opposition in “Pennsylvania has been extremely intemperate and continues to use a very bold and menacing language.”²⁴ The last thing Madison wanted to do was to ensure that such “menacing” opponents of a central government would have a federal right to be armed at all times.²⁵

The majority opinions in *Heller* and *McDonald* mirror the inaccurate historical claims of numerous activists (mostly lawyers) writing about the history and original meaning of the Second Amendment. As the Pulitzer Prize winning historian Jack Rakove notes, supporters of an “individual rights” analysis of the Second Amendment are notorious (at least among serious historians and other scholars) for the many errors in their facts and for their analysis that defies logic and history.²⁶ Michael Waldman details the failure of many of these gun rights protagonists to present competent history or analysis.²⁷

²² IV. *What Defines Us: How We Learn*, TIME (June 25, 2015), <http://time.com/3935325/iv-what-defines-us>.

²³ Paul Finkelman, “A Well Regulated Militia”: *The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 206–12 (2000). The demands of the Pennsylvania minority are found in *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, PA. PACKET & DAILY ADVERTISER (Dec. 18, 1787) [hereinafter *Reasons of Dissent*], reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 618 (Merrill Jensen ed., 1976), discussed in Part V of this Article.

²⁴ Letter from James Madison to Thomas Jefferson (Feb. 19, 1788), in 10 THE PAPERS OF JAMES MADISON 518, 519 (Robert A. Rutland et al. eds., 1977) [hereinafter 10 MADISON’S PAPERS].

²⁵ Here Madison was prescient. In 1794, farmers and others in western Pennsylvania, where opposition to the Constitution had been strong, organized a brief rebellion as some 500 armed men attacked the home of a U.S. official. Eventually the rebels fled in the face of a national army led by President Washington and Alexander Hamilton. Had the Second Amendment provided a personal right to carry weapons it might have been more difficult to disarm these domestic terrorists. See generally THOMAS P. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION (1986).

²⁶ Rakove, *supra* note 5. Rakove notes such false claims as James Monroe was a Federalist, when actually he voted against ratification of the Constitution; that New Hampshire was the “first” state to ratify the Constitution, when it was the ninth; or the claims of attorney Stephen

It turns out that even Justice Scalia is both sloppy and misleading in writing on these issues. Thus, Waldman notes that in discussing the historian Joyce Lee Malcolm, who was born and raised in the United States,²⁸ Scalia referred to her as an “an Englishwoman.”²⁹ This would normally be a minor and insignificant error, but, as Waldman points out, Scalia used Malcolm’s allegedly British citizenship to “snarkily”³⁰ declare that Malcolm “is not a member of the Michigan Militia, but an Englishwoman.”³¹ In other words, Justice Scalia sought to make a rhetorical point by falsely making a claim about Malcolm’s nationality.³² In discussing this faux pas, Waldman quotes Professor Carl T. Bogus: “Malcolm’s name may sound British, and Bentley College, where Malcolm teaches history, may sound like a college at Oxford, but in fact Malcolm was born and raised in Utica, New York, and Bentley is a business college in Massachusetts.”³³ The lesson of course is that if someone is going to make a point based on nationality—especially if that “someone” is a Supreme Court Justice and the point is “snarky”—the author ought to get his facts right. But whether writing books off the

Halbrook that “[t]he American Revolution was sparked at Lexington and Concord, and in Virginia, by British attempts to disarm the individual and hence the militia,” when in fact, as all scholars of the Revolution and that particular battle know, “the regulars who marched out the future Route 2 did not go door to door looking for weapons, but were instead intent on raiding a town where the Provincial Congress had concentrated whatever arms and munitions the colony was able to muster.” *Id.* at 104–05. In other words, the battle at Lexington and Concord was about exactly the opposite of what Halbrook claims. The British were after arms and ammunition stored in public armories and not interested in squirrel guns or rusty muskets owned by local farmers. It was not about the private ownership of arms but the public ownership of weapons and ammunition for a “well regulated militia.” Rakove follows this discussion with the following coda on Halbrook’s narrative:

But perhaps Stephen Halbrook only wants to prepare us for a more startling discovery: that “[b]efore the proposal of the Constitution, the newly independent colonies had existed in a state of nature with each other,” which certainly would have been news to the members of the Continental Congress, the framers and ratifiers of the Articles of Confederation and Perpetual Union, and most Americans who thought that the Declaration of Independence was the work of the United States in Congress assembled.

Id. at 104–05 (footnote omitted).

²⁷ WALDMAN, *supra* note 3, at 96–102.

²⁸ *Id.* at 100 (citing Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 11 (2000)).

²⁹ *Id.* (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 137 n.13 (1997)).

³⁰ *Id.*

³¹ *Id.* (quoting Scalia).

³² Scalia may not have intentionally misled his readers, but one assumes that a Supreme Court justice has the ability—and the available librarians, clerks, and research assistants—to get his facts right.

³³ WALDMAN, *supra* note 3, at 100 (quoting Bogus, *supra* note 28). Professor Malcolm now teaches at George Mason University. *Full Time Faculty*, GEO. MASON U. SCH. L., <http://www.law.gmu.edu/faculty/directory/fulltime> (last visited Oct. 30, 2015).

bench, or offering his own very weird history of the Founding from the bench,³⁴ Justice Scalia does not seem to be too worried about getting his facts or his quotations correct, especially when correct facts and quotations would interfere with the argument he wants to make.

One of the more bizarre examples of misrepresentations by the individual rights advocates is the writing of the attorney Stephen Halbrook. Waldman notes that Halbrook looked up the term “bear arms” in an eighteenth century dictionary, discovered the definition included the phrase “to bear arms in a coat,” and concluded that the Second Amendment must protect the right to own a handgun because only that kind of firearm “could fit in one’s coat pocket.”³⁵ Thus, Waldman (quoting the historian Garry Wills), points out that “Mr. Halbrook does not recognize the term ‘coat of arms,’ a decidedly military form of heraldry presided over by the College of Arms.”³⁶

Waldman reiterates what a number of historians have pointed out over and over again: that the individual rights advocates (most of whom, like Halbrook and Don Kates, are not trained historians, and many of whom are funded, hired, or otherwise supported by the NRA and other “gun-rights” organizations),³⁷ constantly pull quotations out of context to claim the quotations mean something they do not. These individual rights advocates use—or more precisely misuse—historical evidence to make a lawyer’s argument, rather than to try to illuminate history and explain what actually happened. Thus, Kates and others who take this position often quote a letter Thomas Jefferson wrote to George Washington, to prove the Founders supported the NRA view of the Second Amendment. In making this claim, these firearms advocates offer up this line from the letter: “One loves to possess arms.” Waldman writes “What a find! Oops: Jefferson was not talking about guns. He was writing to Washington asking for copies of some old letters, to have handy so he could issue a rebuttal in case he got attacked for a decision he made as secretary of state.”³⁸ The ammunition Jefferson wanted, so he could be “armed,” was in the form of written documents. Jefferson understood, one supposes, that in some cases the pen is indeed mightier than the sword, or a musket. But, the NRA sponsored authors who persistently misuse or misunderstand this quotation do not seem to know this.

³⁴ See *infra* Part III.

³⁵ WALDMAN, *supra* note 3, at 100–01.

³⁶ *Id.* at 101 (quoting Garry Wills, *To Keep and Bear Arms*, N.Y. REV. OF BOOKS (Sept. 21, 1995), <http://www.nybooks.com/articles/archives/1995/sep/21/to-keep-and-bear-arms>). For many more examples of this sort of sloppiness, see Rakove, *supra* note 5.

³⁷ WALDMAN, *supra* note 3, at 98.

³⁸ *Id.* at 101.

As the careful and very well respected historian David T. Konig notes, even while purposefully misrepresenting Jefferson's letter, Kates and others also truncated the quotation. Thus, Konig, in explaining Kates' misleading pseudo-history wrote:

Unfortunately [for Kates], Jefferson was not writing about firearms: rather, he was asking Washington to return to him a document on a diplomatic matter that Jefferson had given to Washington, and which he might need in the future. "Though I do not know that it will ever be of the least importance to me," he said of the note written by Alexander Hamilton and Henry Knox, "yet one loves to possess arms, though they hope never to have occasion for them."³⁹

Konig then offers a list of some of the other individual rights proponents who misuse this quotation.⁴⁰ Articles and books on the Second Amendment by those who support an individual rights argument are littered with such confusions, misunderstandings, and partial quotations yanked out of context.⁴¹

The Supreme Court has, unfortunately, followed, endorsed, and cited these articles and books, and has thus failed to present an accurate history of the adoption of the Second Amendment. In doing so the Court has consistently ignored the large body of scholarship that undermines the NRA's version of history. The Court's history has been built by riding roughshod over language and evidence in its headlong rush to reach its predetermined conclusion—that the Second Amendment is a gigantic bar to reasonable firearms regulations. Tied to this, the Court has accepted, without very much thought, the idea that the Second Amendment must be read as if the Antifederalists, and not the Federalists, won the great debates of 1787 to 1789. This defies logic and is at odds with the actual history of the Founding.

It is true that the Antifederalists were the ones who demanded a Bill of Rights. Some of them sincerely wanted a Bill of Rights.⁴² But, the

³⁹ David Thomas Konig, *Thomas Jefferson's Armed Citizenry and the Republican Militia*, 1 ALB. GOV'T L. REV. 250, 261–62 (2008).

⁴⁰ *Id.* at 261 n.48 (listing Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1216 (1996); Anthony J. Dennis, *Clearing the Smoke from the Right to Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57 (1995); David B. Kopel, *Lawyers, Guns, and Burglars*, 47 ARIZ. L. REV. 345, 356 (2001); L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1358 (1997); Scott A. Henderson, Student Work, *U.S. v. Emerson: The Second Amendment as an Individual Right—Time to Settle the Issue*, 102 W. VA. L. REV. 177, 201 (1999)).

⁴¹ *Id.*; see also Rakove, *supra* note 5; Spitzer, *supra* note 5.

⁴² Many Antifederalists, however, were not truly interested in a Bill of Rights, but were only interested in actually stopping ratification of the Constitution. Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 309 (1991). Patrick Henry, for example, opposed the Constitution and demanded a bill of rights, but then used all his political power to stop Virginia from ratifying the Bill of Rights because he understood once the

Antifederalists lacked the political power to achieve this goal. Antifederalists suggested more than two hundred amendments to the Constitution, most of which James Madison ignored or rejected.⁴³ Sometimes he accepted Antifederalist language word-for-word.⁴⁴ He did not, however, do that with what became the Second Amendment. Indeed, while some Antifederalists asked for explicit protections for the ownership of firearms, Madison clearly rejected this language.⁴⁵ Thus, to understand the Second Amendment we must look at the language used—and the proposed language not used. We must also compare the language Madison used with other available language.

II. MISREADING THE PLAIN MEANING OF LANGUAGE AND MADISON'S GRADUAL SUPPORT FOR A BILL OF RIGHTS

The Second Amendment is the only amendment that contains an internal explanation to articulate its purpose. It begins: “A well regulated Militia, being necessary to the security of a free State”⁴⁶ Any plain interpretation of this wording would lead to the logical conclusion that the Amendment is about the militia—the “well regulated Militia”—in the context of the newly created stronger national government. It was a response to Antifederalists who feared the national government would abolish the state militias or not provide them with arms as required by the Constitution.⁴⁷ It is not about bearing arms for

Bill of Rights was ratified there would be no chance for a second convention to totally rewrite the Constitution. Tench Coxe, one of the leading Federalists in Philadelphia, noted that “honest” Antifederalists supported the Bill of Rights, implying that some Antifederalists had used the demand for a bill of rights as a political stalking horse for their real goal: preventing ratification of the Constitution. Letter from Tench Coxe to James Madison (June 18, 1789), in 12 *THE PAPERS OF JAMES MADISON* 239 (Charles F. Hobson and Robert Rutland, eds., 1979) [hereinafter 12 *MADISON'S PAPERS*]. Similarly, Edmund Randolph observed that “nothing, nay not even the abolishment of direct taxation would satisfy those, who are most clamorous” against the Constitution. Letter from Edmund Randolph to James Madison (June 30, 1789), in 12 *MADISON'S PAPERS*, *supra*, at 273.

⁴³ Kenneth R. Bowling, “A Tub to the Whale”: *The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 *J. EARLY REPUBLIC* 223, 228 (1988); see also Richard E. Ellis, *The Persistence of Antifederalism after 1789*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 295, 297 (Richard Beeman et al. eds., 1987) (“The amendments proposed by the states fall into two categories. The first limited the authority of the central government over individuals The amendments of the second group were both substantive and structural.”).

⁴⁴ See *infra* notes 231–39 and accompanying text.

⁴⁵ See *infra* Part V.

⁴⁶ U.S. CONST. amend. II. By contrast, the First Amendment does not begin with something like “to prevent religious oppression,” and the Press and Speech clauses of that Amendment do not begin with something like “in order to allow for full political debate.”

⁴⁷ U.S. CONST. art. I, § 8, cl. 1, 16 (“The Congress shall have Power To provide for organizing, arming, and disciplining, the Militia . . .”).

self-defense, or for hunting, or to feel good about carrying a weapon. It is a simple guarantee that the states will be allowed to provide arms for their “well regulated” militias if the Congress failed to live up to its constitutional obligation to do so.⁴⁸ As Chief Justice Warren Burger explained, the Amendment “must be read as though the word ‘because’ was the opening word,”⁴⁹ for the simple reason that the founding generation believed that military preparedness had to be based on well trained—“well regulated”—citizen soldiers in local and state militias. Some Antifederalists feared that the national government would abolish the local militias, and that a professional army—what was known in the eighteenth century as a “standing army”—would allow some future president to become a dictator.⁵⁰ The Antifederalists believe that the first step to this tyranny would be the disarming of the state militias.

The Federalists thought such fears were absurd. Nevertheless, Representative James Madison, who drafted the amendments that became the Bill of Rights and proposed them in Congress, had no objections to providing a guarantee that would protect the right of the states to maintain their militias and arm them, as long as they were “well regulated.”⁵¹ Madison did not actually believe a Bill of Rights was necessary,⁵² and had grave reservations about the utility and efficacy of “parchment barriers,” as he called them.⁵³ He opposed adding a Bill of Rights at the Constitutional Convention, in the Congress under the Articles of Confederation when it voted to send the proposed Constitution to the states, during the ratification struggle, and emphatically in the Virginia ratifying convention.⁵⁴

Drawing on his experience in Virginia, where politicians had repeatedly ignored or violated the Commonwealth’s Bill of Rights, Madison (presciently) did not believe a Bill of Rights would deter Congress or the executive branch when national leaders were determined to create a repressive policy.⁵⁵ More than a year after the

⁴⁸ See *id.*

⁴⁹ Spitzer, *supra* note 5, at 350–51 (quoting Warren E. Burger, *The Right to Keep and Bear Arms*, *PARADE MAG.*, Jan. 14, 1990, at 5).

⁵⁰ See Finkelman, *supra* note 23, at 223–25.

⁵¹ U.S. CONST. amend. II.

⁵² Finkelman, *supra* note 42, at 308.

⁵³ Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 *THE PAPERS OF JAMES MADISON* 295, 297 (Robert A. Rutland et al. eds., 1977) [hereinafter 11 *MADISON’S PAPERS*].

⁵⁴ See generally Finkelman, *supra* note 42.

⁵⁵ History of course has proven Madison to be correct, starting with the Sedition Act of 1798, ch. 74, 1 Stat. 596. For a full history of the enforcement of those laws, see JAMES MORTON SMITH, *FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956). The prosecution in *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812), which began under Jefferson and continued under Madison illustrates that once in power, even advocates of personal liberty like Madison could not always live up to their self-proclaimed

Constitutional Convention finished its work, Madison told Jefferson that “experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State.”⁵⁶ In Virginia he had “seen the bill of rights violated in every instance where it has been opposed to a popular current,”⁵⁷ and he did not expect anything better from the new national government. Indeed, he warned that “restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public; and after repeated violations in extraordinary cases, they will lose even their ordinary efficacy.”⁵⁸ In Madison’s mind, no amendments were better than those which would be ignored.

During the ratification struggle Madison, along with almost all other Federalists, consistently belittled the Antifederalists and contemptuously mocked their demands for a bill of rights. Federalists described their opponents as “[d]emagogues and vicious characters”⁵⁹ and as “wicked, . . . ‘malignant, ignorant, and short-sighted triflers.’”⁶⁰ Federalists in North Carolina referred to those who opposed ratification as a “blind stupid set, that wish Damnation to their Country,”⁶¹ who were “fools and knaves” opposed to “any man of abilities and virtue.”⁶² A New Hampshire Federalist predicted “that none but fools, blockheads, and mad men” would oppose the Constitution.⁶³ In New York the anonymous “Caesar” ridiculed their demands for a bill of rights as dishonest attempts “to frighten the people with ideal bugbears.”⁶⁴ Caesar sarcastically commented, “[t]he unceasing cry of these designing croakers is, my friends, your liberty is invaded!”⁶⁵

Madison attacked the integrity and motives of his opponents. He divided Virginia’s supporters of amendments into two categories: men

principles. On Jefferson’s persistent inability to support civil liberties, see LEONARD W. LEVY, *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE* (1963) and PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 193–236 (3d ed. 2014).

⁵⁶ Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 *MADISON’S PAPERS*, *supra* note 53, at 295, 297–99.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ ROBERT ALLEN RUTLAND, *THE ORDEAL OF THE CONSTITUTION: THE ANTIFEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787–1788*, at 34 (1966).

⁶⁰ *Id.* at 73 (quoting *One of the People*, MASS. CENTINEL, Oct. 17, 1787).

⁶¹ *Id.* at 268–69 (quoting Letter from Whitmell Hill to James Irdell (1787), in 2 *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 159, 159 (Griffith J. McRee ed., 1857)).

⁶² *Id.* at 269 (quoting Letter from Archibald Maclaine to James Irdell (Oct. 29, 1787), in 2 *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 178, 178 (Griffith J. McRee ed., New York, D. Appleton & Co. 1857)).

⁶³ *Id.* at 216 (quoting *NEW HAMPSHIRE SPY*, Oct. 27, 1787) (emphasis omitted).

⁶⁴ Caesar II, N.Y. *DAILY ADVERTISER*, Oct. 17, 1787, *reprinted in* 1 *COMMENTARIES ON THE CONSTITUTION: PUBLIC AND PRIVATE* 395, 397 (John P. Kaminski et al. eds., 1981).

⁶⁵ *Id.*

like Edmund Randolph and George Mason, who “do not object to the substance of the Govern[t], [sic] but contend for a few additional Guards in favor of the Rights of the States and of the people,” and others, led by Patrick Henry, who sought amendments that would “strike at the essence of the System.”⁶⁶ He believed Henry’s group had “disunion assuredly for its object,” although he also believed that disunion was the “real tendency” of all opponents of ratification, including Mason.⁶⁷ Thus Madison felt that there could be “no middle ground” between supporters and opponents of the Constitution.⁶⁸ Madison believed that those who demanded amendments, including a bill of rights, wanted to undermine the utility of the new Constitution. He was contemptuous of all these Antifederalists. He noted that in Massachusetts: “Out of the vast number which composed [the opposition] there was scarce a man of respectability, and not a single one capable of leading the formidable band.”⁶⁹ On the other hand, “[t]he men of Abilities, of property, of character, with every judge, lawyer of eminence, and the Clergy of all Sects, were with scarc[e] an exception deserving notice . . . unanimous in” Massachusetts.⁷⁰ Madison later happily noted that Governor Edmund Randolph of Virginia, who had refused to sign the Constitution at the Convention, had now decided to support ratification.⁷¹ But he also noted that George Mason, who had also refused to sign the Constitution, was “growing every day more bitter” and had become “outrageous” in his opposition and would “in the end be thrown by the violence of his passions into the politics of Mr. [Patrick] H[enr]y.”⁷²

Madison’s analysis of the Antifederalists in Massachusetts is particularly useful for helping us understand why he would later reject any language giving Americans a “personal” right to carry firearms. He described the Massachusetts Antifederalists as including “scarce a man of respectability.”⁷³ He asserted that many had been supporters of Shays’ Rebellion and were “ignorant and jealous men, who had been taught or had fancied that the Convention at Philada. had entered into a

⁶⁶ Letter from James Madison to Thomas Jefferson (Dec. 9, 1787), in 10 MADISON’S PAPERS, *supra* note 24, at 310, 312.

⁶⁷ Letter from James Madison to Edmund Pendleton (Feb. 21, 1788), in 10 MADISON’S PAPERS, *supra* note 24, at 532–33.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* (second alteration in original).

⁷¹ Letter from James Madison to Rufus King (June 4, 1788), in 11 MADISON’S PAPERS, *supra* note 53, at 76 (“The Govr. has declared the day of previous amendments past . . .”).

⁷² Letter from James Madison to Thomas Jefferson (Apr. 22, 1788), in 11 MADISON’S PAPERS, *supra* note 53, at 27, 28.

⁷³ Letter from James Madison to Edmund Pendleton (Feb. 21, 1788), in 10 MADISON’S PAPERS, *supra* note 24, at 532–33.

conspiracy against the liberties of the people at large, in order to erect an aristocracy for the rich[,] the well-born, and the men of Education.”⁷⁴ Madison saw Antifederalists as dishonest, corrupt, ignorant, and dangerous.⁷⁵ Just a year before the Convention they had been gun-toting, lawless insurrectionists, partaking in the violent rebellion led by Daniel Shays to destroy the government in Massachusetts. The failed rebellion led to greater support for the Convention and the creation of a stronger national government.⁷⁶ When he wrote the Bill of Rights, Madison had no interest in guaranteeing that these dangerous men could be armed and in a position to attack and undermine the new government. The new Constitution was not a suicide pact. Madison wanted a stronger government that could protect itself from insurrectionists and domestic terrorists, not a weaker government, as the nation had under the Articles of Confederation, which was incapable of suppressing the illegal attacks on the government such as those in Shays’ Rebellion.

Thus, contrary to what the Supreme Court argued in *Heller*, the Second Amendment was not placed in the Constitution to protect an individual right to own weapons or to preserve a right of revolution. Justice Scalia, in *Heller*, argued that the Amendment was not solely about a “well regulated militia,” despite its explicit language, because “if . . . the *organized* militia is the sole institutional beneficiary of the Second Amendment’s guarantee—it does not assure the existence of a ‘citizens’ militia’ as a safeguard against tyranny.”⁷⁷ But, the Federalists—men like Madison, Hamilton, Jay, Roger Sherman, and Washington—did not believe that there could ever be a need for unorganized armed mobs to attack the government. They had just finished creating what the most articulate of all Federalists would later describe as a constitution “intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”⁷⁸ The Bill of Rights was hardly designed to undermine the longevity of the Constitution. Thus, there is not a shred of historical evidence to support the idea that the Federalists who had struggled to create a stable, secure, and long-lasting national government, decided, just a year later, to propose an amendment that

⁷⁴ Letter from James Madison to Thomas Jefferson (Feb. 19, 1788), in 10 *MADISON’S PAPERS*, *supra* note 24, at 518–19.

⁷⁵ See *supra* notes 66–72.

⁷⁶ RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 16–18 (2009).

⁷⁷ *District of Columbia v. Heller*, 554 U.S. 570, 600 (2008).

⁷⁸ *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819). Chief Justice John Marshall was of course writing long after the founding period. But, his ideas of the Constitution were consistent from the time of his participation in the Virginia ratifying convention in 1788 to the end of his life. His assertions in *M’Culloch* captured this position of the leading Federalists in 1787–1791, when the Constitution and the Bill of Rights were written and ratified.

would prevent the government from suppressing violence, anarchy, or revolution from the unorganized rabble that might call itself the “citizens’ militia.”

The men who wrote the Constitution understood that revolutions might be legitimate—after all, they had just participated in one. But, the Declaration of Independence set out a clear theory of when revolution was permitted. The Declaration asserted that “Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government.”⁷⁹ But under the Constitution the new government was being “instituted” by the people—“We the People,” as the preamble began⁸⁰—and the new Constitution provided a clear democratic process to alter it—through regular elections and the amendment process.⁸¹ Under the new Constitution the people would elect the government, they would be self-governing, and so there was no place for an unorganized, unregulated, militia to make war on the government of the people. The government would serve the people. If somehow (and the Federalists could not conceive how this would come about), a tyrant took office, the other branches of the government and the “well regulated militias” would be there to oppose that tyranny.⁸² The framers of the Constitution and the Federalists in Congress, led by James Madison and Roger Sherman, who wrote and passed what became the Second Amendment, were far more worried about radical, self-styled insurrectionists, such as the men who participated in Shays’ Rebellion or the potentially violent Antifederalists in Pennsylvania, than they were about a tyranny created through a popularly elected government.⁸³ The “hangover” from Shays’ rebellion

⁷⁹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁸⁰ U.S. CONST. pmbl.

⁸¹ U.S. CONST. art. V (setting out how the Constitution can be amended).

⁸² For further discussion of this issue, see Carl T. Bogus, *Heller and Insurrectionism*, 59 SYRACUSE L. REV. 253 (2008).

⁸³ The Rebellion, led by Daniel Shays, a former Continental Army captain, was a taxpayer revolt that use armed force and intimidation to close courts and other institutions in Massachusetts. It was ultimately suppressed by a private army of some 4,000 men led by General Benjamin Lincoln in January 1787. Shays Rebellion was one of the catalysts that led to national support for the Constitutional Convention—and was very much on the minds of many of the delegates—which met in May. BEEMAN, *supra* note 76. When he introduced the Virginia Plan at the Convention, Governor Edmund Randolph of Virginia made an explicit reference to the “rebellion [that] had appeared as in Massts.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18 (Max Farrand ed., Yale Univ. Press rev. ed. 1966). In later arguing for a strong national government, Randolph asserted: “Amongst other things congress was intended to be a body to preserve peace among the states, and in the rebellion of Massachusetts it was found they were not authorized to use the troops of the confederation to quell it.” *Id.* at 263.

was evident in the ratification debates.⁸⁴ Thus, Madison and his colleagues thought the Constitution, as written in Philadelphia, was fine and needed no changes. They made this point over and over again during the ratification debates.⁸⁵

But, after the Constitution was ratified, Madison offered the opponents of the new government a political sop that was designed in part to finish off the Antifederalists.⁸⁶ By pacifying those “honest”⁸⁷ Antifederalists who feared the new Constitution threatened basic fundamental rights—such as freedom of the press, freedom of religion, or the right to a jury trial—Madison believed he would divide and destroy the Antifederalist opposition. Madison did not believe the Constitution threatened these liberties, so he was willing to reaffirm these liberties in a bill of rights to mollify the moderate, “honest” Antifederalists.⁸⁸ He understood that once this was accomplished the more radical opponents of the Constitution—like Patrick Henry in Virginia and George Clinton in New York—would lack the support to agitate for a second constitutional convention to rewrite the document and destroy the stronger national government he had just helped create.

In explaining this strategy, Madison told one ally that once the amendments were adopted they would “kill the opposition every where, and by putting an end to the disaffection to the Govt. itself, enable the administration to venture on measures not otherwise safe.”⁸⁹ But he had no intention of proposing any amendments that would undermine the vigor and vitality of the new government. Thus, it is not surprising that he did not guarantee the rights of individuals (especially dangerous individuals like those who had recently tried to overthrow the government in Massachusetts or the angry violent men in Pennsylvania) to be armed. Indeed, he carefully wrote the Bill of Rights so that it would be “limited to points which are important in the eyes of many and can be objectionable in those of none.”⁹⁰ Proudly he noted that with the amendments he proposed “[t]he structure & stamina of the Govt. are as little touched as possible.”⁹¹

⁸⁴ BEEMAN, *supra* note 76, at 386.

⁸⁵ Finkelman, *supra* note 42. Tench Coxe used the term “honest” Antifederalists in a letter to Madison. Letter from Tench Coxe to James Madison, *supra* note 42.

⁸⁶ Letter from James Madison to Richard Peters (Aug. 19, 1789), in 12 MADISON’S PAPERS, *supra* note 42, at 347.

⁸⁷ Letter from Tench Coxe to James Madison, *supra* note 42.

⁸⁸ Letter from James Madison to Thomas Jefferson (Dec. 9, 1787), in 10 MADISON’S PAPERS, *supra* note 24, at 312.

⁸⁹ Letter from James Madison to Richard Peters (Aug. 19, 1789), in 12 MADISON’S PAPERS, *supra* note 42, at 346, 347.

⁹⁰ Letter from James Madison to Edmund Randolph (June 15, 1789), in 12 MADISON’S PAPERS, *supra* note 42, at 219.

⁹¹ *Id.*

Once the Constitution was ratified Madison was willing to support amendments that would not undermine the power of the new government.⁹² When he introduced the amendments, Madison declared that he had “never considered this provision so essential to the federal constitution” that it should have been allowed to impede ratification.⁹³

This is consistent with what Madison and his coauthors Alexander Hamilton and John Jay wrote in the *Federalist Papers*, where they consistently denied that a Bill of Rights was necessary, or even appropriate for the new Constitution. In *Federalist 38* Madison casually dismissed calls for a bill of rights because the Antifederalists could not all agree on what protections of liberty they wanted.⁹⁴ Rhetorically asking “[i]s a bill of rights essential to liberty,” he noted that the Articles of Confederation “ha[d] no bill of rights.”⁹⁵ In *Federalist 48* Madison argued that a bill of rights would be useless. Here he noted that in Pennsylvania “the constitutional trial by jury had been violated, and powers assumed which had not been delegated by the constitution.”⁹⁶ Thus Madison reiterated his belief in the danger and futility of relying on “parchment barriers against the encroaching spirit of power.”⁹⁷ In *Federalist 51* Madison again asserted that the competing interests caused by diversity of the people was the key to liberty. As long as the

society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects⁹⁸

Madison reiterated these points in *Federalist 57*, arguing that the “vigilant and manly spirit which actuates the people of America” would prevent the legislature from usurping its power.⁹⁹

The strongest statement on this issue came from Hamilton, who wrote in *Federalist 84* that a bill of rights was “not only unnecessary in the proposed Constitution, but would even be dangerous. [It] would

⁹² *Id.*

⁹³ 1 ANNALS OF CONG. 453 (1789) (Gales and Seaton ed., 1834) (remarks of James Madison, June 8, 1789).

⁹⁴ THE FEDERALIST NO. 38 (James Madison).

⁹⁵ *Id.*

⁹⁶ THE FEDERALIST NO. 48 (James Madison).

⁹⁷ *Id.*

⁹⁸ THE FEDERALIST NO. 51 (James Madison). This dovetailed with similar arguments Madison made in *Federalist 10*. THE FEDERALIST NO. 10 (James Madison).

⁹⁹ THE FEDERALIST NO. 57 (James Madison).

contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.”¹⁰⁰ Almost every Federalist, including Madison, agreed with this position.

The analysis in the *Federalist Papers* explains why, on the floor of the House of Representatives, Madison strenuously and successfully opposed adding the word “expressly” to what became the Tenth Amendment¹⁰¹—which of course was one of the key demands of radical Antifederalists, like those who voted against the Constitution at the Pennsylvania ratifying convention.¹⁰² Similarly, Madison ignored the demands of the Pennsylvania Antifederalists that the Constitution protect their right to own weapons or to go hunting or fishing. Madison had no interest in supporting these goals, which would have undermined the strength of the new government and eviscerated the Constitution.

Nevertheless, Madison introduced the amendments that became the Bill of Rights because he believed that his amendments would mollify moderate Antifederalists, who had been so decisively defeated in the ratification process and in the elections for the new government. He believed his proposed amendments would be useful in “removing the fears of the discontented” while “avoiding all such alterations as would either displease the adverse side, or endanger the success of the measure.”¹⁰³

But, even as he proposed the amendments, Madison still did not believe a bill of rights was necessary, but was only willing to concede “that in a certain form, and to a certain extent, such a provision was neither improper nor altogether useless.”¹⁰⁴ Thus, Madison carefully wrote his proposed amendments so they were “limited to points which are important in the eyes of many and can be objectionable in those of none.”¹⁰⁵ Significantly, he noted that when his proposed amendments were ratified, “[t]he structure & stamina of the Govt. are as little touched as possible.”¹⁰⁶ It was under these circumstances that he introduced a

¹⁰⁰ THE FEDERALIST NO. 84 (Alexander Hamilton).

¹⁰¹ See 1 ANNALS OF CONG., *supra* note 93, at 790.

¹⁰² See *infra* Part V for a discussion of what the Pennsylvania minority demanded on this issue.

¹⁰³ Letter from James Madison to Samuel Johnston (June 21, 1789), in 12 MADISON’S PAPERS, *supra* note 42, at 249, 250. Johnston was a Federalist in North Carolina, and Madison obviously understood that a third advantage of his proposals was that they might help push North Carolina into ratifying the Constitution, which it would finally do in November 1789.

¹⁰⁴ 1 ANNALS OF CONG., *supra* note 93.

¹⁰⁵ Letter from James Madison to Edmund Randolph (June 15, 1789), in 12 MADISON’S PAPERS, *supra* note 42, at 219.

¹⁰⁶ *Id.*

long series of amendments that became the Bill of Rights, which included what became the Second Amendment.

III. THE SECOND AMENDMENT AND CONTEMPORARY STATE CONSTITUTIONS: JUSTICE SCALIA'S SLEIGHT OF HAND

To understand the meaning of the Second Amendment, it is useful to look at the various amendments the Antifederalists proposed for what became the Second Amendment, and what the disgruntled Antifederalists hoped to get from a Bill of Rights.¹⁰⁷ In this way, we can see how Madison essentially rejected much of what the Antifederalists wanted in relation to the military and firearms. Antifederalists wanted explicit protections for hunting, fishing, and personal ownership of weapons while at the same time they wanted to eviscerate the national army and prevent the national government from maintaining a standing army in peacetime.¹⁰⁸ Madison rejected all these demands. Similarly, we might look at existing state constitutional clauses on firearms, the militia, and the army to see what language Madison might have used, but did not.

In *Heller*, Justice Scalia, speaking for the Court, does look at contemporary state constitutional clauses. A careful and thorough examination of these clauses reveals that Madison and the First Congress clearly rejected language that would support the Supreme Court's analysis in both *Heller* and *McDonald*.

In *Heller*, Justice Scalia explores the four state constitutional provisions dealing with firearms and the militia that preceded the adoption of the Second Amendment. This strategy makes sense. One way of understanding language is to look at other contemporary uses. But doing so requires a careful analysis and a fidelity to history, language, and context.

Justice Scalia places great emphasis on these provisions, although quite frankly, his analysis and conclusions make no sense, and illustrate the same sort of "law office history" that serious academics have condemned when done by advocates of an individual rights interpretation of the Second Amendment,¹⁰⁹ and that Michael Waldman brilliantly eviscerates in *The Second Amendment: A Biography*.¹¹⁰

Justice Scalia claims that his analysis in *Heller* "is confirmed by analogous arms-bearing rights in state constitutions that preceded and

¹⁰⁷ See *infra* Parts IV and V.

¹⁰⁸ See Finkelman, *supra* note 23.

¹⁰⁹ Rakove, *supra* note 5, at 103–06.

¹¹⁰ WALDMAN, *supra* note 3, at 100.

immediately followed adoption of the Second Amendment.”¹¹¹ He notes that “[f]our States adopted analogues to the Federal Second Amendment in the period between independence and the ratification of the Bill of Rights”¹¹² and that “[t]wo of them—Pennsylvania and Vermont—clearly adopted individual rights unconnected to militia service.”¹¹³ He then quotes the Pennsylvania Declaration of Rights of 1776: “That the people have a right to bear arms *for the defence of themselves* and the state”¹¹⁴ Scalia added the emphasis to the quoted text, to highlight the support he finds for his position. He also notes that Vermont’s provision was virtually identical to Pennsylvania’s.¹¹⁵ This evidence certainly proves that if Madison and the First Congress had wanted to create an individual right to firearms, they had the models from one state (Pennsylvania) and one future state (Vermont) to borrow from. But what Justice Scalia fails to do, or even attempt to do, is explain why the First Congress did not follow this model. If the Framers *intended* to protect individual rights, why didn’t they do so by borrowing language from Pennsylvania?¹¹⁶ Justice Scalia provides no answer because he has no answer. Nor does Justice Scalia explain why *only* Pennsylvania of the original thirteen states chose to protect an individual right to own firearms. He does not even attempt to explain why the views of one state, in understanding the Second Amendment, should trump the other twelve states.

Justice Scalia’s use of the Vermont provision is problematic for his position since Vermont was not actually a state in 1789 when the Bill of Rights was written and submitted for ratification. Thus it is hard to imagine why the Supreme Court would consider the views of a non-state to be relevant here. Vermont did become a state in 1791, shortly before the amendments were ratified, so while Scalia’s sentence is technically accurate—that Vermont adopted its provision before the ratification of the Bill of Rights—this is a linguistic sleight of hand, since

¹¹¹ *District of Columbia v. Heller*, 554 U.S. 570, 600–01 (2008).

¹¹² *Id.* at 601.

¹¹³ *Id.*

¹¹⁴ *Id.* (emphasis and alteration in original opinion, but not in the actual text quoted from the Pennsylvania Constitution) (quoting PA. CONST. of 1776, A Declaration of Rights of the Inhabitants of the Commonwealth, or State of Pennsylvania § XIII [hereinafter Pa. Declaration of Rights], in 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3082, 3083 (Francis Newton Thorpe ed., 1909) [hereinafter THORPE]).

¹¹⁵ *Id.*

¹¹⁶ Since Vermont was not yet a state, Madison could not have borrowed from the Vermont Constitution.

Vermont was not even a state at the time the Second Amendment was written and sent to the states.¹¹⁷

Significantly, while quoting both the Pennsylvania and Vermont Constitutions, Justice Scalia failed to present the full text of each clause. The full Pennsylvania clause reads as follows:

That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.¹¹⁸

The Vermont clause read as follows:

That the people have a right to bear arms for the defence of themselves and the State; and, as standing armies, in the time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power.¹¹⁹

Why did Justice Scalia leave out the portions of these state constitutional provisions dealing with the military—explaining why there are arms-bearing clauses in both constitutions? We cannot read Justice Scalia's mind, but the logical assumption is that talking about the military in this context would have undermined or at least complicated his argument. Recall, that in discussing these two state constitutions, Scalia asserted: "Two of them—Pennsylvania and Vermont—clearly adopted individual rights unconnected to militia service."¹²⁰ As we see, this statement is simply not true. When we look at the entire provisions we see that the right to bear arms is directly tied to the desire of the Pennsylvania and Vermont constitution-makers to have a citizen's army—a Militia—rather than a standing army. Furthermore, both provisions focus almost entirely on the military aspects of arms. We might wonder when Justice Scalia was a law professor, what he might have done with a student paper that so selectively ignored evidence or used truncated quotations ripped out of context?

Justice Scalia notes that only two other states had an arms bearing clause, and again he quotes only part of the relevant constitutional provisions. Scalia quotes North Carolina's 1776 Declaration of Rights in this way: "That the people have a right to bear arms, for the defence of

¹¹⁷ Oddly, Justice Scalia cites to a 1777 document which radicals in Vermont wrote when trying to become an independent state, and not the 1786 Constitution which was closer to the time of Vermont's actual statehood, in 1791. See *Heller*, 554 U.S. at 601 (citing VT. CONST. of 1777, ch. 1, § XV, in 6 THORPE, *supra* note 114, at 3741).

¹¹⁸ Pa. Declaration of Rights, *supra* note 114, in 5 THORPE, *supra* note 114.

¹¹⁹ VT. CONST. of 1777, ch. 1, § XV, in 6 THORPE, *supra* note 114, at 3741.

¹²⁰ *Heller*, 554 U.S. at 601.

the State”¹²¹ The Justice admits “[t]his could plausibly be read to support only a right to bear arms in a militia,”¹²² but then declares that this was “a peculiar way to make the point in a constitution that elsewhere repeatedly mentions the militia explicitly.”¹²³

Justice Scalia might have better understood the clause if he had quoted the entire provision:

That the people have a right to bear arms, for the defence of the State; and, as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power.¹²⁴

With all respect to a distinguished member of the Supreme Court, it is hard to imagine why he refused to provide the full text of this clause, just as he refused to provide the full text for the clauses from Vermont and Pennsylvania. But, even without the rest of the North Carolina provision, we might ask what else this could possibly refer to except a military defense of the state?

Despite Justice Scalia’s professed inability to understand the clause, there are many reasons why the “defence of the state” provision was not limited to “the militia.” When this was written, there were no local or state police systems in North Carolina.¹²⁵ Thus, a county sheriff might have called a posse to be used to defend the state against brigands, criminals, or bands of fugitive slaves. At this time the state legislatures still “outlawed” people, in effect making them enemies of the state, who could be killed with impunity. Indeed, the same constitution that Justice Scalia used to explain his understanding of the Second Amendment also explicitly provided for people being outlawed.¹²⁶ Thus a posse gathered to seek and destroy an outlaw (or a single individual who spotted and killed the outlaw) would be acting in defense of the state. In addition, it is important to note, as Justice Scalia fails to do, that this clause was

¹²¹ *Id.* (alteration in original) (quoting N.C. CONST. of 1776, A Declaration of Rights, &c., § XVII, in 5 THORPE, *supra* note 114, at 2787, 2788).

¹²² *Id.*

¹²³ *Id.* (citing N.C. CONST. of 1776, A Declaration of Rights, &c., §§ XIV, XVIII, XXXV, in 5 THORPE, *supra* note 114, at 2787, 2789, 2791, 2793).

¹²⁴ N.C. CONST. of 1776, A Declaration of Rights, &c., § XVII, in 5 THORPE, *supra* note 114, at 2787, 2788.

¹²⁵ Indeed, except for slave patrols, there were virtually no formal police systems in the South until after the Civil War. Gary Potter, *The History of Policing in the United States, Part I*, E. KY. U. POLICE STUDIES ONLINE (June 25, 2013), <http://plsonline.eku.edu/insidelook/history-policing-united-states-part-1>.

¹²⁶ N.C. Const. of 1776, A Declaration of Rights, &c., § XII, in 5 THORPE, *supra* note 114, at 2787, 2788 (“That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land.”).

written in 1776, in the midst of the American Revolution.¹²⁷ At this time, North Carolinians who were not in the militia might have been called to defend against an invading British army or to fight against local Tory combatants. The defense of the state might require men, at a moment's notice, to use arms against the enemy. In 1776, Indians occupied portions of North Carolina. Whites saw these Native Americans as a threat to the peace and safety of the white community. In the event of an Indian war, white citizens would have been expected to fight for the defense of the state, even if they were not in the militia. Furthermore, at this time slaves constituted about thirty percent of the North Carolina population.¹²⁸ Men, whether or not they were in the Militia, served on slave patrols and all able-bodied white men might be called upon to suppress a slave rebellion at any moment.¹²⁹ Thus, the "defence of the state" would have included men not in the militia (as well as those who were), who could be called upon to fight the British, Tories, Indians, and rebelling slaves, as well as to help capture or kill criminals, outlaws, or runaway slaves.

The context of the Revolution also explains why North Carolina, Virginia,¹³⁰ and every other Revolutionary-era state except Pennsylvania, *did not* guarantee a personal right to own weapons. Support for the Revolution was hardly unanimous. As many as a third of all Americans supported the British cause.¹³¹ Revolutionary leaders throughout the new states fully understood that it would be necessary to disarm Tories, even if they were not engaged in any overt acts against the Patriot cause. During this period state governments were seizing land and other property owned by Tories, arbitrarily jailing some of them, and

¹²⁷ The American Revolution began in 1775 and ended with the Peace of Paris in 1783. *The American Revolution*, LIBRARY OF CONG., <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/amrev> (last visited Nov. 1, 2015).

¹²⁸ In 1790 North Carolina had a total population of 393,751 people, 100,572 of which were slaves. This made the slave population twenty-five percent of the state. *THE AMERICAN ALMANAC AND REPOSITORY OF USEFUL KNOWLEDGE FOR THE YEAR 1860*, at 215 (Boston, Crosby, Nichols, & Co. 1860). In 1776 the percent of the population made up of slaves was probably higher, but declined during the war due to the end of the African slave trade and the escape of slaves to British lines, while the white population grew through migration.

¹²⁹ Some scholars argue that in fact the Second Amendment was designed to reassure southern whites that they could use the "well regulated militia" to suppress slave rebellions. See Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998).

¹³⁰ See *infra* text accompanying notes 142–49.

¹³¹ The best estimates are that about 250,000 colonists—twenty percent of the population—remained loyal to the crown throughout the Revolution. See JOHN SHY, *A PEOPLE NUMEROUS AND ARMED: REFLECTIONS ON THE MILITARY STRUGGLE FOR AMERICAN INDEPENDENCE 183* (1976). John Adams estimated that a third of Americans were loyalists and a third neutral when the war began, *id.* at 166, thus when North Carolina adopted this provision, in the second year of the war, the loyalist threat was greater than later in the war.

occasionally passing legislation making them “outlaws.”¹³² Part of this process included disarming them because of their political views.

Indeed, when we remember the chaos of the Revolutionary period, and the real dangers to the states from the British army, Tories, Indians, and slaves (as well as just common criminals), it is hardly surprising that only one Revolutionary state provided a personal right to own weapons. The rest of the states fully understood, as North Carolina noted in its constitution, that it was important for people to be armed for the defense of the state. But the opposite was also true: it was important for the state to be able to disarm troublesome citizens, and inhabitants, including Tories, Indians, slaves, and criminals.

Whatever we think of Justice Scalia’s inability to understand how the “defence of the State” might have gone beyond the militia—or his failure to understand why in the context of the Revolution, North Carolina *did not* have a constitutional protection for owning firearms—it is clear that the North Carolina provision does not, in any way, protect a private right to own a weapon. Weapons, under this clause, are for “the defence of the State.” It can indeed be seen as a forerunner of the federal Second Amendment because, like the Second Amendment, the provision in the North Carolina Constitution only deals with the military use of arms.¹³³

The 1780 Massachusetts Constitution, mostly drafted by John Adams,¹³⁴ similarly provided a protection for the military use of weapons.¹³⁵ Justice Scalia quotes the Massachusetts provision in this way: “The people have a right to keep and to bear arms for the common defence”¹³⁶ Justice Scalia tries to explain away this obvious military provision by citing an 1825 libel case, which had nothing to do with weapons, because in that case Chief Justice Isaac Parker made an off-hand analogy to weapons.¹³⁷ It is not at all clear why a decision that had absolutely nothing to do with firearms, made forty-five years after the 1780 constitution was written and ratified, would be dispositive of what the clause “to bear arms for the common defence” meant when it was written and adopted. He then followed this up¹³⁸ with a reference to the often poorly researched¹³⁹—and NRA funded—work of Don Kates.¹⁴⁰

¹³² Virginia did not ban bills of attainder until its 1850 Constitution. VA. CONST. of 1850, art. IV, § 15, cl. 2, *in* 7 THORPE, *supra* note 114, at 3831, 3839.

¹³³ U.S. CONST. amend. II.

¹³⁴ WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 92 (1980).

¹³⁵ *See infra* note 141 and accompanying text.

¹³⁶ District of Columbia v. Heller, 554 U.S. 570, 601 (2008) (alteration in original) (quoting MASS. CONST. of 1780, pt. I, § XVII, *in* 3 THORPE, *supra* note 114, at 1888, 1892).

¹³⁷ *Id.* at 602.

¹³⁸ *Id.*

¹³⁹ Rakove, *supra* note 5; WALDMAN, *supra* note 3, at 98.

As with his analysis of the other three state provisions, Justice Scalia failed to provide the entire text of the Massachusetts constitutional provision, which reads:

The people have a right to keep and to bear arms for the common defence. And as in time of peace armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.¹⁴¹

At this point it is hardly worth trying to analyze why a U.S. Supreme Court Justice would provide only a portion of the relevant text and in doing so blatantly mislead readers of his opinion on the text of the Massachusetts Constitution. The answer seems clear enough: the full texts of these state constitutional provisions do not actually support Justice Scalia's position, so he truncated them to hide what they really said. Then, he showed an incredible lack of imagination in analyzing them, so he could assert, based on no evidence, that they were about a private right to own weapons.

Following this analysis, Justice Scalia discussed a proposal by Thomas Jefferson for the Virginia Declaration of Rights: "No freeman shall ever be debarred the use of arms [within his own lands or tenements]."¹⁴² Scalia cites this proposal to support his understanding of the Second Amendment, but fails to note, or admit, that Virginia refused to adopt it.¹⁴³ Thus, Justice Scalia bases his legal analysis on a proposed constitutional provision that was never adopted by any state. The fact that Virginia did not adopt this language does not seem to bother the Court majority, even though for historians (and linguists) it seems to be strong evidence that the largest and most important state in the new nation had actually *rejected* the individual rights position that Justice Scalia claims the founding generation supported. Indeed, it is hard to imagine what theory of law, history, or logic, leads to the conclusion that a proposal which was summarily rejected carries more weight—actually outweighs—the proposal that was accepted and

¹⁴⁰ WALDMAN, *supra* note 3, at 98.

¹⁴¹ MASS. CONST. of 1780, pt. I, § XVII, in 3 THORPE, *supra* note 114, at 1888, 1892.

¹⁴² *Heller*, 554 U.S. at 602 (alteration in original) (quoting 1 THE PAPERS OF THOMAS JEFFERSON 344 (Julian P. Boyd ed. 1950)). The brackets were in Jefferson's draft, perhaps indicating that he was unsure of what he really wanted to say. See Konig, *supra* note 39, at 269 n.89.

¹⁴³ *Heller*, 554 U.S. at 602. For a discussion of this see Kozuskanich, *supra* note 6, at 437, demonstrating that "Jefferson's ideas never became entrenched in the constitutional tradition. The Virginia Bill of Rights was drafted primarily by George Mason who, instead of adopting Jefferson's language, venerated the militia as 'the proper, natural, and safe defence of a free State.'" In writing what became the Second Amendment, Madison borrowed from Mason, not Jefferson. *Id.*

implemented. While basically ignoring Jefferson's language, the Virginia constitution-makers adopted language, mostly written by George Mason,¹⁴⁴ which provided:

That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.¹⁴⁵

This language of course reads very much like the actual Second Amendment, including the phrase "well-regulated Militia." But Justice Scalia either did not notice this similarity, or ignored it because it ran counter to the predetermined outcome he wanted his pseudohistory to reach.

In the body of his opinion Justice Scalia failed to acknowledge that in fact Virginia rejected Jefferson's individual rights language. In a footnote, Justice Scalia asserts that "[t]here is no evidence that the drafters regarded the Mason proposal as a substitute for the Jefferson proposal."¹⁴⁶ This is in fact the exact opposite of what was going on. The Virginia framers adopted the language offered by Mason early on in their constitution-making process, and for the most part simply ignored Jefferson's proposal on this issue.¹⁴⁷ Thus, Justice Scalia has turned the history upside down. The Virginia framers refused to accept Jefferson's proposal as a substitute for Mason's language. Almost from the very beginning of the process in Virginia, the draft constitution "proposed by George Mason swallowed up all the rest, by fixing the grounds and plan, which after great discussion and correction, [was] finally ratified."¹⁴⁸ Jefferson was not even in the legislature at the time, because he was in Philadelphia, representing Virginia in the Continental Congress.¹⁴⁹ Under the circumstances, Jefferson's proposals for the state constitution were somewhat gratuitous and even insulting to the members of the legislature. No wonder he was ignored. Thus, Justice Scalia has it backwards. The Virginia legislature, which wrote the state's constitution, chose not to substitute Jefferson's language for Mason's. Thus, the legislature simply ignored and rejected Jefferson's proposals.

¹⁴⁴ ADAMS, *supra* note 134, at 73.

¹⁴⁵ VA. CONST. of 1776, Declaration of Rights, § 13, in 7 THORPE, *supra* note 114, at 3812, 3814.

¹⁴⁶ *Heller*, 554 U.S. at 602 n.18.

¹⁴⁷ Julian P. Boyd, *Editorial Note*, in 1 THE PAPERS OF THOMAS JEFFERSON 333 (Julian P. Boyd ed., 1950).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 329–34 (pointing out that Jefferson was in Congress at the time).

The more intriguing problem with Justice Scalia's argument is that the Jefferson proposal is not actually an analogy to the Second Amendment, as the Justice would like to read the Second Amendment. Jefferson is, at most, proposing that people (that is, white men) be allowed to keep arms on their own property—on their tenements and lands. Such a provision would not protect the right of an armed "freeman" to wander around the country carrying his weapons into a town, store, church, or school. But, in the context of the Revolution, the Virginia legislature had no interest in establishing such a right. The legislature was not prepared to allow a known Tory to store weapons, shot, and powder on his own lands. The Revolutionary government had to be able to seize such weapons, even if the owner had not (yet) taken any overt acts against the Patriot cause.¹⁵⁰

What Justice Scalia shows is that one state—Pennsylvania—and one future state—Vermont—had constitutional provisions protecting an individual right in 1789, but both provisions, contrary to Justice Scalia's assertions, are mostly about the military.¹⁵¹ Two other states had provisions for bearing arms in the context of the military, but do not have any language on individual ownership of weapons.¹⁵² Finally, the largest state, Virginia, had specifically rejected the very type of language that Scalia believes the federal Second Amendment means.¹⁵³

To summarize, Justice Scalia is clearly correct that looking at the existing state constitutional provisions when the Second Amendment was being considered might be helpful in understanding the meaning of the Amendment. But, he in fact looks at only *one* state constitution, misstates what the provision says, and ignores all the other states' provisions. Had Justice Scalia followed his own research model, he would have come to the obvious conclusion that in every state but one there was *no* constitutional right for individuals to own arms.

Given this paucity of support for an individual right to bear arms, it is not surprising that Madison and the majority of Congress rejected calls for an individual right to bear arms to be added to the Constitution. Madison might have followed the Pennsylvania model, but he *did not do so*.

After his analysis of the state constitutions at the time the Second Amendment was ratified, Justice Scalia notes that *after* the ratification of the Second Amendment seven states adopted constitutional clauses that "unequivocally protected an individual citizen's right to self-defense."¹⁵⁴

¹⁵⁰ See *supra* note 131.

¹⁵¹ See *supra* notes 113–20 and accompanying text.

¹⁵² See *supra* notes 121–41 and accompanying text (describing North Carolina and Massachusetts).

¹⁵³ See *supra* notes 142–50 and accompanying text.

¹⁵⁴ *District of Columbia v. Heller*, 554 U.S. 570, 602–03 (2008).

Justice Scalia argues this “is strong evidence that that is how the founding generation conceived of the right.”¹⁵⁵ It is not at all clear that such a conclusion is justified. Some of these state constitutions were written well after the Founding period. It is hard to imagine how a constitutional clause written in 1820 reflected what the Founders believed in 1789. However, these later constitutional clauses may be evidence of what people on the frontier—faced with hostile Indians and unsettled government—believed was necessary for their new states. But, these later constitutional clauses¹⁵⁶—adopted after the Revolution and after the Constitution had been successfully implemented—do not show what the framers of the Second Amendment supported in relation to the private ownership of firearms.

Indeed, there is no standard of interpretation, either in law or history, that allows someone to make an “intent” argument based on what other people did after—and sometimes well after—a constitutional provision was adopted. Scalia points mostly to state constitutions written more than fifteen years after the Second Amendment was written. Are we really to believe that we can understand what James Madison and his colleagues intended, meant, or actually did in 1789, by reading an entirely different text, written into the Missouri Constitution, adopted in 1821? Are we to take seriously the notion that we should understand the intentions of people in 1789 or 1791 based on entirely different texts, written years later by entirely different groups of men?

There is, however, another way in which these later state constitutions help us make sense of the language that was proposed in 1789 and ratified in 1791. The framers of the post-1791 state constitutions had seen the language of the Second Amendment. They fully understood it did not create a personal right to own weapons at the federal level. They understood that the federal constitution, as amended, only guaranteed that the states could provide arms for a “well regulated Militia.”¹⁵⁷ Clearly, these state constitution-makers wanted to provide a state constitutional protection for a private right to own weapons. So they used language that was very different from the Second Amendment to secure, at the state level, what everyone at the time understood the First Congress had emphatically *not* secured at the federal level.

¹⁵⁵ *Id.* at 603.

¹⁵⁶ Justice Scalia notes that seven states adopted a constitutional clause protecting an individual’s right to self-defense. They are, in order of the date of these clauses: Kentucky (1792), Ohio (1802), Indiana (1816), Mississippi (1817), Connecticut (1818), Alabama (1819), and Missouri (1820). *Id.* at 602–03; *see also id.* at 585 n.8.

¹⁵⁷ U.S. CONST. amend II.

IV. THE FEDERALISTS AND ANTIFEDERALISTS: WHO WON IN 1787–1791?

In *McDonald*, the Court quotes *Heller* asserting that: “During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric.”¹⁵⁸ This statement is perfectly true, in the sense that many Antifederalists said such things. But, what the Court fails to say in either *Heller* or *McDonald*, is that the Federalists, who were the great victors, in 1787–1788, denied that any of these fears were based in reality, and for the most part ignored the rantings of the Antifederalists.¹⁵⁹ The Court fails to understand that in citing the Antifederalists for the interpretation of the Bill of Rights, they are citing the great losers in this debate. Thus, while Justice Scalia cites numerous Antifederalists to explain what the Second Amendment meant,¹⁶⁰ he fails to tell his readers that Madison and the First Congress ignored the Antifederalist demands for a personal right to hunt, fish, and defend themselves, and more importantly, that the Antifederalists were the great losers in the debate over the Constitution and the Bill of Rights. Indeed, in the entire history of the United States, no nationally based political faction or party¹⁶¹ was more decisively defeated than the Antifederalists. The goal of the Antifederalists was to defeat the ratification of the Constitution. They failed miserably. In the end, every state ratified the document, thus the Antifederalists were beaten thirteen times.

Congress agreed to send the Constitution to the states for ratification on September 28, 1787.¹⁶² Each state was required to call a special ratifying convention to approve, or reject, the Constitution.¹⁶³ Despite the cumbersome nature of travel and communications at the time, the states ratified the Constitution with remarkable speed.¹⁶⁴

¹⁵⁸ *McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010) (quoting *Heller*, 554 U.S. at 598).

¹⁵⁹ Finkelman, *supra* note 23.

¹⁶⁰ *Heller*, 554 U.S. at 598–99.

¹⁶¹ The Antifederalists cannot really be called a party because there were no organized political parties yet.

¹⁶² 33 J. OF THE CONTINENTAL CONGRESS 548, 549 (1787) (“Resolved Unanimously that the said Report with the resolutions and letter accompanying the same be transmitted to the several legislatures in Order to be submitted to a convention of Delegates chosen in each state by the people thereof in conformity to the resolves of the Convention made and provided in that case.”).

¹⁶³ U.S. CONST. art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution . . .”).

¹⁶⁴ It took slightly less than nine months for nine states to call conventions, conduct elections for those conventions, organize their conventions, and ratify the Constitution. Only two Constitutional amendments, the 12th and the 26th, have been ratified in less time. Even the repeal of Prohibition, perhaps the most popular amendment ever added to the Constitution, took longer—nine months and eleven days—and that was accomplished with the aid of

Between December 4, 1787, when Delaware ratified the Constitution, and July 26, 1788, when New York became the “eleventh pillar” of the federal edifice,¹⁶⁵ the Antifederalists were thoroughly swept away in elections and ratifying conventions.¹⁶⁶ The Antifederalists predicted tyranny or anarchy (or both) if the new Constitution were ratified.¹⁶⁷ They pulled out all the stops to strike fear in the hearts and minds of the American people. And they lost. The Antifederalists suffered eleven humiliating defeats in a row. In one state after another the outcome was the same: the Federalists won, the Antifederalists lost, and the Constitution was ratified. After the new government went into effect the Antifederalists were defeated two more times, when North Carolina and Rhode Island ratified the Constitution.

The failure of the Antifederalists in New York State reveals how thoroughly these “Men of Little Faith,”¹⁶⁸ were defeated. The political leadership in New York, led by Governor George Clinton, opposed the Constitution¹⁶⁹ and made ratification in that state seem unlikely.¹⁷⁰ During the Constitutional Convention, two of New York’s three delegates, John Lansing and Robert Yates (both Clinton allies), went home in early July, hoping to undermine the Convention by not participating in its deliberations.¹⁷¹ This left Alexander Hamilton as the only New York delegate in the Convention. Because each state had to have at least two delegates on the floor to have a quorum, Hamilton could debate and serve on committees, but he could not vote on the floor of the Convention.¹⁷² After the Philadelphia Convention finished its work, Governor Clinton was in no rush to consider the new document,¹⁷³ and an election for delegates was not set until April, with

telephones, the telegraph, radio, automobiles, and trains. *Timeline for Ratification of All Constitutional Amendments*, LEXISNEXIS, http://www.lexisnexis.com/constitution/amendments_timeline.asp (last visited Nov. 1, 2015).

¹⁶⁵ LINDA GRANT DE PAUW, *THE ELEVENTH PILLAR: NEW YORK STATE AND THE FEDERAL CONSTITUTION* (1966).

¹⁶⁶ See Gordon Lloyd, *State-by-State Ratification Table*, TEACHINGAMERICANHISTORY.ORG, <http://teachingamericanhistory.org/ratification/overview> (last visited Sept. 6, 2015).

¹⁶⁷ Paul Finkelman, *Between Scylla and Charybdis: Anarchy, Tyranny and the Debate over a Bill of Rights*, in *THE BILL OF RIGHTS: GOVERNMENT PROSCRIBED 103–74* (Ronald Hoffman & Peter J. Albert eds. 1997).

¹⁶⁸ The phrase was applied to them in a brilliant article published in 1955. Cecelia Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3 (1955), reprinted in *MEN OF LITTLE FAITH: SELECTED WRITINGS OF CECELIA KENYON* 31 (Stanley Elkins et al. eds., 2002).

¹⁶⁹ DE PAUW, *supra* note 165, at 81.

¹⁷⁰ RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 234 (1st ed. 1971).

¹⁷¹ BEEMAN, *supra* note 76, at 203.

¹⁷² *Id.*

¹⁷³ Clinton made no effort to call the legislature into special session, in order to call a ratifying convention. DE PAUW, *supra* note 165, at 85.

the ratification convention to meet in mid-June,¹⁷⁴ after almost every other state had considered the document. Meanwhile, starting in October 1787, Hamilton, John Jay, and James Madison teamed up to write what became the *Federalist Papers* to help gain support for the Constitution.¹⁷⁵

The *Federalist Papers* are a remarkable collection of essays which are still read for an understanding of the Constitution. The Supreme Court has relied on them in a number of cases.¹⁷⁶ However, while modern Americans, especially political scientists, are deeply impressed with the *Federalist Papers*, New York voters in 1788 were unpersuaded by the arguments, given that they elected an overwhelming Antifederalist majority to attend the state's ratifying Convention. When the New York Ratifying Convention opened, there were nineteen delegates, led by Hamilton, pledged to support the Constitution, and forty-six hardcore Antifederalists, including Governor Clinton, opposed to the Constitution.¹⁷⁷ As the leading historian of ratification in New York noted, when the "full magnitude of the Antifederalist victory was revealed . . . New Yorkers had given the Antifederalists more than two-thirds of the seats in the ratifying convention."¹⁷⁸ It should have been an open-and-shut victory for the opponents of the new Constitution. But still the Antifederalists lost, in a thoroughly humiliating vote.

By the time the New York convention met on June 17, eight states had already ratified the Constitution, and under the terms of the document,¹⁷⁹ the new government would be effective when nine states had ratified. On June 21, four days after the New York convention began its deliberations, New Hampshire provided the ninth ratification. Four days later, on June 25, the nation's largest state, Virginia, ratified.¹⁸⁰ The frustrated Antifederalists in New York had no choice, and with many returning home so they would not have to face the embarrassment of voting for a Constitution they despised, the New York convention, by a vote of thirty to twenty-seven, ratified the Constitution.¹⁸¹ The Antifederalists in the state wanted ratification

¹⁷⁴ *Id.* at 90, 186.

¹⁷⁵ KETCHAM, *supra* note 170, at 239.

¹⁷⁶ The Supreme Court cited the *Federalist Papers* at least 200 times from 1900 to 1998. Ira C. Lupu, *Time, the Supreme Court, and The Federalist*, 66 GEO. WASH. L. REV. 1324, 1328 (1998). Since then the Court has continued to cite the papers, often in important cases. See Paul Finkelman, Essay, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 FORDHAM L. REV. 1477, 1515 (2005).

¹⁷⁷ See Lloyd, *supra* note 166.

¹⁷⁸ DE PAUW, *supra* note 165, at 184.

¹⁷⁹ U.S. CONST. art. VII.

¹⁸⁰ See DE PAUW, *supra* note 165, at 204–15 for a discussion of the chronology of these ratifications.

¹⁸¹ *Id.* at 245.

conditional on future amendments or a second convention “for proposing amendments,” but both proposals were defeated.¹⁸² In the end, a ratifying convention that was two-thirds Antifederalist unconditionally accepted the Constitution. The Antifederalist majority was allowed to draft a list of recommended amendments to be attached to the unconditional ratification.¹⁸³

The Constitution now had two more ratifications than the nine it required to go into effect. Only Rhode Island and North Carolina were left. Tiny Rhode Island had boycotted the Constitutional Convention in Philadelphia and was generally seen as a pariah because of its inflationary monetary policy and its refusal to enfranchise most adult free men.¹⁸⁴ Not surprisingly, this obstinate and utterly undemocratic state also refused to ratify the Constitution.¹⁸⁵ But Rhode Island did not actually vote the Constitution down. Instead, the stubborn political leadership in the state refused to call a state ratifying convention.¹⁸⁶ North Carolina’s ratification convention met on July 21, 1788.¹⁸⁷ By this time ten states had already ratified the Constitution and a few days later New York became the eleventh state to ratify. But North Carolina still could not decide what it wanted to do. The state convention adjourned on August 2, without actually taking a vote on the Constitution.¹⁸⁸ Instead the North Carolina convention asked for amendments to the Constitution before it would consider ratifying it.¹⁸⁹

But with eleven state ratifications, the Constitution was in place and the new government was going to go into operation with or without the cooperation of the thoroughly defeated Antifederalists or without either Rhode Island or North Carolina. In the fall of 1788 there were elections for Congress and the states chose senators and presidential electors; in March 1789 George Washington was inaugurated as president, the new Congress met, and the government was started.

In the elections in the fall of 1788 the Federalists were even more successful than they had been during the ratification contests. The Congress was totally dominated by supporters of the Constitution. In the Senate there were only two open Antifederalists, William Grayson and Richard Henry Lee, both allies of Patrick Henry in Virginia. The

¹⁸² *Id.* at 223.

¹⁸³ *Id.* at 246.

¹⁸⁴ BEEMAN, *supra* note 76, at 144.

¹⁸⁵ *Id.* at 391–92.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 403–05.

¹⁸⁸ *Id.* at 404–05; *see also* 4 THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 242–52 (Jonathan Elliot ed., 2d ed. 1888) [hereinafter ELLIOT’S DEBATES].

¹⁸⁹ ELLIOT’S DEBATES, *supra* note 188.

Congress was overwhelmingly Federalist.¹⁹⁰ Emblematic of this was the new leadership. John Langdon, who had signed the Constitution and led the Federalists in New Hampshire, was elected President Pro Tempore of the Senate.¹⁹¹ The first speaker of the House, Frederick A.C. Muhlenberg, had been the presiding officer of the Pennsylvania ratification convention that had crushed the Antifederalists in that state.¹⁹² Madison, one of the nation's most prominent supporters of the Constitution, quickly emerged as the most important leader of Congress, the "first man" of the House.¹⁹³ It was Madison who drafted the amendments that became the Bill of Rights, and it was the Federalist majority in both houses that passed them and sent them on to the states. This history is important to understand the meaning of the Second Amendment.

The evidence from 1787 to 1789 is that the Antifederalists were decisively defeated in almost every political context, and they in fact virtually ceased to exist as a political force by the end of 1789. By using Antifederalist rhetoric and claims to interpret the Second Amendment, the Court turns history upside down, turning the losers into winners, and misreads the entire Founding period. In both *Heller* and *McDonald* the Court bases its conclusions on a false history by relying on the Antifederalists—the great losers of this period—to show what the amendments meant.¹⁹⁴ Furthermore, the Justices in the majority, who are strong advocates of a jurisprudence of original intent, do not base their analysis on the intentions or arguments of the Framers of the Constitution of 1787, the people who voted for and ratified the Constitution, the Framers of the Bill of Rights, or even the members of the state legislatures that ratified the Bill of Rights. On the contrary, the Justices who so often claim to root their opinions in history and on the intentions of the Framers, based their analysis on the rhetoric of a collection of political losers who opposed the Constitution. The Court

¹⁹⁰ FERGUS M. BORDEWICH, *FIRST CONGRESS: HOW JAMES MADISON, GEORGE WASHINGTON, AND A GROUP OF EXTRAORDINARY MEN INVENTED THE GOVERNMENT* (forthcoming 2016) (advance uncorrected reader's proof at 11).

¹⁹¹ John R. Van Atta, *Langdon, John*, in 13 *AMERICAN NATIONAL BIOGRAPHY* 138, 139 (John A. Garraty & Mark C. Carnes eds., 1999).

¹⁹² See BEEMAN, *supra* note 76, at 380; Jürgen Heideking, *Muhlenberg, Frederick Augustus Conrad*, in 16 *AMERICAN NATIONAL BIOGRAPHY*, *supra* note 191, at 54, 55.

¹⁹³ *Editorial Note: Madison at the First Session of the First Federal Congress*, in 12 *MADISON'S PAPERS*, *supra* note 42, at 52–53. Madison's two co-authors of the *Federalist Papers* did not seek elective office, but were immediately involved in the new government. Hamilton became the Secretary of the Treasury and Jay became the nation's first Chief Justice. See generally KETCHAM, *supra* note 170, at 280–303.

¹⁹⁴ The Court also relied on the rather poor and, as Michael Waldman shows, often misleading or inaccurate history of NRA-sponsored authors of law review articles and books. These works overwhelmingly rely on the Antifederalists for their analysis of the Second Amendment. WALDMAN, *supra* note 3, at 98–99.

has astoundingly relied on the arguments, voices, and rantings of a thoroughly defeated political minority who opposed the Constitution, and then lost every meaningful election from 1787 to 1800. In other words, the majority in *Heller* and *McDonald* turn history upside down, privilege and venerate the great losers in American history, and then proclaim that the goals these losers sought—but for the most part failed to achieve—were written into the Constitution. This sort of analysis would be appropriate to Lewis Carroll, but is out of place in the *United States Reports*.

V. THE PENNSYLVANIA MINORITY AND THE SECOND AMENDMENT THAT NEVER WAS

The best example of how the Antifederalists lost on the issue of a personal right to own firearms can be seen in the proposed amendments coming out of the losers in Pennsylvania. After the Pennsylvania convention ratified the Constitution, a disgruntled group of Antifederalists went off to a nearby tavern where they wrote *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, commonly known as the *Reasons for Dissent*, and issued a laundry list of proposed amendments.¹⁹⁵ Justice Scalia refers to this as “the highly influential minority proposal in Pennsylvania,”¹⁹⁶ and notes that their demand for amendments had a “reference to hunting, [which] plainly referred to an individual right.”¹⁹⁷

These losing Pennsylvania opponents of the Constitution were not in fact influential in their home state, which is why they could not persuade the state ratifying convention to even consider their amendments. They had been soundly and overwhelmingly defeated in the election to send delegates to the state ratifying convention, and once in the convention they were thoroughly beaten again.¹⁹⁸ Pennsylvania was the second state to ratify, and the Antifederalists there were outvoted by two to one.¹⁹⁹ Indeed, the defeat of the Antifederalists was so thorough that they had to put their call for amendments into a privately printed pamphlet,²⁰⁰ rather than in the record of the state

¹⁹⁵ See *Reasons of Dissent*, *supra* note 23.

¹⁹⁶ *District of Columbia v. Heller*, 554 U.S. 570, 604 (2008).

¹⁹⁷ *Id.* Justice Scalia of course failed to note that Madison did not include hunting as right in his amendments.

¹⁹⁸ BEEMAN, *supra* note 76, at 382.

¹⁹⁹ The vote in the Pennsylvania ratifying convention was forty-six in favor of the Constitution and twenty-three against. *Id.*

²⁰⁰ See *Reasons of Dissent*, *supra* note 23.

ratifying convention. They are remembered as the first group of Antifederalists to propose amendments, and as I will note below, Madison borrowed some of their language for a number of the amendments,²⁰¹ but he did not borrow their language for what became the Second Amendment. By the end of the ratification process, the conventions in Massachusetts,²⁰² South Carolina,²⁰³ New Hampshire,²⁰⁴ Virginia,²⁰⁵ and New York,²⁰⁶ had appended to their ratification documents various proposed amendments to the Constitution. In that sense, the Antifederalists in those states were far more influential and successful than their counterparts in Pennsylvania²⁰⁷ and Maryland,²⁰⁸ where the Antifederalists also had to privately publish their own recommended amendments.

All told, there were well over one hundred proposed amendments, but many of the separate amendments actually covered multiple topics.²⁰⁹ Thus, the total number of proposed amendments was at least two hundred.²¹⁰ Many concerned issues we normally think of as bill-of-rights protections, such as freedom of the press, religious liberty, and the right to a jury trial. However, the majority of the Antifederalist demands were structural in nature, designed to remake the Constitution by weakening the national government. By eliminating duplications, “[a]bout 100 separate proposals can be distinguished,” and a “clear majority” of these called for structural changes.²¹¹ Indeed, as I have argued elsewhere,²¹² the main goal of the amendments proposed by the Antifederalists was to undermine the strength of the new government. As Madison explained to Jefferson, even before the Constitution was

²⁰¹ See *infra* notes 231–39 and accompanying text.

²⁰² *Amendments Proposed by the Massachusetts Convention* (Feb. 6, 1788), in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 14–15* (Helen E. Veit et al. eds., 1991) [hereinafter *CREATING THE BILL OF RIGHTS*].

²⁰³ *Amendments Proposed by the South Carolina Convention* (May 23, 1788), in *CREATING THE BILL OF RIGHTS*, *supra* note 202, at 15–16.

²⁰⁴ *Amendments Proposed by the New Hampshire Convention* (June 21, 1788), in *CREATING THE BILL OF RIGHTS*, *supra* note 202, at 16–17.

²⁰⁵ *Amendments Proposed by the Virginia Convention* (June 27, 1788), in *CREATING THE BILL OF RIGHTS*, *supra* note 202, at 17–21.

²⁰⁶ *Amendments Proposed by the New York Convention* (July 26, 1788), in *CREATING THE BILL OF RIGHTS*, *supra* note 202, at 21–28.

²⁰⁷ See *Reasons of Dissent*, *supra* note 23.

²⁰⁸ See *Address of a Minority of the Maryland Ratifying Convention*, *MD. GAZETTE*, May 6, 1788, reprinted in 5 *THE COMPLETE ANTI-FEDERALIST* 92–100 (Herbert J. Storing ed., 1981).

²⁰⁹ See generally *CREATING THE BILL OF RIGHTS*, *supra* note 202.

²¹⁰ Bowling, *supra* note 43; see also Ellis, *supra* note 43, at 297 (“The amendments proposed by the states fall into two categories. The first limited the authority of the central government over individuals The amendments of the second group were both substantive and structural.”).

²¹¹ Bowling, *supra* note 43, at 228.

²¹² Finkelman, *supra* note 23.

ratified, the Antifederalists wanted to “strike at the essence of the System,” and either return to the government of the old Confederation, “or to a partition of the Union into several Confederacies.”²¹³

When Madison decided to introduce amendments, he went through these proposed changes to the Constitution, eliminated virtually all of the structural changes, and winnowed down the liberty amendments to a handful, to form what became the Bill of Rights. Many of the Antifederalists wanted amendments about weapons and firearms that were designed to eviscerate the military provisions of the Constitution and to prevent the creation of a standing army.²¹⁴

The most extensive of the proposed amendments dealing with the militia and firearms were the ones drawn up by the Pennsylvania minority, who Madison thought were “extremely intemperate” because of their “very bold and menacing language.”²¹⁵ The Pennsylvania Antifederalists proposed fourteen separate amendments which covered scores of issues.²¹⁶ Three of these fourteen concerned the army, the militia, the right to bear arms, and the right to hunt and fish.²¹⁷ This indicates how important these issues were to this particular group of “intemperate” Antifederalists.²¹⁸ In these three proposed amendments the Pennsylvania Antifederalists addressed at least six separate issues: (1) the right of self-protection through the ownership of weapons, (2) the right to serve in the militia, (3) the right to hunt and fish, (4) the prevention of a standing army, (5) the power of Congress over the states, and (6) the power of the states to control their own armies or militias.²¹⁹ The proposals help us understand the intentions of the framers of the Second Amendment. This understanding, however, is a negative one. By seeing what the framers of the Second Amendment *did not do*, we can better understand what they did do.

Number Seven of the amendments listed in the *Reasons of Dissent* provided:

That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of

²¹³ Letter from James Madison to Thomas Jefferson (Dec. 9, 1787), in 10 MADISON’S PAPERS, *supra* note 24, at 310, 312.

²¹⁴ Finkelman, *supra* note 23, at 204–06.

²¹⁵ Letter from James Madison to Thomas Jefferson (Feb. 19, 1788), in 10 MADISON’S PAPERS, *supra* note 24.

²¹⁶ *Reasons of Dissent*, *supra* note 23, at 623–25.

²¹⁷ *Id.*

²¹⁸ Letter from James Madison to Thomas Jefferson (Feb. 19, 1788), in 10 MADISON’S PAPERS, *supra* note 24.

²¹⁹ *Reasons of Dissent*, *supra* note 23, at 623–24.

public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil powers.²²⁰

Number Eight, an entirely separate provision, asserted that:

The inhabitants of the several states shall have liberty to fowl and hunt in seasonable times, on the lands they hold, and on all other lands in the United States not enclosed, and in like manner to fish in all navigable waters, and others not private property, without being restrained therein by any laws to be passed by the legislature of the United States.²²¹

Number Eleven from the dissenters' list contained two separate paragraphs. At first glance the paragraphs seem entirely disconnected and oddly juxtaposed. Careful examination suggests a connection. The first paragraph declared:

That the power of organizing, arming, and disciplining the militia (the manner of disciplining the militia to be prescribed by Congress) remain with the individual states, and that Congress shall not have authority to call or march any of the militia out of their own state, without the consent of such state, and for such length of time only as such state shall agree.²²²

The second paragraph of Number Eleven asserted “[t]hat the sovereignty, freedom, and independency of the several states shall be retained, and every power, jurisdiction, and right which is not by this constitution expressly delegated to the United States in Congress assembled.”²²³ This second paragraph, when tied to the previous one, underscores the connection many Antifederalists saw between state sovereignty and the control of the state militia.

Had Madison and the First Congress adopted these proposals there would be very little controversy over what the Second Amendment means. However, it is also likely that the United States would never have survived as a nation because it would have lacked a standing army to fight enemies or preserve its sovereignty. The nation would have also lacked the power to disarm rebels and insurrectionists, or call up the militia to fight wars or suppress rebellions. Congress would have lacked the flexibility to pass laws that are necessary and proper if such powers

²²⁰ *Id.*

²²¹ *Id.* at 624.

²²² *Id.*

²²³ *Id.*

were not “expressly delegated” to the national government.²²⁴ Modern environmental laws would not exist if they interfered with the rights of hunters or fishermen. There would be no endangered species—the hunters and fishermen would have wiped them all out.

It is of utmost significance, however, that unlike other aspects of the Pennsylvania proposals, which were incorporated into the Bill of Rights almost word-for-word,²²⁵ Madison and his colleagues in the First Congress emphatically rejected the goals and the language of the Pennsylvania Antifederalists on these issues.

Madison had no intention of either limiting the general powers of the government, or preventing the national government from defending itself against insurrectionists. Nor was he interested in protecting a personal right to own weapons, since he rejected all such language proposed by various Antifederalists. Madison was a realist. He understood that at any moment the rabble might organize around another Daniel Shays, and he wanted to be sure that the national government would have the power to suppress and disarm such men. The Declaration of Independence asserted that “governments are instituted among men, deriving their just powers from the consent of the governed.”²²⁶ In 1775 the Americans had justifiably rebelled, because they were not under a government through their own consent. But the new United States government was in fact created by the people and provided numerous peaceful ways to make changes. The Constitution could not contemplate the legitimacy of civil disorder or armed rebellion. Thus, the right to bear arms, at the national level, could only be for the defense of the state. In this context Madison was willing to guarantee that the states could arm their own “well regulated” militias, which were “necessary to the security of a free State,”²²⁷ even though the Constitution also declared that Congress was “[t]o provide for organizing, arming, and disciplining, the Militia.”²²⁸ However, if Congress failed to do this, the states, under the Second Amendment, would be free to do so.

Some Antifederalists demanded the kind of protection for a personal right to own weapons that Justice Scalia imagines the Second Amendment provides. As I have noted, the Pennsylvania Antifederalists also proposed amendments concerning the army, the militia, the right to bear arms, and the right to hunt.²²⁹ Here the Pennsylvania

²²⁴ The opposite vision of the nation is found in Chief Justice John Marshall’s powerful opinion in *M’Culloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).

²²⁵ See *infra* notes 231–39 and accompanying text.

²²⁶ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

²²⁷ U.S. CONST. amend. II.

²²⁸ U.S. CONST. art. I, § 8, cl. 16.

²²⁹ See *supra* notes 216–19 and accompanying text.

Antifederalists wanted, among other things, the right of self-protection through the ownership of weapons, the right to hunt and fish, a ban on a standing army, and the power of the states to control their own armies or militias.²³⁰ As we have seen, these proposals help us understand the intentions of the Framers of the Second Amendment by showing what Madison and his colleagues *did not do*. Had Madison included these provisions in his proposed constitutional changes, the eventual Second Amendment would mean what Justice Scalia would like it to mean. But, as we know, Madison ignored all of these demands, except to provide that the states were free to arm their “well regulated” militias.²³¹

Significantly, Madison adopted some of the other proposals of the Pennsylvania minority, almost word-for-word. The essence, and in some places the exact language, of the Free Exercise Clause²³² and the Free Press and Speech Clauses²³³ of the First Amendment are found in these fourteen proposals, as are the essence and much of the language of the Fourth,²³⁴ Fifth,²³⁵ Sixth,²³⁶ Seventh,²³⁷ and Eighth²³⁸ Amendments.

²³⁰ *Reasons of Dissent*, *supra* note 23, at 623–24.

²³¹ I discuss these at length in Finkelman, *supra* note 23, at 206–10.

²³² Number One of the *Reasons of Dissent* declared: “The right of conscience shall be held inviolable . . .” *Reasons of Dissent*, *supra* note 23, at 623.

²³³ Number Six of the *Reasons of Dissent* declared: “That the people have a right to the freedom of speech, of writing and publishing their sentiments, therefore, the freedom of the press shall not be restrained by any law of the United States.” *Id.* Curiously, this is one of the very few Antifederalist documents to use the term “freedom of speech.” The fact that Madison included “speech” in the First Amendment may indicate his use of the *Reasons of Dissent*.

²³⁴ Number Five of the *Reasons of Dissent* declared:

That warrants unsupported by evidence, whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are grievous and oppressive, and shall not be granted either by the magistrates of the federal government or others.

Id.

²³⁵ Number Three of the *Reasons of Dissent* declared: “[T]hat no man be deprived of his liberty, except by the law of the land or the judgment of his peers.” *Id.*

²³⁶ Number Three of the *Reasons of Dissent* declared:

That in all capital and criminal prosecutions, a man has a right to demand the cause and nature of his accusation . . . ; to be heard by himself and his counsel; to be confronted with the accusers and witnesses; to call for evidence in his favor, and a speedy trial by an impartial jury of his vicinage

Id.

²³⁷ Number Two of the *Reasons of Dissent* declared: “That in controversies respecting property, and in suits between man and man, trial by jury shall remain as heretofore, as well in the federal courts, as in those of the several states.” *Id.*

²³⁸ Number Four of the *Reasons of Dissent* declared: “That excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.” *Id.* Except for changing two words, this is the exact wording of what became the Eighth Amendment. See U.S. CONST. amend. VIII.

Elements of the Tenth Amendment are also found in the proposals.²³⁹

Thus, it is clear that Madison read the proposed amendments of the Pennsylvania minority carefully. But, when it came to issues surrounding guns, hunting and fishing, a standing army, and “expressly delegated” powers of Congress, he ignored their proposals and instead borrowed from his own state’s declaration of rights the idea of a “well regulated Militia.”²⁴⁰ What became the Second Amendment was clearly not about a personal right to own weapons. It was about the “well regulated Militia” and idea of a citizen army.

CONCLUSION

In its Second Amendment jurisprudence the current Court ignores history, logic, and the text of the Constitution. Pretending to be originalists, the Justices in the majority ignore the vast evidence that undermines the Court’s theory of the Amendment. Instead, the Court has decided that the modern reading of the Amendment by a vocal and very well-financed lobby matters more than fidelity to the Constitution and its history. The Court has embraced a modern interpretation of the Constitution that is popular with a minority of Americans. This is a living constitution for the gun lobby and its supporters.

In the past, other Courts have behaved in a similar manner. In *Dred Scott v. Sandford*,²⁴¹ the Court accepted a Southern reading of the Constitution that privileged slavery at the national level while prohibiting Congress from regulating slavery in the federal territories. Astoundingly, the Court reached this conclusion even though Congress had been regulating slavery in the territories for the entire history of the United States under the Constitution, and, even before that, under the Articles of Confederation.²⁴² Chief Justice Taney willfully misread the Territories Clause of the Constitution²⁴³ to declare that virtually all politicians and jurists since 1787 had been wrong about the power of Congress to regulate the territories in general and to ban slavery in some territories. Following in Taney’s footsteps, Justice Scalia concludes that all Supreme Court Justices and almost all politicians and lawyers before

²³⁹ The second paragraph of Number Eleven asserted: “That the sovereignty, freedom, and independency of the several states shall be retained, and every power, jurisdiction, and right which is not by this constitution expressly delegated to the United States in Congress assembled.” *Reasons of Dissent, supra* note 23, at 624.

²⁴⁰ VA. CONST. of 1776, Declaration of Rights, § 13, *in* 7 THORPE, *supra* note 114, at 3812, 3814.

²⁴¹ 60 U.S. (19 How.) 393 (1856).

²⁴² On regulating slavery under the Articles of Confederation, see generally FINKELMAN, *supra* note 55.

²⁴³ U.S. CONST. art. IV, § 3, cl. 2.

at least the 1980s misread the Second Amendment by assuming it was about the militia and that reasonable firearms regulations are constitutional. To do this, Justice Scalia has rewritten the history of the Founding, carefully editing texts and sources to eliminate embarrassing material that shows the weakness of his history.

Similarly, the Court in *Plessy v. Ferguson*²⁴⁴ ignored the history of the Fourteenth Amendment to foist the racial theories of southern whites on the entire nation, even though at the time, a majority of the states, containing a majority of the U.S. population, had passed anti-discrimination laws.²⁴⁵ Like the Court majority in *Plessy*, the *Heller* and *McDonald* Courts accept the modern constitutional theories of a vocal and determined minority and ignore the history of the Amendment they are interpreting.

Today the opinions in *Dred Scott* and *Plessy* are disgraced relics of the past, cited mostly for how wrong they are. We can only hope that in the future other Justices will actually take the time to examine the full historical record (and not a one-sided version of history written by hired guns working for a well-funded lobby), look at the evidence, and read the plain text of the Second Amendment. Just as *Dred Scott* and *Plessy* have been relegated to the dust bin of history, so too can we expect that a different Court will overturn *Heller* and *McDonald*. In doing this, some Court in the future will provide a more honest analysis of the Second Amendment and its history.

²⁴⁴ 163 U.S. 537 (1896).

²⁴⁵ For discussions of northern civil rights law at this time, see Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHI.-KENT L. REV. 1019, 1039–40, 1057–58 (2014), and Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 973–1027 (2005) (book review).