CAN THE QUILL BE MIGHTIER THAN THE UZI?: HISTORY "LITE," "LAW OFFICE," AND WORSE MEETS THE SECOND AMENDMENT

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INTRODUCTION

Rarely has history met the law with greater consequences than in debates over the Second Amendment. For at least a generation, scholars, commentators, and lobbyists have battled over the Amendment's "original meaning."[1] In *District of Columbia v. Heller*,[2] the Supreme Court famously (or infamously) adopted one side of the historical debate as the basis of its conclusion that the Second Amendment protects an individual's right of gun ownership. Meaningful state and federal gun regulation has therefore become more difficult. Greater gun violence—including killings—may well result.[3]

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1 *See infra* text accompanying notes 46–53.

2 554 U.S. 570 (2008).

3 Gun-related deaths have generally decreased in the last two decades. It has decreased the least, however, in regions where gun regulation is weakest, such as the South. *See* MICHAEL PLANTY & JENNIFER L. TRUMAN, U.S. DEP'T OF JUSTICE, FIREARM VIOLENCE, 1993–2011 (2013), http://www.bjs.gov/content/pub/pdf/fv9311.pdf; *see also* Marty Roney, *South Leads Nation in Gun Violence, Report Finds*, MONTGOMERY ADVERTISER, June 15, 2013, http://archive.montgomeryadvertiser.com/article/20130616/NEWS01/306160002/South-leads-nation-gun-

If there were ever a subject area that demanded an extensive background and particular qualifications from its scholars, it is the Second Amendment. For just this reason, I approach this critique of Michael Waldman's superb book, *The Second Amendment: A Biography* (*The Second Amendment*),[4] compelled to admit that I am not currently, nor have I been, a Second Amendment scholar. I have been fortunate to conduct graduate work with Edmund S. Morgan, one of the finest colonial American historians of the twentieth century,[5] and I have written extensively about other aspects of the founding of the United States (the Founding). Yet the closet I have come to researching gun use in the late eighteenth century has been firing a flintlock—the only weapon I know how to shoot—as a National Park Ranger at a former Continental army encampment.[6]

That said, I have written fairly widely, and critically, about the use of history in constitutional discourse.[7] Assessing *The Second Amendment* offers a timely opportunity to extend that project to the topic on which it may matter most. Armed then with a general background in the Founding and a somewhat hazy memory of the proper use of a ramrod, let me start with the overall conclusion: *The Second Amendment* is, without doubt, among the best efforts at melding constitutional history and constitutional law on any topic—at least since

violence-report-finds; Lesli Salzillo, *New Study Ranks 50 States by Gun Sense and Gun Deaths—Gun Extremists Arrive in 5-4-3-2-1*, DAILY KOS (June 20, 2014, 2:33 PM), http://www.dailykos.com/story/2014/06/20/1308465/-New-Study-Ranks-50-States-By-Gun-Sense-And-Gun-Violence-Deaths.

4 MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY (2014).

5 For examples of Morgan's work, see EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA (1975); EDMUND S. MORGAN, BENJAMIN FRANKLIN (2002); EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1988); EDMUND S. MORGAN, THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP (Oscar Handlin ed., 1958); EDMUND S. MORGAN & HELEN M. MORGAN, THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION (1953).

6 Specifically, the former Continental army encampment is located at the Morristown, New Jersey, National Historical Park, where George Washington encamped the army from December 1779 to June 1780. *Morristown National Historical Park*, NAT'L PARK SERV., http://www.nps.gov/morr/index.htm (last visited Oct. 29, 2015).

7 *See, e.g.*, Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995) [hereinafter Flaherty, *History*]; Martin S. Flaherty, Response, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999); Martin S. Flaherty, *Judicial Foreign Relations Authority After 9/11*, 56 N.Y. L. SCH. L. REV. 119 (2012); Martin S. Flaherty, Exchange, *More Real Than Apparent: Separation of Powers, the Rule of Law, and Comparative Executive "Creativity" in* Hamdan v. Rumsfeld, 2006 CATO SUP. CT. REV. 51 (2006); Martin S. Flaherty, *The Constitution Follows the Drone: Targeted Killings, Legal Constraints, and Judicial Safeguards*, 38 HARV. J.L. & PUB. POL'Y 21 (2015); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Martin S. Flaherty, Exchange, *The Most Dangerous Branch Abroad*, 30 HARV. J.L. & PUB. POL'Y 153 (2006).

the modern revival of originalism two generations ago.[8] Such is my admiration that were I sufficiently eminent, I would gladly write a blurb for the paperback edition when it comes out—though I note that there are more than enough eminent scholars in line already.[9] The achievement is doubly noteworthy, as Waldman has no particular background in either history or the Second Amendment. He appears never to have even picked up a flintlock. That he has written a work that meets the highest standards of both historical and constitutional rigor goes to show that, while background, credentials, and training do not hurt, at the end of the day, what matters is the rigor itself.

With that lesson in mind, this Essay will proceed as follows. Part I will get various minor criticisms of Waldman's effort out of the way. Part II will devote considerably more attention to the book's numerous strengths. Finally, in Part III, this critique will turn more generally to the question of whether there should be a place for historical arguments in constitutional discourse in light of the sorry tale of misuse and manipulations that *The Second Amendment* recounts.

I. MISFIRES

Even the most positive review should not degenerate into a love fest. No work is perfect. Adding some grist of criticism, moreover, makes the overall praise that much more credible. Some of *The Second Amendment*'s flaws are therefore worth noting.

One such flaw is the subtitle. Waldman coyly dubs his study a biography.[10] In this he follows the authors of popular works in constitutional law, such as Akhil Amar's *America's Constitution: A Biography*,[11] and beyond, including Siddhartha Mukherjee's *The Emperor of All Maladies: A Biography of Cancer*.[12] As these works show, the device has proven to be a winning strategy. Presumably, the idea of a biography, with the promise of dramatic episodes and personal details,

8 For better or for worse, originalism in its current incarnation is commonly seen as starting with then-Attorney General Edwin Meese's call for constitutional interpretation to be based on the Framers' "original intent." *See* Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 7 (1988). For the rejoinders Meese's article generated, see, for example, William J. Brennan, Jr., Justice, U.S. Sup. Ct., Remarks at the Georgetown University Text and Teaching Symposium (Oct. 12, 1985), http://www.pbs.org/wnet/supremecourt/democracy/sources_document7.html.

9 The roster of luminaries appearing on the back cover of the hardcover edition of *The Second Amendment* includes Joseph J. Ellis, Marcia Coyle, David Frum, Jack Rakove, and Sean Wilentz. WALDMAN, *supra* note 4.

10 *Id.*

11 AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005).

12 SIDDHARTHA MUKHERJEE, THE EMPEROR OF ALL MALADIES: A BIOGRAPHY OF CANCER (2010).

attracts readers in ways that the reality of a rigorous analysis of a concept do not. Yet that is exactly the problem. By definition, a biography is about a person, with all the attendant expectations, rather than an account of an issue, idea, or doctrine. To suggest otherwise, even to garner an expanded readership, comes at the price of precision and clarity. That price may be worth paying in a work simply intended to introduce a topic to a wider audience. For the scholarship related to the Second Amendment, however, and for constitutional discourse more generally for that matter, precision and clarity should matter in tipping arguments one way or the other. That these qualities have been in short supply in the Second Amendment debate, in fact, rightly constitutes one of Waldman's primary themes.[13] For that and other reasons, his effort deserves as extensive a readership as possible. Unfortunately, obtaining it with its breezy biographical subtitle makes the study appear as if it is aiming to be simply more popular and less rigorous than it actually is.

More importantly, *The Second Amendment* does contain a number of factual errors and problematic assertions.[14] Fortunately, they are few and far between, and none bear directly on the Founders' views on gun ownership. Nevertheless, ensuring that basic facts are accurate remains important wherever such facts appear. Of course, the fewer the errors, however minor, the greater the resulting confidence in the account. Yet the stakes are even higher with a white-hot topic such as gun control. In such cases, opponents can and do blow otherwise minor errors out of proportion and seek to transform them into mortal blows.[15] The following examples are therefore offered with a view toward suggesting corrections for *The Second Amendment*'s next edition.

Among the many historical procedures Waldman gets right, he places the origins of the Second Amendment in deep context.[16] This approach rightly prompts him to consider English views on gun regulation while America was still under colonial rule.[17] In so doing, Waldman states in passing that King James II "abdicated" the throne, thereby clearing the way for the Glorious Revolution, the accession of William and Mary, and the adoption of the English Bill of Rights.[18] Abdicate, however, is the one thing King James never thought to do. Rather, upon fleeing London, he threw the Great Seal of Great Britain into the Thames, seeking to deny William, Mary, or anyone else who might try to supplant him, the means of exercising lawful royal

13 *See generally* WALDMAN, *supra* note 4.
14 *See infra* text accompanying notes 17–26.
15 *See, e.g.*, Flaherty, *History*, *supra* note 7, at 552–53.
16 *See* WALDMAN, *supra* note 4, at 5–12.
17 *See id.*
18 *Id.* at 59.

authority. William and Mary's supporters argued that this act amounted to abdication, a claim that James' supporters, and even many opponents, denied. Lest there be any doubt that James never thought to abandon the throne, he sought to restore his monarchy by raising an army and seeking to return to England through Ireland. There he was soundly defeated by William, a result that belies the myth that the Glorious Revolution that American colonists tended to venerate was "bloodless."[19] To Waldman's credit, none of this is remotely central to his account. Yet it is precisely the type of error that, taken with others, polemicists of the sort that gun advocates tend to attract would likely inflate into an attack on the author's overall reliability.

Less arcane is *The Second Amendment*'s statement that *Marbury v. Madison*[20] "established" judicial review.[21] Now this could be read simply to claim that the case confirmed a doctrine already well settled. But the more natural reading would be that *Marbury* created or launched the idea that courts could hold statutes unconstitutional. This understanding has a significant pedigree. In modern scholarship, it owes much to Alexander Bickel's devastating take-down of Chief Justice Marshall's opinion in his classic book *The Least Dangerous Branch*.[22] The idea that John Marshall concocted judicial review matters, both generally and for the Second Amendment. The more weakly the doctrine appears to be grounded in the Constitution's text, structure, and history, the less legitimate the judiciary's authority to undo the work of the political branches appears. Since at least the Warren Court, the move to question *Marbury* and to delegitimize judicial review has generally been the province of the political right, which has challenged court rulings supporting de-segregation, interracial marriage, the use of contraceptives, abortion, consensual sex acts among adults, gender equality, and an array of similar "progressive" rights. Here, consciously or not, Waldman's apparent endorsement of *Marbury*'s shaky basis works to undermine the basis of judicial review on behalf of "conservative" rights such as gun ownership.

The problem is that the myth that John Marshall invented judicial review is just that—a myth. The idea was always wrong, but today it flies in the face of at least two generations of historical scholarship. That

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19 For general accounts, see STEVE PINCUS, 1688: THE FIRST MODERN REVOLUTION (2009) and JOHN MILLER, THE GLORIOUS REVOLUTION (2d ed., Routledge 2014) (1983). For specialized accounts, see THREE BRITISH REVOLUTIONS: 1641, 1688, 1776 (J.G.A. Pocock ed., 1980) and Thomas P. Slaughter, *'Abdicate' and 'Contract' in the Glorious Revolution*, 24 HIST. J. 323 (1981).

20 5 U.S. (1 Cranch) 137 (1803).

21 WALDMAN, *supra* note 4, at 104.

22 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 2–3 (1962).

scholarship holds, among other things, that judicial review was a logical outcome of popular sovereignty—the idea that the "people" entrenched higher law in order to control the excesses of elected officials—and the enhancement of the judiciary as a method of bolstering separation of powers. The origins of judicial review were evident on the state level prior to the Federal Convention.[23] The idea was expressly defended during the ratification debates, most famously by Hamilton in *The Federalist*.[24] The lower federal courts employed the power well before *Marbury*.[25] That said, the doctrine originally had a narrower scope, mainly conceived as defending encroachments on federal court jurisdiction, and on federal power generally, against assertions by the states.[26] These initial concentrations aside, one thing is clear: judicial review was a key feature in Federalist constitutional thought well before John Marshall was appointed to the Supreme Court.

Even then, this error—if error it be—does not bear upon Waldman's core historical arguments on the origins, understandings, and applications of the Second Amendment itself. On these central matters, the book does more than simply avoid errors. It stands as a model of how to integrate credible history with modern constitutional discourse.

II. HITTING THE MARK

The Second Amendment's rare, successful, integration of law and history necessarily prompts a shift from minor criticism to major praise. The measure of such praise has nothing to do with a basic agreement with Waldman's policy conclusions. Rather, the praise is due to his consistent ability to follow the basic standards of actual historians. Doing so matters for a deceptively simple reason: American constitutional lawyers typically invoke history as a source outside of the law to bolster their legal arguments. Originalists invoke history on the theory that the history underlying a constitutional text is dispositive. Non-originalists do so simply because having historical support for a

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23 GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, at 453–62 (1969).

24 THE FEDERALIST NO. 78 (Alexander Hamilton).

25 Records of cases in which instances of judicial review were noted existed prior to the American Revolution and such cases continued through the time of *Marbury*. William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 555 (2005). Cases involving instances of judicial review post-Revolution occurred on both the state and the federal level, throughout the Circuit Courts, and include at least two instances of judicial review by the Supreme Court prior to *Marbury*. *Id.* at 540.

26 *Id.* at 557; *see also* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 90 (1990) ("[O]nly sovereign power can violate fundamental law . . . .").

position is better than not having it. It follows that seeking support from a discipline external to the law for assistance that the law itself cannot supply can be effective only to the extent that such reliance is faithful to the practices, standards, and conventions of that discipline.[27] Years ago, in an article entitled *History "Lite" and Modern American Constitutionalism*, I somewhat optimistically sketched the historiographical norms at which constitutional lawyers should aim.[28] Years later, and less hopefully, I surveyed the general track record of history in constitutional discourse in a talk tellingly named *History Bullshit*.[29]

The Second Amendment is not "lite," and even more so it is not "bullshit." Instead Waldman, not a trained historian, has written a work that meets the standards of history as a discipline so well that it restores one's optimism that constitutional advocates can still do it, even as he demonstrates that much of the work in the field is soul-crushingly awful.

Waldman's work succeeds, first of all, because it meets what might be called a good historian's "procedural" strictures. One threshold practice already noted is approaching a specific issue only after considering it in its larger context. This might seem axiomatic even for non-historians. Yet too often lawyers and legal scholars leap directly to a relevant legal text without any attempt to discern either what connotations the words might have had at the time, or the purposes those words were seeking to address.[30] Not so in *The Second Amendment*. Though it could have gone back earlier, the book nonetheless begins with the first days of the American Revolution, not with the Federal Convention.[31] This starting point enables Waldman to explore several themes that are essential to understanding the eventual Second Amendment that would appear over a decade later. These themes include: the perceived merits of state militias versus a professional army; the relationship between the state and national governments, especially in military matters; and the expectations about the role of gun ownership that resulted. This stands in sharp contrast to what is too often the lawyerly practice of taking a constitutional text, focusing on a key word, often by attributing a modern meaning to it, and decorating the conclusion with a snippet from *The Federalist* that

27 Flaherty, *History*, *supra* note 7, at 551.

28 Flaherty, *History*, *supra* note 7.

29 Martin S. Flaherty, Presentation at the University of Alabama School of Law: History Bullshit (Oct. 19, 2007), http://www.law.ua.edu/resources/podcasts/symposia/lhistory_session_1.mp3.

30 Flaherty, *History*, *supra* note 7, at 553–54.

31 WALDMAN, *supra* note 4.

itself is taken out of context. Moreover, Waldman sets out the context of the Second Amendment with admirable brevity, clarity, and verve.[32]

Waldman does an exemplary job recreating context by following another procedural stricture: rather than pretending to rely mainly on primary sources, *The Second Amendment* candidly relies on secondary work. Perhaps counter-intuitively, this is just how a competent historian proceeds. Building upon previous work helps avoid wasting time reinventing scholarly wheels, especially for issues or episodes that are already well researched. The practice also helps a scholar approach a topic by providing an existing framework or frameworks to apply, critique, and adapt. With this foundation, a historian's primary research can then help advance an existing account, revise it, or reject it altogether. The need to rely on existing scholarship applies with even greater force in the law. Lawyers, judges, law clerks, and even law professors typically do not have the luxury of spending years concentrating on gaining background knowledge and decades testing that knowledge with primary research. That is all the more reason why legal professionals—including academics who usually must publish more, yet are not subject to peer review—should rely on scholars who do have that luxury. If a legal neophyte's additional research can prompt some partial revision of an existing paradigm, then so much the better. Given the law's demands and constraints on a legal scholar's time, among other things, that result will be the exception.[33]

Waldman should therefore wear his heavy reliance on various American historians as a badge of honor. Moreover, he seeks out only the very best scholars and their time-tested works, including: Gordon S. Wood's *The Creation of the American Republic: 1776–1787*,[34] Edmund S. Morgan's *The Birth of the Republic, 1763–89*,[35] Pauline Maier's *Ratification: The People Debate the Constitution, 1787–1788*,[36] Jack Rakove's *Original Meanings: Politics and Ideas in the Making of the Constitution*,[37] Charles Royster's *A Revolutionary People at War: The Continental Army and American Character, 1775–1783*,[38] Saul Cornell's *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun*

32 *Id.* at 3–44.

33 Flaherty, *History*, *supra* note 7, at 553–54.

34 WOOD, *supra* note 23.

35 EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC, 1763–89 (4th ed. 2013).

36 PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788 (2010).

37 JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996).

38 CHARLES ROYSTER, A REVOLUTIONARY PEOPLE AT WAR: THE CONTINENTAL ARMY AND AMERICAN CHARACTER, 1775–1783 (1979).

Control in America,[39] and Eric Foner's *Reconstruction: America's Unfinished Revolution, 1863–1877*[40]—to name just a few.[41] Anyone claiming to uncover the "original understanding" of any constitutional provision who does not genuinely draw upon these works should be treated as either a paradigm-shifting prodigy or, more likely, a hack. Waldman is neither, but instead a careful advocate who respects history's procedural standards.

Even better, Waldman respects history's substance as well. Historical scholarship often produces heated debate, revisions, defenses of the positions being revised, and revisions of the revisions. At the risk of oversimplification, the scholarship of the Founding in general, and the Second Amendment in particular, has produced a fairly stable narrative—at least outside of law schools, foundations, and other centers built to foster controversy. As Kate Shaw observes, *The Second Amendment* gets this narrative right.[42] That is, the Second Amendment does not protect a right to individual gun ownership for the purposes of serving in the militia.[43] Still less was it meant to protect a freestanding right to individual gun ownership.[44] Rather, the right reflected concerns that are all but antique. Placed in full historical context, the Second Amendment meant to protect the right of property-owning white males to serve in a militia, in which they could carry, train in, and otherwise "bear" arms, to protect the state governments from the possible specter of federal coercion, or be called into federal service to repel foreign invaders or illegitimate domestic rebellions.[45]

What develops later in the book is something that historians should engage in more of—devastating critique, at least of "law office," history, or history "lite."[46] Most crushing, significant, and telling in this regard is *The Second Amendment*'s annihilation of Justice Scalia's majority opinion in *Heller*. As Waldman points out, Scalia all but ignores the historical context and hones in on the Second Amendment's text. Even here, he rushes past the introductory qualifying phrase about a "well regulated militia" and proceeds directly to the "right . . . to bear arms." Then, and most egregiously, Scalia disregards the eighteenth

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

40 ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (Henry Steele Commager & Richard B. Morris eds., 2002).

41 WALDMAN, *supra* note 4, at 7–9, 181–87.

42 Kate Shaw, Assistant Professor, Benjamin N. Cardozo Sch. of Law, Address at the Floersheimer Center Panel: *The Second Amendment: A Biography*: A Conversation with the Author (Oct. 13, 2014).

43 WALDMAN, *supra* note 4, at 62.

44 *Id.*

45 *Id.*

46 *See* discussion *infra* Part III.

century meaning of "bear"—which referred to military service—and blithely concludes it simply meant to "carry."[47] Waldman can and does keep going, not without some relish, citing a number of other historical howlers in Scalia's "Wikipedia-like" performance.[48]

The Second Amendment, in short, leaves *Heller* in tatters. Waldman shreds it with so many further examples that there is not much more anyone, even myself, could add. Yet Scalia's embarrassing performance alone is not what is so disillusioning. Even more disheartening is the *Heller* majority's apparent cynicism.[49] At least based upon my brief time there, my impression of the Court was that the Justices really did engage in a good faith effort at reaching credible historical answers, however problematic the ultimate effort. Consider for example *Harmelin v. Michigan*—a previous Scalia foray into early American history.[50] The Justice took the position that the Eighth Amendment did not prevent punishments that were disproportionate.[51] He based this conclusion in large part on readings of the English Bill of Rights, early state constitutions, various statements from the Founders, and not-so-early applications of parallel state constitutional provisions.[52] As history, the argument is more or less absurd. Yet one does not need to have been an insider to appreciate the care, effort, and especially the earnestness that the opinion reflects. *Heller*, by contrast, flies so spectacularly in the face of contrary scholarship that the only thing to appreciate about the opinion's use of history is its cynicism.

Even so, critiquing *Heller* is the equivalent of hunting pheasants in a shoot-to-kill game park—an activity not unknown to its author. More daring is *The Second Amendment*'s critique of otherwise liberal law professors. Here, Waldman with some courage points out that such scholars paved the way for the individual right conception of the Second Amendment by legitimizing the view that many NRA-funded non-historians had themselves peddled in popular journals and law reviews. Most prominent is Sanford Levinson, whose landmark *Yale Law Journal* article, *The Embarrassing Second Amendment*,[53] probably did more than any single scholarly work to advance the NRA agenda, however unintentionally. Only somewhat less influential is another leading progressive, Akhil Amar, who put forward the original thesis that

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47 *See* Waldman, supra note 4, at 122–23.

48 *Id.* at 123, 121–32; *see also* District of Columbia v. Heller, 554 U.S. 570, 584 (2008) (stating that to "bear arms" connotes the idea that there is a purpose of confrontation).

49 *See Heller*, 554 U.S. at 574–636.

50 *See* Harmelin v. Michigan, 501 U.S. 957 (1991).

51 *Id.* at 994–95.

52 *Id.* at 966–85.

53 Sanford Levinson, Comment, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

Reconstruction transformed what had been a right tied to militia service into an individual right to gun ownership.[54]

Waldman concedes that it would have been fair play had these and other prominent scholars offered historical accounts that lived up to their prestige. Yet they did not, as *The Second Amendment* convincingly shows. Levinson may have rightly chided the academy for not taking "conservative" rights such as gun ownership seriously. His own historical case, however, comports with established scholarship not much better than the work of gun rights polemicists.[55] Likewise Amar's ideas on how the Second Amendment—a measure designed to protect the states—might have been transformed by Reconstruction—a constitutional revolution that centered on nationalizing the protection of individual rights—may be brilliantly original.[56] They nonetheless receive insufficient support, as Waldman shows, from the history of Reconstruction itself.[57]

The tragedy is that what constitutes interesting legal scholarship can have real and literally deadly consequences. Though Waldman doesn't explore this point, the problem has as much to do with law schools as it does with the Second Amendment. For various reasons, legal academics put a premium on brilliance and productivity over rigor and homework. The lack of peer-review journals has something to do with this bias. So too does the penchant of lawyers to think that they can readily master almost any topic, at least for the purposes of making a legal argument.[58] A resulting irony is that legal scholarship, precisely because it influences the law, has affected the world outside the academy in a way that history does not. There are few areas where the stakes would appear higher than in the government's ability to regulate gun ownership in a nation where gun violence long ago went viral. Perhaps Waldman, writing outside the legal academy, felt a freedom to call out certain prominent professors where those inside might hesitate. What he did makes *The Second Amendment* much more commendable.

III. IS HISTORY RELEVANT?

All that said, *The Second Amendment* does get one aspect of constitutional history wrong. As noted, the problem has nothing to do with Waldman's historical procedures or substantive accounts. Instead,

54 *See* Akhil Reed Amar, *Second Thoughts*, NEW REPUBLIC, July 12, 1999.
55 *Id.* at 99–100.
56 AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).
57 WALDMAN, *supra* note 4, at 68–77.
58 *See* Flaherty, *History*, *supra* note 7, at 589–90.

the book missteps on the theoretical question of whether history should be used to inform constitutional interpretation at all.

The Second Amendment confronts the matter directly, and Waldman leaves no doubt about his conclusion. "[S]imply," he writes, "originalism is untenable."[59] His argument is not so much that defenders of an individual right to gun ownership lack historical support for their position. Instead, Waldman concludes that both the world of the Founding and even of Reconstruction are too profoundly different from twenty-first century urban America for the norms created in those earlier times to be applied to today. As he puts it, modern majorities have and should "not make gun policy based on half-remembered history or sentimentalized notions of personal empowerment."[60] In this statement, Waldman echoes Justice Jackson on the subject of original intent and separation of powers: "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. . . . They largely cancel each other."[61]

Despite the august company, Waldman goes too far in rejecting constitutional history altogether. Given the misuses and abuses that *The Second Amendment* recounts, this outright rejection comes as no surprise. Yet there are good reasons not to ignore the Nation's exceptionally rich past as applied to modern constitutional issues.

First, like it or not, history permeates modern constitutional discourse. In many regards it always has. Take, for example, *McCulloch v. Maryland*.[62] Among the most significant passages in Chief Justice Marshall's opinion is his response to Maryland's effective contention that "the states" established the Constitution. Marshall argued that instead, the Constitution was ordained by "the *people*" of the United States, organized for practical purposes in state conventions.[63] The account stands as a succinct precursor to much modern constitutional history. It is also pure originalism, lacking citations only because Marshall lived through the history he is reporting.[64] More to the point, today, Justices of all political bents invoke history almost obsessively.

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59 WALDMAN, *supra* note 4, at 171.

60 *Id.* at 172.

61 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring). Jackson deftly underlined the point with a footnote showing how two prominent Founders who joined forces to write most of *The Federalist*—Madison and Hamilton—profoundly disagreed with one another as soon as major controversies arose under the new Constitution. *Id.* at 635 n.1.

62 17 U.S. (4 Wheat.) 316 (1819).

63 *Id.* at 402–04.

64 *See* Martin S. Flaherty, *John Marshall,* McCulloch v. Maryland, *and "We the People": Revisions in Need of Revising*, 43 WM. & MARY L. REV. 1339 (2002).

Aside from *Heller*, other opinions relying heavily on the history of a given constitutional provision include: *Zivotofsky v. Kerry*,[65] *Medellín v. Texas*,[66] *Sosa v. Alvarez-Machain*,[67] *Boumediene v. Bush*,[68] *Printz v. United States*,[69] *New York v. United States*,[70] *Harmelin v. Michigan*,[71] *Morrison v. Olson*,[72] and *Immigration and Naturalization Service v. Chadha*.[73] The list goes on and on.

The current vogue of originalism and history arguably results from the efforts of conservative advocates and scholars dating back to the Reagan Administration. Though sometimes overlooked, progressive scholars and advocates countered with originalist or historical arguments (or sometimes both) of their own in short order. The turn to history has been so dominant that Randy Barnett only slightly overstated when he proclaimed that originalism has triumphed.[74] Given this reality, constitutional lawyers cede historical arguments to the opposing side at their peril.

This reality brings up a second reason not to give up on constitutional history. To channel Brandeis, often the only cure for bad history is more history.[75] Periodically, scholars and jurists resurrect the canard that the Founders believed that the term "executive Power" in Article II[76] encompassed not just the power to implement laws, but also a general grant of authority to conduct foreign affairs.[77] Given the current dominance of historical argument, the best and perhaps only way to refute this position is by showing either that history simply is not sufficiently clear one way or the other, or as in this case, the better-supported view is the opposite view. *The Second Amendment* itself offers a perfect illustration. As noted, Waldman marshals some of the best recent scholarship on the subject to demolish the idea that the Second Amendment originally meant to protect an individual's right to own

65 135 S. Ct. 2076 (2015).

66 552 U.S. 491 (2008).

67 542 U.S. 692 (2004) (using Founding history to interpret a provision of the First Judiciary Act of 1789).

68 553 U.S. 723 (2008).

69 521 U.S. 898 (1997).

70 505 U.S. 144 (1992).

71 501 U.S. 957 (1991).

72 487 U.S. 654 (1988).

73 462 U.S. 919 (1983).

74 Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999).

75 *Cf.* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (arguing that the remedy for bad speech is more speech).

76 U.S. CONST. art. II, § 1, cl. 1.

77 *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2096–101 (2015) (Thomas, J., concurring in part and dissenting in part); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231 (2001). *But see* Bradley & Flaherty, *supra* note 7.

guns free of government regulation, or that Reconstruction transformed the provision in such a manner.

Finally, sometimes history *is* both discernable and translatable to modern situations. Here, the timeliest example is the Declare War Clause.[78] Today, the United States is mounting military actions in—among other places—Syria, Yemen, and Iraq (again), without any meaningful debate in Congress. This stands in stark contrast to the U.K. Parliament, which after a considered debate on a Syrian intervention, rejected the Prime Minister's recommendation in a free vote. The United States may suffer by comparison as a matter of political theory. Having the national legislature back the Executive in committing troops abroad is probably a good thing. But what matters more in modern American constitutionalism is that the failure to include Congress in the decision to undertake these military actions flies in the face of a fairly discernable original understanding that the legislative branch should be the *primary* decisionmaker when it comes to committing the nation to hostilities on foreign soil.[79] Nor is there any obvious reason to assume that the world has changed so radically that the principle cannot be translated to current world affairs. Admittedly, historical sources will often not be this clear on such constitutional specifics. Yet as Jack Balkin (among others) has pointed out, history will often confirm the entrenchment of principles at a somewhat higher level of generality, which, as it turns out, makes translation to modern conditions that much easier.[80]

The Second Amendment, in part, illustrates these points as well. The book shows that a prevailing understanding of the Second Amendment *is* discernable. As noted in this regard, Waldman marshals the same leading scholarship to show that the provision sought to protect the ability of free white men to train and drill in state militias lest the new Federal government prove to be tyrannical.[81] That said, the book rightly concludes that this safeguard does not translate to modern conditions. On one hand, the existence of a national security establishment that can destroy the world in half an hour makes the idea of effective resistance by state militias unlikely. On the other hand, the

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78 U.S. CONST. art. I, § 8, cl. 11.

79 *See* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3–10, 139–52 (1993); LOUIS FISHER, PRESIDENTIAL WAR POWER (3d. ed., rev. 2013); Charles A. Lofgrent, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972).

80 *See* JACK M. BALKIN, LIVING ORIGINALISM (2011) (discussing constitutional interpretations and principles adapting over time).

81 *See supra* notes 43–45 and accompanying text.

violence resulting from individual gun ownership is rampant beyond the Founders' worst nightmares.[82]

What matters, though, is this: Out of necessity, since history cannot be avoided, as critique to undermine false positions, and as a positive account to show what was actually intended, *The Second Amendment* refutes its ostensible rejection of history brilliantly. It is mainly because Waldman handles history so well that he makes his case so effectively.

None of this is to say that making credible and effective appeals to history will be easy. *The Second Amendment* suggests various challenges that its author does not expressly identify. Among other things, the book serves as further testimony that the misuse of history in constitutional advocacy takes several forms. These misuses, and others more generally, might be thought of as reflecting three pathologies.

First, and most readily exposed, is classic "law office" history. This may be simply defined as selectively deploying historical sources to support preconceived results. "Law office" history generally serves as a subset of the famous practice of Justice Abe Fortas, who would write drafts of opinions without citations and then tell his law clerks to "decorate" them with legalese.[83] As the example suggests, "decorating" arguments with historical quotations and other materials often wrenched out of context is all too seductive for anyone needing to bolster an argument with outside authority, especially judges and lawyers. In the Second Amendment context, Waldman shows how the practice further attracts special interest advocacy groups, such as the NRA, as well as the polemicists it funds.[84]

As *The Second Amendment* shows, "law office" history is subject to ready exposure precisely because it is so instrumental. Historical arguments that follow the basic procedural and substantive strictures of the discipline itself, as Waldman does, will almost by definition deprive accounts that do not offer the external authority they seek.

More subtle, and perhaps more prevalent today, is what I have termed history "lite."[85] The metaphor meant to describe historical arguments that were not as rigorous as full-bodied history, but which were delivered just as convincingly as an invocation of the past.[86] As such, history "lite" implies a good faith attempt to find "answers" from the past that are not preconceived, yet an attempt that is nonetheless undercut by the very different demands of legal advocacy—in contrast to historical writing.[87] Among the different imperatives that the law

82 WALDMAN, *supra* note 4, at 171–77.
83 LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 46 (1996).
84 *See* WALDMAN, *supra* note 4, at 98, 220.
85 Flaherty, *History*, *supra* note 7.
86 *Id.*
87 *Id.*

imposes is not just the need to advocate, but the need to do so with limited time to become immersed in a subject outside of the law. What applies to lawyers, moreover, also applies to legal scholars. Compared to their colleagues in history departments, law professors generally have to produce more pieces on more varied topics in less time. Student-edited—as opposed to peer-reviewed—law reviews make this possible, which is good news for legal academics, but do not necessarily produce a check on rushed historical work.[88]

Here, any number of remedies might be tried. On an institutional level, at the very least, student law review editors should seek out experts in history, economics, science, or other fields that authors draw upon to support their legal points. With regard to the Second Amendment, Waldman once again shows that remedy. As noted, his work shows a special aptitude for mastering, synthesizing, and popularizing leading secondary accounts in ways that meet or exceed credible history's procedures and, in this instance, general substantive narrative. That a non-historian can do so in such a clear, concise, and effective manner gives cause for hope. That it takes a substantial amount of talent, focus, and work, however, should give us some cause for concern.

Cause for further concern is a final pathological misuse of history, one that I have termed history "bullshit" (B.S.).The term as applied in this regard comes from a recent, slim, unexpected bestseller by Princeton philosophy professor Harry Frankfurt, entitled *On Bullshit*.[89] Frankfurt refused to accept the common definition of the term as a false statement. Rather, he argued that the idea carried the more pernicious connotation of a statement that was simply indifferent to whether truth or falsehood existed.[90] Applied to constitutional history, the idea means an assertion about the past that does not reflect any concern for whether the claim is "right" or "wrong." Frankfurt argues that bullshit prevails in modern culture in part because of outlets such as cable television or social media, in which there is a need to say something that fills the airways, sounds clever, attracts attention—imperatives that do not necessarily require any attention to the underlying accuracy of the given statement.[91] In constitutional law, the counterpart would appear to be legal scholarship in particular, where rewards come less for historical rigor than for originality, boldness, and the ability to provoke.

Among these three pathologies, the last may be the most difficult to counter. Works such as *The Second Amendment* can counter "law office" history and history "lite" with a superior account of the historical

88 *See* WALDMAN, *supra* note 4, at 87–102.

89 HARRY G. FRANKFURT, ON BULLSHIT (2005).

90 *Id. passim*.

91 *Id. passim*.

record. They cannot do so on their own in confronting history B.S. That would instead require a more fundamental recommitment to craft over cleverness, something that a better factual account itself cannot accomplish. Waldman's work may demonstrate the ways in which provocative scholarship falls short. However, it will likely do little to change the incentive structure for young scholars bent on establishing themselves, especially since it is an effort by an outsider.

CONCLUSION

The Second Amendment is a considerable achievement, but is it enough? That a full-time constitutional advocate with no formal historical training could produce such a solid and convincing work gives cause for hope. Yet even a work of this quality has its work cut out for it. It provides a ready counter to "law office" history. It also helps address the more subtle problems of history "lite." Yet even this work can only go so far in undoing the damage that misuses of history have caused, and which reflect a constitutional culture generating fewer distinctions between arguments that are supported by evidence and those that are not.

The true lesson of Waldman's effort is that—no matter how daunting—keep on keeping on. In this regard, I draw upon my other day job, as a human rights advocate dealing mostly with China, which is itself more and more of an uphill climb. That struggle rarely leads to transformative victories, but it can result in small successes, which furnish the hope that greater progress will result. Even if a small victory—and I believe it is more than that—*The Second Amendment* provides a much needed, accessible corrective. With regard to gun control, every success, great or small, is essential. As the recent shooting in Charleston shows, the stakes are simply too high. Beyond even this, Waldman's work also provides a model for the intelligent use of history in any number of other areas of constitutional law. Far from prompting a turn away from the past, the book should inspire others to replicate its achievement wherever constitutional law turns on a historical narrative.