ESSAYS IN RESPONSE TO MICHAEL WALDMAN'S *THE SECOND AMENDMENT: A BIOGRAPHY*

INTRODUCTION

As a law student reading *District of Columbia v. Heller*,[1] an unsettling question presents itself: Am I in the right place? In other words: Is a doctoral candidate in eighteenth century history and linguistics going to be better prepared than I am to understand the Constitution?

Heller is the Supreme Court's landmark 2008 decision, which interpreted the Second Amendment's right to bear arms to prohibit laws banning handgun possession in the home.[2] Seizing upon the relatively scarce judicial guidance relating to the Second Amendment, the Court in *Heller* engaged in a jurisprudential firefight that appeared to be as much about competing constitutional interpretative theories as it was about the government's power to regulate guns.

The triumphant theory in *Heller* was Justice Scalia's, which relied heavily on analysis of historical dictionaries, commentaries, and treatises to divine what the words of the Second Amendment meant to the public at the time the Amendment was adopted and at various points in history.[3] The dissenting Justices, meeting Scalia on his own turf, returned fire by relying on many of the same sources to reach the opposite conclusion.[4] Reading *Heller*, the contours of our constitutional rights seem to turn on things like whose excerpts from Blackstone are

1 554 U.S. 570 (2008).

2 *Id.* at 635.

3 *See id.* at 581–84 (citing, *inter alia*, 1 A NEW AND COMPLETE LAW DICTIONARY (1771); 1 COMMENTARIES ON THE LAWS OF ENGLAND (1765); 1 W. HAWKINS, TREATISE ON THE PLEAS OF THE CROWN (1771); 1 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755); T. SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1796); 1 J. TRUSLER, THE DISTINCTION BETWEEN WORDS ESTEEMED SYNONYMOUS IN THE ENGLISH LANGUAGE (1794)); *see also id.* at 614–19.

4 *See id.* at 647, 662 (Stevens, J., dissenting) (citing 1 COMMENTARIES ON THE LAWS OF ENGLAND (1765); 1 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755); 1 J. TRUSLER, THE DISTINCTION BETWEEN WORDS ESTEEMED SYNONYMOUS IN THE ENGLISH LANGUAGE (1794)). In a separate dissent, Justice Breyer and the same group of dissenting justices relied on different authorities to balance the government's interest in its handgun regulation against the individual interest in self-defense. *Id.* at 681 (Breyer, J., dissenting).

more revealing,[5] or whether a certain British idiom was used as a prepositional phrase.[6]

Naturally, the use of history and language in constitutional interpretation is nothing new. However, the sort of analysis used in *Heller* is largely absent from law school curricula. And yet, at least with regard to the Second Amendment, competence in linguistic history appears necessary to understand our constitutional rights today. Nor is the challenge unique to law students—it is shared by anyone analyzing or litigating gun laws, including the lower federal courts charged with interpreting and applying the Second Amendment post-*Heller*.[7]

And so the *Cardozo Law Review* is pleased to publish this trio of essays that add to the growing—and increasingly important—body of scholarship on the history of the Second Amendment. The essays arise out of a panel discussion convened by the Floersheimer Center for Constitutional Democracy, which took place on October 13, 2014, at the Benjamin N. Cardozo School of Law in New York City. The occasion for the panel was the recent publication of *The Second Amendment: A Biography*,[8] an important work by Michael Waldman, president of the Brennan Center for Justice at New York University School of Law. The panel, moderated by Professor Kate Shaw, included Waldman, together with the authors of the three essays published in this Issue—Professors Paul Finkelman, James Jacobs, and Martin Flaherty, leading scholars in American legal history, the Constitution, and gun control. Two of the essays review and build upon Waldman's in-depth recounting of the Second Amendment's history up through the present day, and in light of *Heller* and *McDonald v. City of Chicago*;[9] the third essay considers a very current gun control issue—the Assault Weapons Ban.

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5 *Compare id.* at 594 (majority opinion), *with id.* at 665 (Stevens, J., dissenting).

6 *Compare id.* at 586 (majority opinion), *with id.* at 647 n.9 (Stevens, J., dissenting).

7 *See* United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011) ("There may or may not be a Second Amendment right in some places . . . , but we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions. . . . The whole matter strikes us as a vast *terra incognita* . . . ."), *see also* Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) (observing that the "vast *terra incognita*" described in *Masciandaro* "has been opened to judicial exploration by *Heller*," and "[t]here is no turning back by the lower federal courts").

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

9 561 U.S. 742 (2010).

10 Many thanks to Professor Kate Shaw, Professor David Rudenstine, and the editors of the *Cardozo Law Review*.