
DEAD OR ALIVE: ORIGINALISM AS
POPULAR CONSTITUTIONALISM IN *HELLER*

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We should find the lost Second Amendment, broaden its scope and determine that it affords the right to arm a state militia and also the right of the individual to keep and bear arms.

— Robert Sprecher, ABA prize winner, 1965¹

[T]he Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. . . . What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new “constitutional right” by a Court that is impatient of democratic change.

— Justice Scalia, *Lawrence v. Texas*, 2003²

The Court’s announcement in 2008 that the Second Amendment,³ ratified in 1791, protects an individual’s right to bear arms against federal gun control regulation was long awaited by many, long feared by others. What produced this ruling and what might it reveal about the character of our constitutional order? For many, constitutional law changed because the Court interpreted the Second Amendment in accordance with the understandings of the Americans who ratified it: *Heller*⁴ marks the “Triumph of Originalism.”⁵ Others saw the case

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¹ Robert A. Sprecher, *The Lost Amendment* (pt. 2), 51 A.B.A. J. 665, 669 (1965).

² *Lawrence v. Texas*, 539 U.S. 558, 602–03 (2003) (Scalia, J., dissenting).

³ U.S. CONST. amend. II (“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.”).

⁴ *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

⁵ Linda Greenhouse, *Three Defining Opinions*, N.Y. TIMES, July 13, 2008, at WK4; see also Randy E. Barnett, Op-Ed., *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13 (“Justice Scalia’s opinion is the finest example of what is now called ‘original public meaning’ jurisprudence ever adopted by the Supreme Court.”); David G. Savage, *Supreme Court Finds History Is a Matter of Opinions*, L.A. TIMES, July 13, 2008, <http://articles.latimes.com/2008/jul/13/nation/na-scotus13> (“This year the Supreme Court relied more than ever on history and the original meaning of the Constitution in deciding its major cases.”); Legal Theory Blog, <http://lsolum.typepad.com/legaltheory/2008/06/analysis-of-hel.html> (June 26, 2008, 10:56) (“It

very differently, observing that the Court had interpreted the Second Amendment in accordance with the convictions of the twentieth-century gun-rights movement and so had demonstrated the ascendancy of the living Constitution.⁶ The two accounts of the decision stand in some tension. One views *Heller*'s authority as emanating from the deliberations of eighteenth-century Americans, while the other views the constitutional debates of twentieth-century Americans as decisive.

What kind of authority did the Court exercise when it struck down the District of Columbia's handgun ban as violating the Second Amendment? On the originalism view, the Court is merely enforcing the judgments of eighteenth-century Americans, who, in an epochal act of constitutional lawmaking, ratified a Bill of Rights that forbids handgun bans such as the District of Columbia's. On the popular constitutionalism view, the Court *itself* is deciding whether handgun bans are consistent with the best understanding of our constitutional tradition; the determination is made in the present and responds to the beliefs and values of living Americans who identify with the commitments and traditions of their forbears. In the first case, the Court stands above the fray, disinterested, merely executing the commands of Americans long deceased. In the second case, the Court is normatively engaged in matters about which living Americans passionately disagree, enforcing its own convictions about the best understanding of a living constitutional tradition to which *Heller* contributes. On this account, *Heller*, through its originalism, participates in what Justice Scalia refers to in his *Lawrence* dissent as "the culture war."⁷

Relating these two competing accounts of the opinion, this Comment shows how *Heller*'s originalism enforces understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism. It situates originalism's claim to ground judicial decisionmaking outside of politics in the constitutional politics of the late twentieth century, and demonstrates how *Heller*

is difficult to imagine a clearer or more thoroughgoing endorsement of original public meaning originalism.").

⁶ Posting of Jack Balkin to Balkinization, <http://balkin.blogspot.com/2008/06/this-decision-will-cost-american-lives.html> (June 27, 2008, 00:08) ("[T]he result in *Heller* would have been impossible without . . . social movement actors who, over a period of about 35 years, succeeded in changing Americans' minds about the meaning of the Second Amendment This is living constitutionalism in action."); Dave Kopel, *Conservative Activists Key to DC Handgun Decision*, HUMAN EVENTS, June 27, 2008, <http://www.humanevents.com/article.php?id=27229> (reporting that the author — a member of the Cato Institute who helped argue *Heller* — attributes both its result and its originalist reasoning to twentieth-century social movements); Posting of Adam Winkler to The Huffington Post, http://www.huffingtonpost.com/adam-winkler/justice-scalias-living-co_b_109728.html (June 27, 2008, 21:17) ("[W]hat explains the reasonable regulations that Scalia's opinion recognizes? America's living tradition of the right to bear arms.").

⁷ *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting) (quoted *supra* p. 191).

respects claims and compromises forged in social movement conflict over the right to bear arms in the decades after *Brown v. Board of Education*.⁸

The Comment offers this reading of the opinion in two steps. Part I begins by examining the temporal locus of authority in the *Heller* opinion itself. In *Heller*, the dissenters insist the Second Amendment is concerned primarily with militia and military matters, whereas the majority reads the amendment as codifying an individual right of self-defense that enables citizens to protect themselves, their families, and their homes against crime. The majority presents this account as the original public meaning of the Second Amendment, yet draws upon evidence that may incorporate understandings that emerged long after the founding. This possibility becomes more pronounced as the Court explains how it will enforce the Second Amendment's right to bear arms. *Heller* holds that government cannot deprive citizens of traditional weapons of self-defense, but may ban civilian use of military weapons, even if this means that the right to bear arms may no longer be effectively exercised for the republican purpose of resisting tyranny that the "prefatory clause" discusses.⁹ It is, to say the least, striking that an *originalist* interpretation of the Second Amendment would treat civic republican understandings of the amendment as antiquated, and refuse to protect the arms a militia needs to defend against tyranny. What guides the majority's judgments about how to enforce the right to bear arms?

To examine more closely the authority *Heller* exercises in enforcing the right to bear arms, this Comment looks beyond the text of the *Heller* opinion itself to the decades of social movement conflict that preceded the decision. This history illustrates how contest over the Constitution's meaning can endow courts with authority to change the way they interpret its provisions. The effort to persuade — and to capture institutions that can authoritatively pronounce law — can prompt mobilization, countermobilization, coalition, and compromise, a process that can forge and discipline new understandings that courts engaged in responsive interpretation recognize as the Constitution.¹⁰

⁸ 347 U.S. 483 (1954).

⁹ See U.S. CONST. amend. II ("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.")

¹⁰ This Comment builds on earlier work exploring how movement conflict helps guide the Constitution's development and how responsive interpretation helps sustain its democratic authority. See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006) [hereinafter Siegel, *Constitutional Culture*]; Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. (forthcoming 2008); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001) [hereinafter Siegel, *Text in Contest*]; see also Jack M. Balkin & Reva B. Siegel, *Princi-*

These practices of democratic constitutionalism enable mobilized citizens to contest and shape popular beliefs about the Constitution's original meaning and so confer upon courts the authority to enforce the nation's foundational commitments in new ways.¹¹

To show how such processes helped shape the right *Heller* enforces, Part II of this Comment examines chapters of American constitutional history not discussed in *Heller* — debates about the Second Amendment that transpired in the shadow of *Brown v. Board of Education*. Exploring this social movement history, we learn how, in the wake of *Brown*, citizens made claims on a Second Amendment concerned with law and order and self-defense; how, during the 1980s, a growing coalition of citizens came to assert their convictions about the Second Amendment as the original understanding; and why, by the 1990s, proponents of this law-and-order Second Amendment came to differentiate their claims from those of the modern militia movement, emphasizing that the Second Amendment entitled the citizen to arms needed to defend his family against crime, not against the government. The Second Amendment's twentieth-century history shows how political conflict can both motivate and discipline the claims that mobilized citizens make on the text and history of the Constitution. These contemporary struggles help explain the shape of the right *Heller* enforces. In the process, they illuminate how authority to enforce the original understanding depends on contemporary public convictions.

In analyzing the conflict leading up to *Heller*, Part III of this Comment provides a positive and interpretive account of how the boundary between constitutional law and constitutional politics has been negotiated in recent decades. *Heller* depicts its authority as forged in one epochal act of eighteenth-century lawmaking. The twentieth-century history considered in this Comment suggests that, in important part, *Heller*'s originalist authority for protecting weaponry popularly used for self-defense, but not for militia purposes, is responsive to contemporary constitutional deliberation — forged in the very culture wars Justice Scalia insists should play no part in constitutional interpretation.

The result is not license of the kind Justice Scalia fears. This Comment's reading of *Heller* demonstrates that when courts apprehend the history of constitutional lawmaking through constitutional politics,

ples, Practices, and Social Movements, 154 U. PA. L. REV. 927 (2006); Robert Post & Reva Siegel, *Originalism As a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006) [hereinafter Post & Siegel, *Originalism as a Political Practice*]; Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007) [hereinafter Post & Siegel, *Roe Rage*].

¹¹ See Siegel, *Constitutional Culture*, *supra* note 10, at 1347–48; Post & Siegel, *Originalism As a Political Practice*, *supra* note 10.

both guide and constrain the ways courts enforce the Constitution. If we analyze the practices of democratic constitutionalism that help make *Heller* law, we can see forms of discipline and discretion that narratives of originalism occlude.

I. THE TEMPORAL LOCUS OF CONSTITUTIONAL AUTHORITY IN *HELLER*

[T]he Great Divide with regard to constitutional interpretation is . . . between *original* meaning (whether derived from Framers' intent or not) and *current* meaning. The ascendant school of constitutional interpretation affirms the existence of what is called The Living Constitution, a body of law that . . . changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and "find" that changing law. Seems familiar, doesn't it? Yes, it is the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures.

— Justice Scalia, *A Matter of Interpretation* (1997)¹²

Justice Scalia has long advocated originalism on the grounds that it constrains judicial discretion and so enables judges to enforce the Constitution as law, not politics. In his view, judges should interpret the Constitution to enforce its original and "fixed meaning," without taking into consideration "current societal values" or the judge's own preferences.¹³ In *Heller*, Justice Scalia reaffirms this account of the judge as a kind of amanuensis for those who adopted the Constitution:

The very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.¹⁴

Justice Scalia depicts a judge interpreting the Constitution as implementing directives the judge has had no normative role in deter-

¹² Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 38 (Amy Gutmann ed., 1997).

¹³ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989) (discussed *infra* note 137).

¹⁴ *Heller*, 128 S. Ct. at 2821 (denouncing an interest-balancing test proposed by Justice Breyer). To illustrate his claim, Justice Scalia discusses the application of the First Amendment in *Skokie, Illinois* — a rather odd example of the unchanging scope of rights, as the text of the First Amendment is expressly addressed to "Congress," and does not mention the states. See *id.*

mining. This picture of constitutional interpretation is in considerable tension with the reasoning of *Heller* itself. *Heller's* account of the Second Amendment's original public meaning invokes authorities from before and after the founding, relies on common law-like reasoning, endows judges with vast amounts of interpretive discretion, and, in these respects, resembles the practice of living constitutionalism that Justice Scalia often condemns.

In *Heller*, both the majority and dissenting opinions appeal to the Second Amendment's text and history,¹⁵ yet offer very different accounts of the amendment's purpose and reach. The dissenting Justices emphasize the Second Amendment's republican purposes,¹⁶ depicting the amendment as a guarantee against government tyranny. They assert that the "Second Amendment . . . was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States."¹⁷ The dissenters maintain that the Second Amendment protects only "a right to use and possess arms in conjunction with service in a well-regulated militia,"¹⁸ and not "the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense."¹⁹ The majority, however, asserts that the Second Amendment preserved the militia by codifying the common law right of self-defense,²⁰ and "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."²¹

There are temporal oddities in the evidence the majority marshals in support of this claim about the original meaning of the Second Amendment. For example, the majority starts and finishes its argument that "bear arms" has nonmilitary meanings by citing a dissenting opinion that Justice Ginsburg wrote in 1998 that in turn cites a 1998 edition of Black's Law Dictionary.²² This is perhaps the most promi-

¹⁵ See, e.g., *id.* at 2789–90, 2799; *id.* at 2824–25 (Stevens, J., dissenting).

¹⁶ See U.S. CONST. amend. II ("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." (emphasis added)).

¹⁷ *Heller*, 128 S. Ct. at 2822 (Stevens, J., dissenting); see also *id.* at 2823 (citing *United States v. Miller*, 307 U.S. 174 (1939)).

¹⁸ *Id.* at 2831.

¹⁹ *Id.* at 2822.

²⁰ *Id.* at 2801 (majority opinion) ("[T]he Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia.").

²¹ *Id.* at 2821.

²² *Id.* at 2793 (citing *Muscarello v. United States*, 524 U.S. 125, 143 (Ginsburg, J., dissenting)); see also *id.* at 2794. Sensible of the temporal discrepancy, the majority then cites state constitutional provisions it asserts "unambiguously" demonstrate that the "natural meaning" of "bear

ment but surely not the only temporal incongruity in the evidence on which the majority's account of the original meaning relies. The majority more than once discounts evidence drawn from the amendment's drafting history, appearing to favor evidence remote in time over evidence proximate in time to the amendment's ratification. For example, the majority rejects the dissenters' claim that the military meaning of the phrase "keep and bear Arms" is elucidated by James Madison's inclusion of a conscientious-objector clause in his original draft of the Second Amendment ("but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person"), observing "[i]t is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process."²³ In debating the amendment's purpose, the majority again discounts evidence from "the drafting history of the Second Amendment — the various proposals in the state conventions and the debates in Congress," observing, "[i]t is dubious to rely on such history to interpret a text that was *widely understood* to codify a pre-existing right."²⁴ To demonstrate that it was "widely understood" that the Second Amendment codified this preexisting, individual right of self-defense, the majority opinion examines sources that range into the second half of the nineteenth century.²⁵ When Justice Stevens chides the majority for relying on the amendment's post-ratification history to establish its purpose and meaning,²⁶ the majority contemptuously explains that its reliance on these sources is "to determine *the public understanding* of a legal text in the period after its enactment or ratification."²⁷

Justice Scalia has a sound basis in democratic theory for privileging the public's understanding of the amendment over its framers' — it was the public's vote that made the Constitution law²⁸ — but the

arms" is the same as its historical meaning; the sources cited do not supply unambiguous support for its claims, and a number are from a later period. *See id.* at 2793.

By contrast, *Heller's* dissenters rely on a usage study of more than 100 texts that employed the term "bear arms" in the period between the Declaration of Independence and the adoption of the Second Amendment to establish that the term was regularly used in a military context. *See id.* at 2828 n.9 (Stevens, J., dissenting).

²³ *Id.* at 2796 (majority opinion).

²⁴ *Id.* at 2804 (emphasis added); *see also id.* (discussing "our longstanding view that the Bill of Rights codified venerable, widely understood liberties"); *id.* at 2798 (observing that the English Bill of Rights "has long been understood to be the predecessor to our Second Amendment").

²⁵ *See, e.g., id.* at 2797 (citing *United States v. Cruikshank*, 92 U.S. 542 (1876)); *id.* at 2802 (citing *Robertson v. Baldwin*, 165 U.S. 275 (1897)).

²⁶ *Id.* at 2837 n.28 (Stevens, J., dissenting).

²⁷ *Id.* at 2805 (majority opinion).

²⁸ *Cf. Scalia, supra* note 12, at 38 ("I will consult the writings of some men who happened to be delegates to the Constitutional Convention . . . I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.")

question remains how the interpreter establishes what the public's understanding of the relevant constitutional text was. Justice Scalia himself acknowledges that the writings of the framers may be probative of the text's public meaning.²⁹ Given this, is there reason to favor popular views of the amendment one hundred years after its ratification?³⁰ Either the evidence the majority marshals to demonstrate that it was "widely understood" that the Second Amendment codified an individual right of self-defense accurately captures the understanding of those who ratified the amendment in 1791, or the majority is presenting *as* the original public meaning an understanding of the amendment that emerged in common law-like fashion in the decades after the amendment was ratified.

If these questions about the temporal locus of authority in *Heller* haunt the majority's account of the amendment's original understanding, they dominate its claims about the scope of the right the Second Amendment protects. The majority simply declares that the Constitution allows many familiar forms of gun control regulation:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.³¹

What authority supports this claim? Does the common law right of self-defense that the Second Amendment codifies continue to evolve in history? If so, what kind of constraint on judicial interpretation does the original public understanding provide? Who decides which gun control laws are constitutionally forbidden and which ones are allowed?³² Without answering any of these questions, the majority then

²⁹ *Id.*

³⁰ See *Heller*, 128 S. Ct. at 2812 (using as authority a treatise from 1891). Cf. Akhil Reed Amar, *The Supreme Court, 2007 Term—Comment: Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 173 (2008) ("But if a future twenty-third-century historian seeks to understand the 1960s, I hope she does not treat the 1980s as decisive evidence. Even if most commentators in the years after 1791 read the Second Amendment through the prism of English common law and individual rights of self-defense, this approach may well have been anachronistic and incorrect.").

³¹ *Heller*, 128 S. Ct. at 2816–17.

³² Cf. Mark Tushnet, *Heller and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. (forthcoming Apr. 2009) (manuscript at 41–42), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1189494 (arguing that in determining the scope of the right the Second Amendment protects, Justice Scalia's opinion employs as much discretion as Justice Breyer's dissent, though Justice Scalia "cannot admit the fact"); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. (forthcoming 2009) (manuscript at 22–23, available at <http://ssrn.com/abstract=1265118>) ("As Justice Breyer notes, the Court does not explain why these restrictions are embedded in the Second Amendment. The Constitution's text . . . has as little to say about restrictions on firearm ownership by felons as it does about the trimesters of pregnancy." (footnote omitted)); Richard A. Posner, *In Defense of Looseness: The Supreme Court and*

announces “another important limitation on the right to keep and carry arms,”³³ which it derives from two apparently unrelated sources of constitutional authority. It notes that *United States v. Miller*³⁴ said that “the sorts of weapons protected [by the Second Amendment] were those ‘in common use at the time,’” and then observes “[w]e think that limitation is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”³⁵ The majority imputes a limitation on the weapons the Second Amendment protects to a passage in *Miller* that discusses arms the militia employed without imposing any such limitation;³⁶ it then declares this imputed limitation confirmed by Blackstone’s discussion of the kinds of weapons the common law allowed individuals to carry. The resulting amalgam expresses a common law restriction on the right to bear arms (adopted either in 1769, 1791, 1939, or 2008) in the positive law language of original expected application — a restriction in some tension with the majority’s earlier observation that the Second Amendment extends to arms that were not in existence at the time of the founding.³⁷

More remarkably, the restriction the majority adopts renders the right the Second Amendment protects useless for its textually enumerated military purpose — *a point the majority goes out of its way to emphasize*. The majority insists that the Second Amendment doesn’t protect “weapons that are most useful in military service,” even if it means that the right to bear arms can no longer be exercised for the republican purpose of preventing tyranny that the text specifies:

It may be objected that if weapons that are most useful in military service — M-16 rifles and the like — may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment’s ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are

Gun Control, NEW REPUBLIC, Aug. 27, 2008, at 32, 34 (observing that the reach of the opinion is “up for grabs”).

³³ *Heller*, 128 S. Ct. at 2817.

³⁴ 307 U.S. 174 (1939).

³⁵ *Heller*, 128 S. Ct. at 2817 (quoting *Miller*, 307 U.S. at 179).

³⁶ *Miller*, 307 U.S. at 179 (“These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. ‘A body of citizens enrolled for military discipline.’ And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”).

³⁷ See *Heller*, 128 S. Ct. at 2791–92 (“Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. . . . [T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”).

highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.³⁸

In this remarkable passage, the majority imposes restrictions on the kinds of weapons protected by the Second Amendment that the majority concedes would disable exercise of the right for the amendment's textually enunciated purposes. How could an originalist interpretation of the Second Amendment exclude from its protection the kinds of weapons necessary to resist tyranny — the republican purpose the text of the Second Amendment discusses and, on the majority's own account, "the purpose for which the right was codified"?³⁹ In these passages Justice Scalia seems to apply something other than an original "public understanding" analysis.

A glimpse of a different form of authority the opinion is exercising comes into view in the majority's discussion of stare decisis. The majority asserts its account of the Second Amendment is not inconsistent with the Court's decision in *United States v. Miller*⁴⁰ — and then quickly abandons the effort to reconcile the two, breaking into a direct attack on *Miller*:

As for the "hundreds of judges" who have relied on the view of the Second Amendment Justice Stevens claims we endorsed in *Miller*: If so, they overread *Miller*. And their erroneous reliance upon an uncontested and virtually unreasoned case cannot nullify the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms. In any event, it should not be thought that the cases decided by these judges would necessarily have come out differently under a proper interpretation of the right.⁴¹

What kind of voice emerges in this attack on *Miller*? The majority seems to identify with "the reliance of millions of Americans . . . upon the true meaning of the right to keep and bear arms," dismissing the "erroneous reliance" of "hundreds of judges" on Supreme Court precedent as immaterial to a "true" understanding of the amendment. Here the Court is not dispassionately analyzing evidence of the original "public understanding," or enforcing a judicial, common law under-

³⁸ *Id.* at 2817.

³⁹ *Id.* at 2801 ("[T]he Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right — unlike some other English rights — was codified in a written Constitution.")

⁴⁰ *See id.* at 2815–16.

⁴¹ *Id.* at 2815 n.24 (citation omitted).

standing of the Second Amendment, but instead declaring the amendment's "true meaning" in a full-throated populist voice. The *Heller* majority claims to derive its authority to enforce the Second Amendment solely from epochal acts of constitutional lawmaking in the eighteenth century. But as this passage makes plain, *Heller* also takes guidance from the lived experience and passionate convictions of Americans in times since the founding — convictions and experience the majority is prepared to elevate over the considered views of "hundreds of judges" in the twentieth century.

II. A SECOND AMENDMENT SOCIAL MOVEMENT HISTORY: GUN RIGHTS, ORIGINALISM, AND THE CULTURE WARS

To this point, this analysis of *Heller* has considered different kinds of constitutional authority that might be at work in the opinion — positive lawmaking associated with the Second Amendment's eighteenth-century ratification and incremental articulation of a tradition of the kind associated with common law adjudication. In fact, the state constitutions, treaties, and other evidence cited in *Heller* suggest that the temporal forms and social sources of constitutional authority are quite diverse. Judges who engage in common law reasoning about the Constitution may interpret its text in response to claims about its meaning that citizens and elected officials propose.⁴²

What do we learn about the forms of authority the Court exercised in *Heller* if we look outside the opinion to the passionate national debate that preceded the Court's decision? *Heller* invites this inquiry when it appeals to popular conviction — to "the reliance of millions of Americans . . . upon the true meaning of the right to keep and bear arms" — to limit the authority of precedent on which "hundreds of judges" have relied.⁴³ This mode of reasoning sounds in popular constitutionalism. More precisely, it is judicial interpretation of the Constitution that is responsive to popular constitutionalism. Elsewhere I have shown how, in American constitutional culture, social movement conflict can motivate as well as discipline new claims about the Constitution's meaning, and how responsive interpretation by public officials can transmute constitutional politics into new forms of constitutional law.⁴⁴ Popular debate over the Second Amendment offers striking evidence of these dynamic features of our constitutional order

⁴² See Siegel, *Text in Contest*, *supra* note 10, at 299–300; see also *id.* at 314 ("Outside the courthouse, the Constitution's text plays a significant role in eliciting and focusing normative disputes among Americans about . . . rights under the Constitution — a dynamic that serves to communicate these newly crystallizing understandings and expectations about . . . rights to judges interpreting the Constitution inside the courthouse door.")

⁴³ *Heller*, 128 S. Ct. at 2815 n.24.

⁴⁴ See Siegel, *Constitutional Culture*, *supra* note 10.

and sheds light on the forms of responsive authority judges may exercise, even when invoking original understanding as a warrant for judicial review.⁴⁵ The exercise illuminates relations between constitutional politics and constitutional law otherwise not legible in *Heller*.

In these twentieth-century struggles we can learn about the meaning of the Second Amendment to its contemporary proponents. The history provides a different perspective on the kinds of authority the Court exercises when it conceives of protecting weapons for self-defense as the core purpose of the Second Amendment *and* when it refuses to extend the amendment's protection to weaponry a militia might employ today. When we read the *Heller* opinion in light of the decades of social movement conflict that preceded it, it is possible to see how decisions enforcing the original understanding of the Constitution can participate in a twentieth-century "culture war."

A. *Great Society Advocates for Gun Control*

The modern quest for gun control and the gun rights movement it triggered were born in the shadow of *Brown*. Directly and indirectly, conflicts over civil rights have shaped modern understandings of the Second Amendment.

Contemporary debate over gun control began in the 1960s, when President Johnson called for restrictions on firearms sales in the wake of President Kennedy's assassination.⁴⁶ The National Rifle Association (NRA) was easily able to spur opposition to the proposed measures.⁴⁷ In the 1950s and 1960s, guns were popular, distributed by the government,⁴⁸ and glamorized by the media.⁴⁹ Even so, there was sig-

⁴⁵ See Post & Siegel, *Originalism As a Political Practice*, *supra* note 10.

⁴⁶ LEE KENNETT & JAMES LAVERNE ANDERSON, THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA 231 (1975) ("Within a week of President Kennedy's death a dozen firearms bills had been placed in the congressional hoppers."). A Hein Online title search for law review articles on the "Second Amendment," "bear arms," or "gun control" shows that publications begin steadily to increase in the 1960s. See *infra* note 157.

⁴⁷ ALEXANDER DECONDE, GUN VIOLENCE IN AMERICA: THE STRUGGLE FOR CONTROL 175 (2001); KENNETT & ANDERSON, *supra* note 46, at 231-43; see also Stanley Meisler, *Get Your Gun from the Army*, 198 NATION 568, 569 (1964) (noting that members of the NRA get "a subscription to the NRA's *American Rifleman*, a chance to buy Army guns, a massive public relations campaign that included a float in the 1963 Tournament of Roses Parade saying, 'The Bill of Rights — Freedom to Keep and Bear Arms' and, most important, some lobbying on their behalf in the halls of state legislatures and Congress"); Drew Pearson & Jack Anderson, *The Washington Merry-Go-Round: Gun Industry Holds Capitol Hill at Bay*, WASH. POST, Apr. 13, 1968, at D15 ("More moving than the memory of President John F. Kennedy and the Rev. Martin Luther King, apparently, has been the lobbying of the National Rifle Association which, for six years, has blocked every move on Capitol Hill to curb the indiscriminate sale of firearms.").

⁴⁸ See ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL 102 (1995).

⁴⁹ In 1956, *Life* magazine ran a story on "the western film genre, noting that 'in Hollywood eight films with "gun" in the title have been completed and actors are learning now to shoot and be shot,'" and "each evening, a television critic in *The Nation* reported, 'twenty to thirty million

nificant public support for gun control.⁵⁰ And the case for gun control grew in urgency in the next several years as the nation was shaken by civil rights conflict, riots in the nation's cities, rising crime rates, campus slayings, and struggles over the Vietnam war⁵¹ — conflicts that imbued guns with a variety of racial meanings.⁵² In 1968, with the assassinations of civil rights leader Martin Luther King, Jr., and presidential candidate Senator Robert Kennedy, Congress was ready to take action on the President's request to impose restrictions on certain classes of purchasers and to bar the interstate mail order sale of guns.

American homes rock with the sound of sudden gunfire.” KENNETT & ANDERSON, *supra* note 46, at 218; *see also* DECONDE, *supra* note 47, at 161 (reporting the depiction of gun violence in the 1950s on the “new medium of television,” where “[n]ight and day with the press of a button Americans could now view programs featuring graphic firearms violence,” including “*Gunsmoke*, *Have Gun Will Travel*, *The Rifleman*, and *Wanted Dead or Alive*”).

⁵⁰ For example, in 1959, Gallup reported 59% of the public in support of a handgun ban. *See* sources cited *infra* note 74 and accompanying text.

⁵¹ *See* DECONDE, *supra* note 47, at 173–84.

⁵² *See* Peter Bart, *Los Angeles Whites Voice Fear*, N.Y. TIMES, Aug. 17, 1965, at 1 (reporting on “groups of white men in gas stations and stores talking about ‘what they’ll do if the niggers attack,” and quoting an observer describing the “fantastic run on gun stores” as going “beyond the instinct for self protection” and the “smell of violence in the air in both the white and Negro communities”); Pearson & Anderson, *supra* note 47 (reporting that “the gun lobby has started an ugly whispering campaign that the gun control bill would prevent white people from buying weapons to defend their homes against Negro rioters”). *See generally* Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230, 247 (2007) (discussing the ways in which conservatives reacting to different forms of violence “attached civil rights to lawlessness”).

At least some gun control efforts during this period seem to have been racially motivated and were resisted by some members of the black community. *See, e.g.*, Jane Rhodes, *Fanning the Flames of Racial Discord: The National Press and the Black Panther Party*, 4 HARV. INT’L J. PRESS/POL. 95, 95 (1999) (discussing a California bill that was motivated “in part to stifle the [Black] Panthers’ open use of guns” and the Panthers’ protest of that bill at the California state legislature); BLACK PANTHER PARTY, PLATFORM AND PROGRAM: WHAT WE WANT, WHAT WE BELIEVE (1966), *reprinted in* THE BLACK PANTHERS SPEAK 2, 3 (Philip S. Foner ed., 1970) (“The Second Amendment to the Constitution of the United States gives a right to bear arms. We therefore believe that all black people should arm themselves for self defense.”). But racial conflict did not become entrenched in these ways. A black nationalist right to bear arms did not become the focal point of organizing in the African-American community. *See* Black Panther Party, Platform and Program: What We Want, What We Believe (1972), <http://www.stanford.edu/group/blackpanthers/history.shtml> (omitting reference to the Second Amendment). Instead, there has been substantial support for gun control. *See* PEW RESEARCH CTR. FOR PEOPLE & THE PRESS, HANDGUNS: PUBLIC REJECTS A BAN — BUT SUPPORTS CONTROLS (2008), <http://pewresearch.org/pubs/835/handgun-ban> (“[F]ully three-quarters of African Americans (75%) say controlling gun ownership is more important [than protecting] the rights of Americans to own guns.”); Paul M. Barrett, *NAACP Suit Puts Race on Table in Gun Debate*, WALL ST. J., Aug. 13, 1999, at B1 (discussing the NAACP’s suit against gun manufacturers, which claimed that “African-Americans have been ‘disproportionately injured’ by the gun industry’s ‘negligent marketing’” (quoting complaint in *NAACP v. Acusport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003))).

In the 1960s, it was a matter of ordinary professional reason that Congress had power to adopt restrictions of this sort.⁵³ Counsel to the House Subcommittee on Postal Operations was succinct in explaining the governing law:

The second amendment to the Constitution of the United States is only 27 words and seems plain on its face. . . . The reference to a “well regulated Militia” would seem to govern the phrase “the right of the people to keep and bear Arms” which means in its context the right of the States to organize a Militia.⁵⁴

Committee reports concluded similarly.⁵⁵

Yet, even if no court would impose Second Amendment limits on gun control legislation, the President’s advisers still worried about selling a federal gun control bill to the American public. The plan they hit upon involved sending a group of Hollywood cowboys — Kirk Douglas, James Stewart, Gregory Peck, Hugh O’Brian and Charlton Heston — to appear on the late night *Joey Bishop Show* and urge Americans to support the President’s gun control bill.⁵⁶ The civil rights concerns of the bill’s proponents were unmistakable. “President John F. Kennedy was murdered by a rifle. Martin Luther King was murdered by a rifle. Medgar Evers was murdered by a rifle,” the cowboys emphasized, while reassuring the TV audience that the bill’s purpose was “not to deprive the sportsman of his hunting gun” nor

⁵³ See, e.g., S. REP. NO. 90-1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2169 (“[T]he decided cases, both at the Federal and State levels, reveal no constitutional barrier to the passage of [federal gun control regulation]. To the contrary, they afford ample precedent for its validity.”). The Court had sustained Congress’s authority, under the Commerce Clause and the Second Amendment, to enact gun control laws during the New Deal. See *United States v. Miller*, 307 U.S. 174, 178 (1939) (“In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”). Lower courts understood *Miller*’s interpretation of the Second Amendment as identifying a collective right to militia-based weapons. See, e.g., *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (“It is clear that the Second Amendment guarantees a collective rather than an individual right.”); *United States v. Casson*, 288 F. Supp. 86, 88 (D. Del. 1968) (“In the absence of some showing that the possession or use of the shotgun bears some reasonable relationship to the preservation or efficiency of a well regulated Militia, the Second Amendment does not guarantee defendant the right to keep and bear such a firearm.”); *Galvan v. Superior Court*, 452 P.2d 930, 940 (Cal. 1969) (“The claim that legislation regulating weapons violates the Second Amendment has been rejected by every court which has ruled on the question.”).

⁵⁴ *Mail Order Gun Control: Hearing Before the Subcomm. on Postal Operations of the H. Comm. on Post Office and Civil Serv.*, 90th Cong. 16 (1968) (reprinting legal memorandum on “The Right To Bear Arms”); *id.* at 17 (reviewing text, ratification history, and case law and concluding “[t]here is little or no case law on this subject. The principal case involved a sawed off shotgun which the Court held was not vital to the maintenance of a ‘well regulated Militia.’”).

⁵⁵ See, e.g., S. REP. NO. 90-1097.

⁵⁶ EMILIE RAYMOND, FROM MY COLD, DEAD HANDS: CHARLTON HESTON AND AMERICAN POLITICS 179 (2006).

deny to “any responsible citizen his constitutional right to own a firearm.”⁵⁷ At this point even the NRA was prepared to support federal gun control laws,⁵⁸ and Congress enacted two rounds of legislation in 1968 restricting high-risk purchasers, prohibiting sale of firearms through the mail, barring import of certain guns, and creating the Bureau of Alcohol, Tobacco, and Firearms within the Treasury Department.⁵⁹

But the 1968 gun control legislation represented at best a qualified victory for President Johnson, as it grew out of criticisms of his Great Society initiatives and was enacted encumbered with civil rights restrictions he opposed. Though willing to support gun control in 1968, many Americans — recoiling from social unrest, protests, riots, and rising crime rates — were losing confidence in the Great Society policies of gun control’s liberal proponents. An Administration committed to expanding opportunities for all Americans was on the defensive and had embraced gun control as part of a strategy to reduce crime by preventing crime.⁶⁰ The President’s conservative critics thought the Administration’s gun control initiative ineffectual or insufficient and sought harsher controls on the “criminal.” They opposed recent Warren Court decisions according criminal defendants constitutional rights — “de facto civil rights”⁶¹ — and larded the 1968 bill with restrictions

⁵⁷ *Joey Bishop Show* (ABC television broadcast June 18, 1968) (a copy of their statement is available at <http://www.vpc.org/nrainfo/memo.htm>, as well as <http://www.gunownersalliance.com/Lbjo4.htm>; original available at Lyndon Baines Johnson Library). For correspondence between the Johnson administration and actors involved in gun control efforts, see <http://www.vpc.org/nrainfo/doc.htm>; <http://www.gunownersalliance.com/moses-1.htm> (last visited Oct. 5, 2008). For Heston’s perspective, see RAYMOND, *supra* note 56, at 178–80.

⁵⁸ The Executive Vice President of the NRA testified before Congress that no “sane American, who calls himself an American, can object to placing in [the Gun Control Act of 1968] the instrument which killed [President Kennedy].” Keersten Heskin, *Easier Than Obtaining a Driver’s License: The Federal Licensing of Gun Dealers*, 46 FLA. L. REV. 805, 819 n.123 (1994); see also NRA Staff, *Congress Threshes Out Gun Law Issue: Senators Defeat Four Registration and Licensing Attempts*, AM. RIFLEMAN, Nov. 1968, at 22, 22 (“[W]hile the interstate features of the measure ‘appear unduly restrictive and unjustified in their application to law-abiding citizens, the measure as a whole appears to be one that the sportsmen of America can live with and we are particularly glad to see 3 positive recommendations of the NRA become law.’” (quoting NRA Executive Vice President Franklin L. Orth)).

⁵⁹ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified in scattered sections of 5, 18, and 42 U.S.C.); Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified in scattered sections of 26 U.S.C.).

⁶⁰ Weaver, *supra* note 52, at 251 (“Ultimately, liberals betrayed their early solidaristic calls for social reform and warring on poverty and, by the end of the 1960s, they began downplaying underlying causes, arguing instead for more gun control. . . . By 1968, Democrats had aligned themselves with the ‘law and order’ program and were trying desperately to mimic the Republicans.”).

⁶¹ Yale Kamisar, *How Earl Warren’s Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice*, 3 OHIO ST. J. CRIM. L. 11, 25 (2005) (“[T]hat so many of the coerced confession cases ‘were appeals from southern courts, and so many of the defendants powerless blacks cast them as de facto civil rights cases.’” (quoting ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 462 (1997))). An early draft of Chief Justice Warren’s *Miranda* opinion noted

on them. As a result, the new gun control bill limited rights of the accused to counsel and to protections from interrogation.⁶² Concerned about the bill's restrictions on civil rights and its challenge to the Court's authority, Professor Alexander Bickel publicly urged the Senate to vote against the bill.⁶³

Encumbered with these restrictions on defendants' rights, the 1968 Act embodied a view of the criminally accused that was anathema to gun control's civil rights supporters, who opposed Jim Crow justice and the view that there were innate and identifiable "criminal classes" that government should control.⁶⁴ A congressman protested the contradictions of the 1968 Act: "Passing this legislation as a memorial to Sen. Kennedy was grimly ironic, because in life he had not supported it. He had opposed the wiretapping and confession provisions and called for strong gun controls," observing "[t]here must also be a firm commitment to eliminate the root causes of crime — the sense of despair and hopelessness born of continued privation, poverty, poor education and lack of equal opportunity."⁶⁵

But in 1968, Americans were losing confidence in this vision. Campaigning against the Great Society policies of the Johnson-

that "Negro defendants were subjected to physical brutality — beatings, hanging, whipping — employed to extort confessions" and cited a 1947 report of the "President's Committee on Civil Rights [that] probed further into police violence upon minority groups." BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT* 591 (1983) (quoting an early draft of the *Miranda* opinion); see also A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968) ("The Court's concern with criminal procedure can be understood only in the context of the struggle for civil rights. . . . If the Court's espousal of equality before the law was to be credible, it required not only that the poor Negro be permitted to vote and to attend a school with whites, but also that he and other disadvantaged individuals be able to exercise, as well as possess, the same rights as the affluent white when suspected of crime.").

⁶² The 1968 Act was amended over the President's opposition to include war-on-crime provisions that restricted the rights of criminal defendants only recently recognized by the Warren Court. See SPITZER, *supra* note 48, at 172 n.11; ROBERT J. SPITZER, *THE PRESIDENCY AND PUBLIC POLICY: THE FOUR ARENAS OF PRESIDENTIAL POWER* 69–70 (1983); Weaver, *supra* note 52, at 255–58; *Crime Bill an Odd Mix of Good, Bad*, INDEP., June 24, 1968, at B-2. For example, contrary to the Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), "[t]he bill provided that a confession by a defendant was to be admissible in evidence if it were 'voluntary,' even if the suspect had not been warned of his constitutional rights." *Congress Passes Extensive Anticrime Legislation*, 24 CONG. Q. ALMANAC 225, 226 (1968). The bill also "provided for the admissibility in evidence of eyewitness testimony, even if the suspect had not had a lawyer when he was identified in a police lineup," *id.*, directly contradicting the Warren Court's holding in *United States v. Wade*, 388 U.S. 218 (1967), that such evidence must be excluded. For further discussion of these provisions, see Recent Case, 82 HARV. L. REV. 1392 (1969) (discussing Title II of the Omnibus Crime Control and Safe Streets Act of 1968); see also Robert A. Burt, *Miranda and Title II: A Morgantatic Marriage*, 1969 SUP. CT. REV. 81.

⁶³ See Alexander M. Bickel, *The Senate Judiciary's Abominable Crime Bill*, NEW REPUBLIC, May 25, 1968, at 13, 13 (criticizing the bill as "so mangled by the Senate Judiciary Committee as to be an abomination").

⁶⁴ See LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS 200–08* (1983).

⁶⁵ See Bob Kastenmeier, *Toward a Peaceful Society*, CAP. TIMES, July 15, 1968, at 32.

Humphrey administration, Nixon deplored “the socially suicidal tendency — on the part of many public men — to excuse crime and sympathize with criminal[s] because of past grievances the criminal may have against society,”⁶⁶ and intimated “linkages between racial conflict and lawlessness.”⁶⁷ “Making no effort to distinguish between street crime, political protests, and urban riots, Nixon charged that liberals had promised a Great Society but had delivered great disorder.”⁶⁸ Soon thereafter, Richard Nixon swept to office on a campaign of “law and order.”

B. Movement-Countermovement: The Libertarian Second Amendment

The political maelstrom from which the 1968 Act emerged would shape the debates over gun control that exploded in its wake. The 1970s witnessed the birth of a libertarian movement for Second Amendment rights, which grew out of conservative “law and order” challenges to the Great Society.

In the early 1970s, gun control initiatives continued to gather support, spurred on by the assassination attempt that crippled presidential candidate George Wallace in 1972 and two more assassination attempts against President Ford in September of 1975.⁶⁹ As importantly, in this period, gun control initiatives were supported by an uneasy coalition of law and order conservatives⁷⁰ and civil rights leadership.⁷¹ The National Council to Control Handguns, later Handgun Control,

⁶⁶ Weaver, *supra* note 52, at 251 (quoting Richard M. Nixon, *Toward Freedom from Fear* (1968), reprinted in 114 CONG. REC. 12936, 12936 (1968)).

⁶⁷ *Id.* at 259 (describing a Nixon commercial linking protesters to “violence,” which Nixon observed “hits it right on the nose. It’s all about law and order and the damn Negro-Puerto Rican groups out there.” (quoting PHILIP A. KLINKNER & ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 292 (1999)) (internal quotation marks omitted)); see also BAKER, *supra* note 64, at 244 (“[A]lthough Nixon would not mention [George] Wallace by name, the Republican would appear as ‘a more respectable alternative’ to the Alabaman, countering his rhetoric ‘with a velvet-glove version of the mailed fist.’”); Steven Cann, *Politics in Brown and White: Resegregation in America*, 88 JUDICATURE 74, 76 (2004) (describing Nixon’s “southern strategy” as “an electoral strategy of the Republican Party to expand its electoral base by going soft on civil rights”); *id.* (“Nixon’s former presidential counsel John W. Dean argues that Rehnquist once defined ‘strict constructionism’ as voting against criminal defendants and civil rights plaintiffs.”).

⁶⁸ MICHAEL W. FLAMM, *LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S*, at 173 (2005); see also Weaver, *supra* note 52, at 251, 259.

⁶⁹ KRISTIN A. GOSS, *DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA* 39–40 (2006).

⁷⁰ For the 1972 Republican Party platform expressing support for gun control, see *infra* p. 215.

⁷¹ See GOSS, *supra* note 69, at 166–67 (“Many early gun control leaders were inspired by the citizen movements for civil rights, women’s rights, and consumer protection that unfolded in the 1950s, 1960s, and 1970s. They thought that a national victory for gun control could be next. Yet the gun control campaign was beginning to institutionalize nationally at a time when the power and moral authority of the federal government were waning. By 1974, the War on Poverty and the premises that inspired it were under attack . . .”).

Inc., was organized and expressed support for a national ban on handguns.⁷² Washington, D.C., enacted the handgun ban at issue in *Heller* in 1976.⁷³

But resistance to gun control was growing in the 1970s, both among gun rights activists and in the public at large. After a decade of protests, riots, and rising crime rates, national support for handgun bans dropped — from sixty percent in 1959 to forty-one percent in 1975.⁷⁴ The NRA pointed to this shift in public support when President Ford proposed more modest restrictions on the sale of inexpensive handguns (often referred to as “Saturday night specials”).⁷⁵

With the continuing rise in crime rates,⁷⁶ a conservative insurgency in the NRA questioned the organization’s willingness to support even moderate forms of gun control.⁷⁷ In 1975, Harlon Carter, head of the NRA’s newly created Institute for Legislative Action (ILA), testified against a bill that would tighten federal handgun regulation. His remarks sharply differentiated “law abiding . . . gun owners” from a different group of Americans whom Carter called “criminals”:

I do not believe a man is a future criminal just because he owns, or desires to own, a firearm.

. . . .

Law abiding people, and particularly gun owners, are tired of being blamed for crime. They are sick of being harassed with federal bureaucracy and having their freedom progressively and increasingly chipped away because of the inability or unwillingness of their government officials to deal with those responsible for crime, namely, criminals.

. . . .

⁷² GOSS, *supra* note 69, at 157–62.

⁷³ D.C. CODE ANN. § 7-2501.01 (LexisNexis 2008).

⁷⁴ *Gallup’s Pulse of Democracy: Gun Laws*, <http://www.gallup.com/poll/1645/Guns.aspx> (last visited Oct. 5, 2008); *see also* DECONDE, *supra* note 47, at 165 (reporting that in 1959 a Gallup poll found that 59% of Americans “wanted private ownership of handguns outlawed”); *Gun Control Bill Reported in House*, 32 CONG. Q. ALMANAC 406, 407 (1976) (“[I]n a series of lopsided votes, . . . [the House Judiciary Committee] rejected amendments to ban the sale and possession of handguns”); *Gun Control*, 28 CONG. Q. ALMANAC 524 (1972) (“Any proposal outlawing or drastically restricting the private possession of small arms would stand little chance of passage at this time.” (quoting Robert McClory, H. Subcomm. on the Judiciary) (internal quotation mark omitted)).

⁷⁵ Ashley Halsey Jr., *The President’s Stand on Guns*, AM. RIFLEMAN, Aug. 1975, at 23, 23 (discussing news of the Gallup polling on declining support for handgun controls and suggesting that the President was subject to “influences from within the Treasury and the Justice Departments”); *cf. supra* note 58 (describing NRA support for provisions of the 1968 Gun Control Act).

⁷⁶ James Vorenberg, *The War on Crime: The First Five Years*, ATLANTIC MONTHLY, May 1972, at 63, 63 (reporting a “30 percent increase in the reported crime rate during the first three years of the Nixon Administration”); *see also* GOSS, *supra* note 69, at 40 (“By the beginning of 1975, the nation had reached the highest rate of gun violence ever recorded: 16.1 shooting deaths per 100,000.”).

⁷⁷ *See supra* note 58 (describing NRA support for provisions of the 1968 Gun Control Act).

[P]eople in the media, in the Congress, in the courts seem to blame crime on everything in our society except the criminal and want to punish anyone and anything except the criminals.⁷⁸

Opposition to gun control was now expressed in law and order frames. The argument for gun rights divided society into two classes — citizen and criminal — and demonstrated deep estrangement from Great Society government. The gun rights argument did not presume the innocence of the poor or the innocence of the accused.⁷⁹ Like law and order discourse, the gun rights claim called for individual accountability and asked government to deliver security — not social justice. Unlike law and order discourse, the gun rights claim voiced a libertarian spirit that was increasingly hostile to the government in any guise.

The same year that Harlon Carter testified before Congress, Ronald Reagan, then Governor of California and a board member of Young Americans for Freedom (YAF),⁸⁰ published an article in the pages of *Guns & Ammo* that expressed these convictions in a constitutional register.⁸¹ YAF had recently formed a Citizens Committee for the Right to Keep and Bear Arms, and an affiliated Second Amend-

⁷⁸ *Firearms Legislation: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 94th Cong. 2845–47 (1975) (statement of Harlon Carter, Executive Director, National Rifle Association, Institute for Legislative Action).

⁷⁹ Carter continued:

There are very few victims of brutal criminality who wonder or even care about the socioeconomic conditions that may or may not have motivated their attacker. . . . [U]nder our system of justice — or at least as it was designed — the criminal who directly caused that suffering is supposed to pay the consequences. But somehow, it does not work out that way any more.

....

I do not believe that it is possible to take enough guns away from criminals to insure the safety of a disarmed public. But if the President is right, if most crime is attributable to a relatively small number of criminals, we can take them — the criminals — out of circulation.

Id. at 2853.

⁸⁰ Reagan had served on the advisory board of Young Americans for Freedom since 1962. *History*, Young Americans for Freedom, <http://www.yaf.com/history/index.php> (last visited Oct. 5, 2008); see also GREGORY L. SCHNEIDER, CADRES FOR CONSERVATISM: YOUNG AMERICANS FOR FREEDOM AND THE RISE OF THE CONTEMPORARY RIGHT 138 (1999); *Second Amendment Foundation*, in 2 GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE AND THE LAW 527, 527–28 (Gregg Lee Carter ed., 2002) [hereinafter GUNS IN AMERICAN SOCIETY]; *Active National Pro-Firearms Organizations*, National Rifle Association — Institute for Legislative Action, <http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=16> (last visited Oct. 5, 2008). For a description of the activities of the Second Amendment Foundation, see *SAF Fighting Good Fight for Constitutional Right To Keep and Bear Arms*, CONSERVATIVE DIG., Oct. 1981, at 40, 40 (describing the media activities of the Foundation as created “to meet the need for an intellectual defense of freedom of gun ownership”).

⁸¹ See Ronald Reagan, *Ronald Reagan Champions Gun Ownership*, GUNS & AMMO, Sept. 1975, at 34.

ment Foundation, with which Reagan was no doubt familiar.⁸² Reagan expressed objections to gun control in law and order frames (“Criminals are not dissuaded by soft words, soft judges or easy laws. They are dissuaded by fear and they are prevented from repeating their crimes by death or by incarceration.”⁸³), but Reagan *also* expressed the objection to gun control in constitutional terms. At a time when the legally literate read the text of the Second Amendment as plainly allowing gun regulation,⁸⁴ Reagan read its text as — potentially — plainly prohibiting gun regulation:

The Second Amendment is clear, or ought to be. It appears to leave little if any leeway for the gun control advocate. It 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.”

....

The [S]econd [A]mendment gives the individual citizen a means of protection against the despotism of the state. . . . [T]he rights of the individual are pre-eminent.

The founding fathers had seen, as the Declaration of Independence tells us, what a despotic government can do to its own people. Indeed, every American should read the Declaration of Independence before he reads the Constitution and he will see that the Constitution aims at preventing a recurrence of the way George III’s government treated the Colonies.

....

There are those in America today who have come to depend absolutely on government for their security. And when government fails they seek to rectify that failure in the form of granting government more power. So, as government has failed to control crime and violence with the means given it by the Constitution, they seek to give it more power at the expense of the Constitution.

But in doing so, in their willingness to give up their arms in the name of safety, they are really giving up their protection from what has always been the chief source of despotism — government.⁸⁵

Harlon Carter and Ronald Reagan were harbingers of change. Within two years, conservative members of the NRA led by Carter and comrade Neal Knox conducted what insurgents called a “revolt at Cincinnati,”⁸⁶ challenging incumbent NRA leaders who supported incremental forms of gun control regulation.

⁸² YAF played a key role in spearheading Reagan’s drive for the presidency in 1976 and 1980. See SCHNEIDER, *supra* note 80, at 161.

⁸³ Reagan, *supra* note 81, at 34.

⁸⁴ See *supra* notes 53–55 and accompanying text.

⁸⁵ Reagan, *supra* note 81, at 35.

⁸⁶ JOSEPH P. TARTARO, REVOLT AT CINCINNATI 39 (1981).

As recounted by Joseph Tartaro of *Gun Week*, the conservative insurgency was “intent on reorganizing the NRA with the specific purpose of breaking a stranglehold on the ILA and its freedom to defend the Second Amendment.”⁸⁷ The insurgents understood the constitutional struggle through the prism of the American Revolution. Tartaro reported:

Many pro-gun activists outside of NRA leadership were convinced that gun owners could no longer compromise on legislation designed to restrict the ownership of firearms. Indeed, some of these blamed prevailing statutes on compromises by NRA leadership in the 1930s and 1960s. . . . A classic confrontational situation developed not unlike the schism between the American colonists and the Crown in 1775.⁸⁸

While restrictions on lobbying by the ILA were at issue, so too were questions of politics and fundraising linked to the organization’s plans to move its headquarters from Washington, D.C., to Colorado Springs, where the NRA was building a complex for sports and conservation.⁸⁹ Carter’s supporters had in their possession a report on fundraising feasibility that warned:

NRA must attract to its cause powerful leadership and financial support that is today either repelled or put off by NRA’s image as the leader in the fight against gun control. . . . [T]he current media image of the NRA destroys its ability to raise money from foundations, especially the large ones such as Rockefeller, Ford and Mellon.⁹⁰

Distribution of this report to NRA membership helped Carter in his bid to take over the NRA in a revolt figured in constitutional terms: “As in the days preceeding [sic] the Declaration of Independence, the people who populated NRA’s colonies felt themselves unrepresented.”⁹¹

What the insurgents wanted was freedom for the ILA to defend “the political, civil and inalienable rights of the American people to keep and bear arms as a common law and Constitutional right both of the individual citizen and of the collective militia.”⁹² Thereafter, *American Rifleman* ran an article reporting on the difference between a “collective” right and “individual” right interpretation of the Second Amendment, and insisting that reports of Supreme Court precedents to

⁸⁷ *Id.* at 27.

⁸⁸ *Id.* at 19.

⁸⁹ *Id.*

⁹⁰ *Id.* at 21–22 (quoting the fundraising report by Oram International, Inc.).

⁹¹ *Id.* at 24; *see also id.* at 18 (displaying “Revolutionary War ‘Don’t Tread on Me’ flag as the emblem of a strong pro-gun political position”).

⁹² *Id.* at 36.

the contrary were mistaken: the collective right view could not be historically or legally substantiated.⁹³

C. *The Coalition Politics of the New Right: Originalism and the Republicans' Quest for Constitutional Restoration*

In the revolt at Cincinnati, Harlon Carter and his compatriots had established the fundamentals of the NRA's new constitutional politics. What they needed was institutional power to embody this new constitutional understanding in law. In fact, by the time of the Cincinnati revolt, the coalition that would carry them to power was already in place. An emergent New Right movement sought restoration of the Constitution in matters concerning criminal defendants' rights, gun control, and other "social issues," including prayer, busing, and abortion.

1. *"Social Issues" and the Direct Mail Strategies of the New Right.* — In 1974, Richard Viguerie, former executive secretary of YAF, chief fundraiser for George Wallace's 1972 presidential campaign, and a pioneer in computerized techniques of direct mail fundraising, called a meeting with Terry Dolan and Howard Phillips, formerly of YAF, and Paul Weyrich, who, with the Olin Foundation's help, had just founded the Heritage Foundation.⁹⁴ Viguerie planned to use the group's combined talents — and the mailing lists Viguerie had acquired working for YAF, for Wallace's campaign against busing,⁹⁵ and for other con-

⁹³ *Institute Reports: The Right To Keep and Bear Arms: An Analysis of the Second Amendment*, AM. RIFLEMAN, Aug. 1977, at 37. A more circumspect account of the takeover appears in the July issue. See NRA Staff, *Concerned NRA Members Redirect Their Association*, AM. RIFLEMAN, July 1977, at 16.

⁹⁴ Martin Durham, *Family, Morality and the New Right*, 38 PARLIAMENTARY AFF. 180, 180 (1985). On Viguerie's role in the Wallace campaign, see Alan Ehrenhalt, *The "New Right" Movement Emerging in Washington*, NASHUA TELEGRAPH, Oct. 28, 1976, at 23.

⁹⁵ In beginning his direct mail operation with the donor lists of the Wallace campaign, Viguerie was building a New Right by mobilizing Americans who were estranged from the civil rights rulings of the Warren Court. Wallace was famous for leading white resistance to *Brown*. See Michael J. Klarman, *Brown v. Board: 50 Years Later*, HUMAN., Mar.–Apr. 2004, at 24, 28 ("Governor George Wallace of Alabama personified the post-*Brown* racial fanaticism of southern politics. . . . Wallace declared in his [1962] inaugural address: ' . . . [S]egregation now, segregation tomorrow, segregation forever.'"); see also DAN T. CARTER, FROM GEORGE WALLACE TO NEWT GINGRICH: RACE IN THE CONSERVATIVE COUNTERREVOLUTION 1963–1994, at 48 (1996) (quoting a radio ad for Wallace's 1970 gubernatorial campaign that observed: "Suppose your wife is driving home at 11 o'clock. She is stopped by a highway patrolman. He turns out to be black. Think about it. . . . Elect George Wallace."). In his 1972 campaign for the presidency, Wallace expressed these themes in more muted terms, such as through as hostility to busing. See *Wallace's Showing in Primaries Kills Labor's Kingmaking Role*, HARTFORD COURANT, June 7, 1972, at 14 (reporting that Wallace told workers "that stopping busing was more important than overtime, seniority or a union shop"); Tom Wicker, *To Bus or Not To Bus*, N.Y. TIMES, Feb. 17, 1972, at 37 ("[Wallace] entered the race, crying that a vote for him would be a vote against busing.").

servative clients⁹⁶ — to invigorate the conservative movement. At the decade's end, Viguerie's magazine, *Conservative Digest*, described their successful strategy:

Attention to so-called social issues — abortion, busing, gun rights, pornography, crime — has also become central to the growth of the New Right. But to imagine that the New Right has a fixation on these issues misses the mark. The New Right is looking for issues that people care about, and social issues, at least for the present, fit the bill. As [Paul] Weyrich puts it, “We talk about issues that people care about, like gun control, abortion, taxes and crime. Yes they're emotional issues, but that's better than talking about capital formation.”⁹⁷

As Weyrich explained to *Time* magazine: “In the past, we conservatives have paraded all those Chamber of Commerce candidates with the Mobil Oil billboards strapped to their backs. It doesn't work in middle-class neighborhoods.”⁹⁸ These conservative strategists helped draw Protestant and Catholic clergy together to intervene in politics in defense of faith and family, and a new “moral majority” was born.⁹⁹

The emerging gun rights movement was fatefully shaped by its inclusion in this New Right coalition and by the direct mail strategies that Viguerie employed on its behalf. Direct mail strategies provided Viguerie and his clients financial independence from the Republican Party and foundation establishment and opened new communicative

Viguerie continued to affiliate with racial conservatives estranged from the Warren Court after he left the Wallace campaign and began to organize the New Right. See RUSS BELLANT, THE COORS CONNECTION: HOW COORS FAMILY PHILANTHROPY UNDERMINES DEMOCRATIC PLURALISM 16–17 (1991) (describing Viguerie's attendance at the “1976 convention of the American Independent Party (AIP) to seek a spot . . . on the national ticket. The AIP . . . was a coalition that included elements of the Ku Klux Klan, John Birchers . . . , and operatives of the Liberty Lobby.”).

⁹⁶ Tim Wyngaard, *On the GOP Front: New Breed Battles Old-Timers for Party Funds*, EL PASO HERALD-POST, June 17, 1977, at D-5 (observing that Viguerie started with “the mailing list of the arch-conservative Young Americans for Freedom (YAF), for which he formerly worked,” and “[i]n the next decade he collected and codified, cross-indexed and culled the names of 10 million American conservatives who would be willing to donate to right-wing causes on the basis of ‘personalized’ letters spewing from the computers”). Viguerie's clients built their own donor lists. “But they [couldn't] take the lists to another direct-mail firm. They [became] Viguerie's property as well.” *Id.*; see also RICHARD A. VIGUERIE & DAVID FRANKE, AMERICA'S RIGHT TURN: HOW CONSERVATIVES USED NEW AND ALTERNATIVE MEDIA TO TAKE POWER 150 (2004) (recounting how “the hundreds of thousands of names of Wallace contributors [that Viguerie] amassed were later used to help conservative Republicans take over the South”).

⁹⁷ *The New Right: A Special Report*, CONSERVATIVE DIG., June 1979, at 9, 10.

⁹⁸ *Right On for the New Right*, TIME, Oct. 3, 1977, at 24, 26 (internal quotation marks omitted).

⁹⁹ See *Mobilizing the Moral Majority*, CONSERVATIVE DIG., Aug. 1979, at 14; *The Pro-Family Movement: A Special Report*, CONSERVATIVE DIG., May–June 1980, at 14. For an account of the role the conservative strategists of the New Right played in forging a coalition of Protestants and Catholics aroused to protest secular humanism, the Equal Rights Amendment, and abortion, see Post & Siegel, *Roe Rage*, *supra* note 10, at 420–23.

channels in the public sphere that would allow them to bypass the traditional media.

In the fall of 1975, Viguerie, working with California State Senator H.L. Richardson, founded Gun Owners of America¹⁰⁰ (GOA) and soon after celebrated his direct mail fundraising success, identifying “[g]un enthusiasts a[s] one of the great untapped money markets for the new right.”¹⁰¹ Through direct mail, GOA used law and order frames expressing fear of the “criminal element” to stimulate gun rights mobilization. A GOA solicitation letter signed by Richardson warned that “if the criminal element knew we could not legally own firearms to protect our families and our property, . . . crime would double,” urging “that ‘radical,’ ‘gun-grabbing,’ ‘soft on crime’ politicians must not be allowed ‘to destroy our Constitution and unleash what could well be the most terrifying crime wave in modern history.’”¹⁰² Richardson would later describe direct mail’s power: “Direct mail can tell your story undiluted by the media and unadulterated by your opposition. You can pinpoint your message and call people to action. You can rally an army of support from those unaccustomed to political action.”¹⁰³ GOA began spending money raised by Viguerie’s direct mail campaign in support of political candidates who supported gun rights.¹⁰⁴ At the same time, Viguerie began fundraising on an even larger scale for the NRA, and worked with Harlon Carter of the ILA to build a political donation committee for the NRA modeled on GOA.¹⁰⁵ The Viguerie-Carter relationship coincided with Carter’s efforts to move the NRA right.¹⁰⁶

¹⁰⁰ Joe Scott, *The GOA Connection*, OAKLAND TRIB., Apr. 4, 1976, at 18. The head of GOA was State Senator Bill Richardson of Sacramento, California, “a one-time field representative of the John Birch Society.” ALAN CRAWFORD, THUNDER ON THE RIGHT: THE “NEW RIGHT” AND THE POLITICS OF RESENTMENT 33 (1980).

¹⁰¹ Paul Houston, *Foes of Gun Control Press Fund Drives*, L.A. TIMES, Apr. 25, 1976, at 1 (internal quotation marks omitted).

¹⁰² *Id.* (quoting solicitation letter signed by H.L. Richardson, founder of Gun Owners of America) (internal quotation marks omitted).

¹⁰³ H.L. Richardson, *Political Turn to the Right Would’ve Been Impossible Without Role of Direct Mail*, CONSERVATIVE DIG., June 1981, at 23, 23.

¹⁰⁴ Houston, *supra* note 101.

¹⁰⁵ *Id.*; see also CRAWFORD, *supra* note 100, at 67–69 (reporting that in 1975 Viguerie handled fundraising for the ILA, bringing in \$5.8 million at a cost of \$3.2 million and building the organization’s list of contributors by 600,000 names, and observing that in the late 1970s, Viguerie raised \$12 million for the NRA while also doing direct mail work for the Citizens Committee for the Right to Keep and Bear Arms and Gun Owners of America).

¹⁰⁶ See *supra* section II.B; see also GOSS, *supra* note 69, at 172 (describing the creation of NRA’s Office of Legislative Affairs, which raised nearly \$2 million in a year, and noting how “advocates dissatisfied with what they saw as the NRA’s insufficiently hard-line stance created Gun Owners of America, which pulled the NRA in the direction of protecting its right flank”). Martin Durham describes the New Right strategy:

The anti-gun-control National Rifle Association and the anti-abortion National Right to Life Committee were not so willing to give up their political independence, and the New

The Viguerie-Carter working relationship put gun rights advocates in coalition with many other conservative single-issue groups. Together, this emergent coalition helped transform the Republican Party platform on so-called “social issues,” including gun control and the Second Amendment. In 1972, the Republican platform reflected Nixon’s vision and charged state and federal government with responsibility for “prevent[ing] criminal access to all weapons, including special emphasis on cheap, readily-obtainable handguns,” while promising to “[s]afeguard the right of responsible citizens to collect, own and use firearms for legitimate purposes, including hunting, target shooting and self-defense.”¹⁰⁷ In 1976, Reagan narrowly lost the Republican nomination to Gerald Ford, and the party’s platform adopted a different approach to gun control and the Constitution: “We support the right of citizens to keep and bear arms. We oppose federal registration of firearms. Mandatory sentences for crimes committed with a lethal weapon are the only effective solution to this problem.”¹⁰⁸ Statist law and order talk of the Nixon era gave way to the more libertarian law and order talk of the New Right, of the kind that Reagan, Harlon Carter, and Viguerie were developing.¹⁰⁹

2. *Originalism and the “Social Issues” of the New Right.* — Reagan’s election as President in 1980 raised hopes that this libertarian, law and order understanding of the Second Amendment might soon become law — despite the attempt to assassinate the President only months after his election and the shooting murder of John Lennon.¹¹⁰ In the early 1980s, the town of Morton Grove enacted a handgun ban that the Court, in a closely watched decision, let stand.¹¹¹ In the Senate, where Reagan’s election swept Republicans to power, conservatives had their first opportunity to refashion the constitutional law under which gun control laws would be judged. Strom Thurmond became chair of the Senate Judiciary Committee, replacing Edward Kennedy,¹¹² and Orrin Hatch assumed control of the Subcommittee on

Right was compelled to work with them as best it could. At the same time, it . . . encouraged small groups on the independent organisations’ right — the Gun Owners of America in the first case, the Life Amendment Political Action Committee and the American Life Lobby in the second.

Durham, *supra* note 94, at 181.

¹⁰⁷ REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1972, *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=25842>.

¹⁰⁸ REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1976, *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=25843>.

¹⁰⁹ See Wyngaard, *supra* note 96 (discussing role of direct mail in changing the shape of the Republican National Party).

¹¹⁰ GOSS, *supra* note 69, at 45–46. See *Quilici v. Village of Morton Grove*, 464 U.S. 863 (1983) (mem.) (denying certiorari).

¹¹¹ GOSS, *supra* note 69, at 162–65.

¹¹² *Id.* at 46.

the Constitution. The combination was ideal for Viguerie, who did direct mail fundraising for Thurmond and Hatch;¹¹³ Viguerie and Weyrich had helped Hatch win election to the Senate in 1976,¹¹⁴ where he was now a key member of the New Right inner circle.¹¹⁵

Upon assuming subcommittee chairmanship, Hatch authorized extensive historical research on the Second Amendment and, in February of 1982, issued a report entitled *The Right To Keep and Bear Arms*.¹¹⁶ The report announced: "What the Subcommittee on the Constitution uncovered was clear — and long lost — proof that the second amendment to our Constitution was intended as an individual right of the American citizen to keep and carry arms in a peaceful manner, for protection of himself, his family, and his freedoms."¹¹⁷ In 1986, Congress passed the Firearm Owners Protection Act,¹¹⁸ which specifically invoked "the rights of citizens . . . to keep and bear arms under the second amendment" as a basis for repealing parts of the 1968 Gun Control Act and imposing mandatory sentences for using a gun in committing certain crimes.¹¹⁹ With this act of legislative constitutionalism, principles and policies that members of the New Right had worked out in the 1970s were now embodied in law.

But the developments that would do most to legitimate the new Second Amendment arguments unfolded in the Reagan Justice Department. After his resounding reelection, President Reagan elevated

¹¹³ *He's Mail Fundraising King*, SYRACUSE HERALD-AM., Jan. 8, 1978, at 79 (explaining that Viguerie solicits money "to fight the Panama Canal treaties, abortion, gun control, [and] the Equal Rights Amendment" and that monies are "contributed to candidates like George Wallace, Sen. Jesse Helms, R-N.C., Sen. Orrin [sic] Hatch, R-Utah, and Sen. Strom Thurmond, R-S.C.?).

¹¹⁴ Viguerie boasts of having helped elect Orrin Hatch. See RICHARD A. VIGUERIE, *THE NEW RIGHT: WE'RE READY TO LEAD* 38, 60 (1981). Critics charged that Viguerie's committees made loans to Hatch's Senate campaign that together exceeded the limits set by campaign finance laws. See *Panel Reports Complaint on Hatch Contributions*, SALT LAKE TRIB., Oct. 21, 1976, at 10A. Weyrich also takes credit for helping elect Hatch. See Lee Edwards, *Paul Weyrich: Conscience of New Right Fighting for Conservative Victory in '82*, CONSERVATIVE DIG., July 1981, at 2, 4 (discussing how Weyrich's Committee for the Survival of a Free Congress (CSFC) helped elect Hatch in 1976).

¹¹⁵ See *Right On for the New Right*, *supra* note 98, at 24.

¹¹⁶ STAFF OF SUBCOMM. ON THE CONSTITUTION OF THE S. COMM. ON THE JUDICIARY, 97TH CONG., *THE RIGHT TO KEEP AND BEAR ARMS* vii (Comm. Print 1982) ("Immediately upon assuming chairmanship of the Subcommittee on the Constitution, I sponsored the report . . . [on] the right to keep and bear arms."). Hatch observed:

We did not guess at the purpose of the British 1689 Declaration of Rights; we located the Journals of the House of Commons and private notes of the Declaration's sponsors, now dead for two centuries. . . . We did not speculate as to the intent of the framers of the second amendment; we examined James Madison's drafts for it, his handwritten outlines of speeches upon the Bill of Rights

Id. at vii-viii.

¹¹⁷ *Id.* at viii.

¹¹⁸ Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified at 18 U.S.C. §§ 921-929 (2006)).

¹¹⁹ *Id.* § 1(b) (codified at 18 U.S.C. § 921 note).

Edwin Meese to Attorney General in 1985. Meese was determined to translate into law the conservative movement's wide-ranging demands for constitutional restoration.¹²⁰ Ronald Reagan made a key part of his campaign for the presidency the promise to replace the judiciary with judges who, in the words of the Republican Party platform, "respect traditional family values and the sanctity of innocent human life."¹²¹ As Reagan took office, Weyrich worked from the Heritage Foundation and then the Free Congress Foundation — the conservative think tanks he had helped found with Coors and Scaife money — to press for change on "social issues" through the judiciary.¹²² This focus on the judiciary would be crucial: by the end of his second term, President Reagan would appoint close to half of the lower federal court judges, and three new Supreme Court Justices.¹²³ Reagan's impact on the judiciary resulted not only from the numbers of his appointments, but also from the distinctive constitutional understandings and commitments that the Administration brought to the federal bench.

At the time of Reagan's election, conservative critiques of the Court had begun to shift from demands for "strict construction" — a theme of the Nixon years — to an emerging call for return to the Constitution's "original intent" — a theme sounded by Robert Bork, Raoul Berger, and *Benchmark*, a journal published by the Olin- and Scaife-funded Center for Judicial Studies.¹²⁴ The government itself began to

¹²⁰ See *infra* p. 220. See generally Steven M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, Prepared for Studies in American Development (unpublished manuscript, on file with the Harvard Law School Library).

¹²¹ REPUBLICAN NAT'L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1980, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25844>; see Sheldon Goldman, *Reagan's Second Term Judicial Appointments: The Battle at Midway*, 70 JUDICATURE 324, 324–25 (1987).

¹²² Weyrich founded the conservative Heritage Foundation and the Free Congress Foundation with funds from Joseph Coors and Richard Scaife. By 1988, Scaife had given the Free Congress Foundation \$7,014,000, making him the Foundations' top lifetime donor. BELLANT, *supra* note 95, at 83. Under Weyrich's leadership, both organizations focused on judicial reform. See John Chamberlain, *Moral Issues Not a Good Core for Political Coalitions*, IRONWOOD DAILY GLOBE, Dec. 1, 1981, at 4 (discussing polling by Weyrich's Heritage Foundation in the spring of 1980 reporting that "two-thirds of the people would prefer to have state rather than federal judges decide such 'social issues as abortion, busing and voluntary prayer in the schools'" and explaining that "the New Right's Paul Weyrich has decided to lead off with a call for reform of our court system"). See generally A BLUEPRINT FOR JUDICIAL REFORM (Patrick B. McGuigan & Randall R. Rader eds., 1981) (collecting papers of a conference sponsored by the Free Congress Research and Education Foundation).

¹²³ David M. O'Brien, *Federal Judgeships in Retrospect*, in THE REAGAN PRESIDENCY 327, 327 (W. Elliot Brownlee & Hugh Davis Graham eds., 2003); see also Goldman, *supra* note 121, at 325.

¹²⁴ For a history of originalism's construction in the Reagan administration, see JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS 111–32, 162–70 (2005). The Center for Judicial Studies connected conservatives in the foundations, government, and the academy interested in developing constitutional theory for the New Right. See *id.* at 137, 148 (observing

express criticism of the Court in originalist terms in Reagan's second term, with Meese's appointment as Attorney General strengthening ties between the Justice Department and the various think tank organizations of the New Right, such as Weyrich's Heritage Foundation and the Center for Judicial Studies.¹²⁵ Soon after his appointment, Meese drew fire with a series of prominent addresses embracing original intent¹²⁶ and challenging the Court's claim in *Cooper v. Aaron*¹²⁷ that its decisions were the supreme law of the land: "To confuse the Constitution with judicial pronouncements allows no standard by which to criticize and to seek the overruling of" the Court's decisions and thus was "to submit to government by judiciary."¹²⁸ As Nixon had shown, calls for "strict construction" of the Constitution that condemned the busing and criminal defendants decisions of the Warren Court helped mobilize and unite Americans;¹²⁹ Reagan demonstrated how filio-pietistic appeal to the framers' Constitution could legitimate the New Right's demands for constitutional change.¹³⁰ Meese's speeches endorsing original intent and the departmental prerogative of the executive branch to challenge the Court's interpretation of the Constitution now gave the movement's constitutional politics jurisprudential form.¹³¹

that *Benchmark* featured articles by James McClellan and Gary McDowell, who "became associate director of the Office of Public Affairs in the Justice Department in June 1985 and helped formulate Meese's speeches on originalism"). Gary McDowell's work at the Center for Judicial Studies was reportedly funded by the Olin Foundation and the Sarah Scaife Foundation. See Media Transparency, Grants to Center for Judicial Studies, <http://www.mediatransparency.org/recipientgrantsprint.php?recipientID=1056> (last visited Oct. 5, 2008). For more on the Center for Judicial Studies' *Benchmark* magazine, see SIDNEY BLUMENTHAL, *THE RISE OF THE COUNTER-ESTABLISHMENT* 301-02 (1986); Al Kamen & Howard Kurtz, *Theorists on Right Find Fertile Ground: Conservative Legal Activists Exert Influence on Justice Department*, WASH. POST, Aug. 9, 1985, at A1.

¹²⁵ See Kamen & Kurtz, *supra* note 124 (reporting that conservative foundations "appear to have a particularly aggressive ally in Meese" and quoting the director of the "judicial-revision project" at the Free Congress Foundation describing the foundation's relation to the Justice Department, "We're part of the team . . . We're trying to influence the agenda. We provide some of the intellectual power.").

¹²⁶ O'NEILL, *supra* note 124, at 156.

¹²⁷ 358 U.S. 1 (1958).

¹²⁸ Edwin Meese III, *Perspectives on the Authoritativeness of Supreme Court Decision: The Law of the Constitution*, 61 TUL. L. REV. 979, 989 (1987). In challenging the Court's authority, Meese was invoking Lincoln's challenge to *Dred Scott* and implicitly, Raoul Berger's recent attack on the Warren and Burger Courts. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 363 (1st ed. 1977) (criticizing proponents of a "living Constitution"); *id.* at 367 (criticizing all those who "endeavored to discredit 'original intention,' to rid us of the 'dead hand of the past'"); *id.* at 370 (stating that "[i]f the Court may substitute its own meaning for that of the Framers it may . . . rewrite the Constitution without limit").

¹²⁹ See sources cited *supra* note 68.

¹³⁰ *Cf. supra* p. 210.

¹³¹ See Post & Siegel, *Originalism As a Political Practice*, *supra* note 10, at 549 ("To understand originalism's power at the dawn of the twenty-first century is to appreciate the subtle ways in

But how would those committed to originalism achieve restoration of *their* Constitution? The Center for Judicial Studies's *Benchmark* did more than urge a jurisprudence of original intent; it helped conservatives work out a New Right approach to constitutional change. Although proponents of original intent insisted that the Constitution could only be changed through Article V amendment,¹³² the director of the Center for Judicial Studies, James McClellan, penned editorials advising conservatives to “kick the habit” of relying on Article V to overturn Supreme Court decisions; the strategy had repeatedly failed in the 1960s and 1970s and tended instead to legitimate the Court.¹³³ “[T]here is something fundamentally wrong with our system if we are driven to amend the Constitution so as to restore its original meaning,”¹³⁴ McClellan advised, criticizing the Reagan Administration's “Prayer Amendment” and pointing out that conservatives would better achieve their aims by selectively restricting the Court's jurisdiction or filing amicus briefs in Supreme Court cases.¹³⁵ Introducing an issue of *Benchmark* in the fall of 1984 that surveyed some seven hundred decisions of the judges Reagan had appointed in his first term (a survey undertaken with the support of the Right-to-Work Foundation), McClellan was plainly impressed. McClellan predicted that the President's

careful selection of judges thus far points to the conclusion that he will succeed in protecting many of his political gains against judicial attack in the years ahead. Indeed, Reagan's reform of the Federal Judiciary, done

which originalism connects constitutional law to a living political culture and provides its proponents a compelling language in which to seek constitutional change through adjudication and politics.”); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 601 (2004) (“[O]riginalism was a reactive theory motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger Courts; originalism was largely developed as a mode of criticism of those actions.”).

¹³² O'NEILL, *supra* note 124, at 126 (“[Raoul] Berger . . . regularly defended . . . the reservation of basic constitutional change for the Article V amendment process.”); *see also infra* note 137 (discussing an article by Justice Antonin Scalia written in 1989).

¹³³ James McClellan, *Kicking the Amendment Habit*, BENCHMARK, Jan.–Feb. 1984, at 1, 2 (“[W]e should resist efforts to add amendments to our fundamental law to correct misinterpretations rendered by the Supreme Court. At the very least, such amendments tend to wink at judicial supremacy, and color the Court's usurpations with the tint of legitimacy.”); *see also* O'NEILL, *supra* note 124, at 148, 257 n.52. The New Right's assumption that constitutional change on the “social issues” agenda would come through legislative channels — statutes regulating the judiciary and Article V amendments — was visible in a conflict during the first year of Reagan's presidency. *See* John Lofton Jr., *Baker Urges Delay of Social Issues Legislative Agenda Until Next Year*, CONSERVATIVE DIG., May 1981, at 2, 2–3 (reporting that the Senate would “delay until next year the so-called ‘social issues’ agenda — that is, legislation dealing with abortion, forced busing, voluntary school prayer, family protection, etc.” — to give priority to the President's economic program, and characterizing the deferral as requiring postponement of “emotional issues and constitutional amendments”).

¹³⁴ McClellan, *supra* note 133, at 2.

¹³⁵ *Id.* at 2–3.

without the benefit of legislation reducing the power of the courts, may prove to be the most enduring achievement of his presidency.¹³⁶

Thus, as conservatives took over the federal bench, they kicked their old Article V habits and began to employ new constitutional tools. Originalists might still catechistically insist that changing the Constitution required amending it,¹³⁷ but as McClellan emphasized, “to restore [the Constitution’s] original meaning”¹³⁸ did not.

In assuming the role of Attorney General in Reagan’s second term, Meese approached appointments as a way “to institutionalize the Reagan revolution so it can’t be set aside no matter what happens in future presidential elections.”¹³⁹ Stephen Markman was named head of the Office of Legal Policy (OLP) to oversee this effort.¹⁴⁰ As chief counsel for Orrin Hatch’s Subcommittee on the Constitution, Markman helped write *The Right To Keep and Bear Arms* and was then asked to found the D.C. chapter of the Federalist Society.¹⁴¹ Reporting on Reagan’s elevation of Federalist Society “favorite” Antonin Scalia to the Supreme Court in 1986, the *New York Times* quoted Markman as explaining that “[t]he Federalist Society provides a good opportunity for us to get to know people who share the constitutional conservative perspective of the Attorney General and the President.”¹⁴² By the end of his second term, Reagan had appointed nearly half of the nation’s judges in a highly orchestrated and careful screening process that paid close attention to the nominees’ substantive views.¹⁴³ “‘Reagan had certain judicial values he wanted institutionalized on the bench,’ . . . Markman, now a judge on the Michigan Supreme Court,” recently emphasized.¹⁴⁴

¹³⁶ James McClellan, *Advertisement to Our Readers*, BENCHMARK, July–Oct. 1984, at ii.

¹³⁷ As Justice Scalia analyzed the question in 1989, judges should interpret the Constitution to enforce fidelity to “original values”; it was abandoning original values that required a constitutional amendment. See Scalia, *supra* note 13, at 862.

¹³⁸ McClellan, *supra* note 133, at 2 (emphasis added).

¹³⁹ David M. O’Brien, Op-Ed., *Meese’s Agenda for Ensuring the Reagan Legacy*, L.A. TIMES, Sept. 28, 1986, at E3 (quoting Edwin Meese III, Attorney General) (internal quotation marks omitted); see also Teles, *supra* note 120.

¹⁴⁰ Press Release, Department of Justice, Markman New Head of OLP (1985), available at http://www.usdoj.gov/oip/foia_updates/Vol_VI_4/page1.htm.

¹⁴¹ STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 145 (2008).

¹⁴² *Judge Scalia’s Cheerleaders*, N.Y. TIMES, July 23, 1986, at B6 (quoting Stephen Markman, who represented the Justice Department at judicial selection meetings in the White House) (internal quotation marks omitted). In the same article, the *Times* also reported that the Federalist Society, founded in 1981, had \$100,000 of its \$400,000 budget in 1985 funded by the Scaife Foundation. *Id.*

¹⁴³ See O’Brien, *supra* note 123, at 333–34 (describing the introduction of an “unprecedented screening process for potential judicial nominees” involving comparison of candidates’ records in a computerized database and day-long interviews in which candidates were asked questions “about their views on abortion, affirmative action, and criminal justice”).

¹⁴⁴ T.R. Goldman, *The Flower of the Reagan Revolution*, LEGAL TIMES, Aug. 1, 2005, at 40.

In 1987, under Markman's direction, the OLP prepared an *Original Meaning Jurisprudence* sourcebook,¹⁴⁵ which reproduced foundational texts on original intent, including excerpts from Raoul Berger's *Government By Judiciary*, and a speech by Antonin Scalia urging that claims about the original intent were better understood as claims about "original meaning" — claims based on the understandings of the Americans who ratified the document rather than those who drafted it.¹⁴⁶ The following year, the OLP institutionalized these views about the proper method of interpreting the Constitution in the Department of Justice's *Guidelines on Constitutional Litigation*¹⁴⁷ and a lengthy document entitled *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation*,¹⁴⁸ which singled out the areas of substantive law that judicial appointments would affect. Like the sourcebook, the *Guidelines* and *The Constitution in the Year 2000* identified favored and disfavored lines of cases that tracked "social issues" of the New Right (for example, the rights of criminal defendants, school prayer, and contraception and abortion).¹⁴⁹

The OLP documents set out this New Right agenda for constitutional change as a project of restoring the original meaning of the Constitution. The OLP *Guidelines on Constitutional Litigation* explained how originalism justified changing constitutional law: "The inclusion of an original meaning section [in government briefs] will help to focus judges on the text of the Constitution and away from their personal

¹⁴⁵ OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK (1987) [hereinafter OLP, SOURCEBOOK].

¹⁴⁶ *Id.* at 101, 103–04, 139–50.

¹⁴⁷ OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION 3 (1988) [hereinafter OLP, GUIDELINES] ("[C]onstitutional language should be construed as it was publicly understood at the time of its drafting and ratification and government attorneys should advance constitutional arguments based only on this 'original meaning.'").

¹⁴⁸ OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION (1988) [hereinafter OLP, CONSTITUTION IN THE YEAR 2000]. For a fuller account, see Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363 (2003).

¹⁴⁹ See OLP, CONSTITUTION IN THE YEAR 2000, *supra* note 148; OLP, GUIDELINES, *supra* note 147, at 82 (identifying the "right of privacy cases, exemplified by *Griswold v. Connecticut*, 381 U.S. 479 (1965)," which held unconstitutional a Connecticut statute criminalizing the use of birth control, and *Roe v. Wade*, 410 U.S. 113 (1973), which held that states could not prohibit abortion, as "examples of judicial creation of 'fundamental' rights not found in the Constitution"); *id.* at 86–87 ("Neither the search and seizure exclusionary rule nor the procedural rules for custodial interrogations established by *Miranda v. Arizona*, 384 U.S. 436 (1966)," rules that protect the rights of criminal defendants, have any "constitutional or statutory basis"); *id.* at 85–86 (arguing that "no establishment of religion was involved" in a Third Circuit case where a high school refused to allow students to use school facilities for prayer meetings); OLP, SOURCEBOOK, *supra* note 145, at vi (listing the *Sourcebook's* disfavored cases "illustrating non-interpretivist jurisprudence").

preferences or from incorrectly reasoned court precedent as the appropriate basis for decisionmaking.”¹⁵⁰ The originalist narrative presents change as legitimate precisely *because* it is impersonal and *not* responsive to the “personal preferences” of the interpreter. Markman used the same language of self-denial in explaining how the judges the Administration had nominated would change constitutional law: “We’ve tried to appoint to the bench individuals who understand that their own policy preferences are not necessarily incorporated into the Constitution”¹⁵¹

The executive branch’s project of constitutional restoration strengthened individual rights claims under the Second Amendment. President Reagan affirmed that the founders’ Constitution protected an individual right to bear arms: “Our team believes that law-abiding people who want to protect their home and family have a constitutional right to own guns.”¹⁵² Similarly, the Justice Department’s *Guidelines on Constitutional Litigation*, which sought changes in constitutional law that would embody the original understanding, affirmed that the “Constitution protects numerous individual liberties against government infringement,” including among the rights that “the Bill of Rights expressly protects against federal government action . . . the right to keep and bear arms (Second Amendment).”¹⁵³ Even more consequentially, numerous federal judges were appointed who shared the President’s constitutional vision.¹⁵⁴ Claims about original understanding that the Reagan Justice Department helped forge offered a rule-of-law reason for the Administration and the judges Reagan appointed to abandon Warren and Burger Court precedents addressing “social issues” of the New Right and to propose new bodies of constitutional law in their stead. Changing the Constitution required amending it, but as James McClellan had

¹⁵⁰ OLP, GUIDELINES, *supra* note 147, at 10.

¹⁵¹ Kathryn Kahler, *Vision of a Reformed Judiciary Unlikely To Materialize*, DAILY INTELLIGENCER/MONTGOMERY COUNTY REC., Jan. 20, 1988, at 11 (quoting Stephen Markman, assistant attorney general in the Office of Legal Policy) (internal quotation marks omitted).

¹⁵² Remarks at a Republican Campaign Rally in Mesquite, Texas, 2 PUB. PAPERS 1461, 1463 (Nov. 5, 1988); *see also* Remarks at the Annual Members Banquet of the National Rifle Association in Phoenix, Arizona, 1 PUB. PAPERS 659, 660 (May 6, 1983) (“[T]he Constitution does not say that government shall decree the right to keep and bear arms. The Constitution says ‘. . . the right of the people to keep and bear Arms, shall not be infringed.’”).

¹⁵³ OLP, GUIDELINES, *supra* note 147, at 70.

¹⁵⁴ *See id.* (describing careful “ideological screening” of Reagan’s judicial nominees). At the time Justice Scalia penned his decision in *Heller*, almost all significant opinions written by federal judges in the late twentieth century that recognize or remark favorably upon an individual right to bear arms appear to have been written by judges whom President Reagan appointed. *See infra* note 234.

emphasized, “to *restore* [the Constitution’s] original meaning”¹⁵⁵ did not.¹⁵⁶

Commentary on the Second Amendment in the nation’s law reviews changed with these movement and government activities. Discussion of the right to bear arms increased with the introduction of gun control proposals in Congress in the 1960s and 1970s, but spiked in the 1980s and after.¹⁵⁷ Not only were there more articles, but they were differently researched and reasoned. They focused on founding-era history and appealed to the past, not simply as the repository of custom and wisdom,¹⁵⁸ but of impersonally binding law.¹⁵⁹

Yet even as the New Right coalition imbued libertarian claims on the Second Amendment with originalist authority, endowing the argument with evidence, rhetorical form, and public authority, the Second Amendment claim was never wholly integrated with the other “social issues” of the New Right coalition that Viguerie and Weyrich helped build, nor was it fully integrated into the originalist constitutional vision emerging from the Meese Justice Department. The impediments may have been personal and political.¹⁶⁰ Or they may have stemmed from a deeper tension between the original understanding claims the

¹⁵⁵ McClellan, *supra* note 133, at 2 (emphasis added).

¹⁵⁶ For a volume that locates the Second Amendment in a survey of the “original meaning” and “current understanding of the Bill of Rights,” see THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING (Eugene W. Hickock, Jr., ed., 1991) (compiling papers from eight separate conferences conducted by the Center for Judicial Studies between 1985 and 1987).

¹⁵⁷ As of Oct. 5, 2008, a Hein Online title search for “Second Amendment,” “bear arms,” or “gun control” in the Law Journal Library database resulted in 8 publications before 1950, 1 between 1950 and 1959, 8 between 1960 and 1969, 21 between 1970 and 1979, 59 between 1980 and 1989, 162 between 1990 and 1999, and 149 between 2000 and the present.

¹⁵⁸ See, e.g., Robert A. Sprecher, *The Lost Amendment*, 51 A.B.A. J. 554, 554 (1965) (arguing that because of “[t]he wisdom of the Founding Fathers . . . , the framework of the original document has proved durable enough to encompass great flexibility through the device of judicial interpretation”); see also James A. McClure, *Firearms and Federalism*, 7 IDAHO L. REV. 197, 205 (1970) (“Since the genius of the nation’s founders has been the basis of our system of checks and balances and federal structure, scholars are continually attempting to interpret their words.”).

¹⁵⁹ See, e.g., Bernard J. Bordenet, *The Right To Possess Arms: The Intent of the Framers of the Second Amendment*, 21 UWLA L. REV. 1, 30 (1990) (“The only proper and logical approach is to interpret the Constitution as its drafters and adopters intended. The Constitution contains provisions for amending it. Amendment through judicial fiat is both unconstitutional and illegal.” (footnote omitted)); Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 75 (1983) (“The Americans desired a written constitution, for it was felt a constitution should contain ‘a fixed and definite body of principles.’” (quoting 1 R. CURRENT ET AL., AMERICAN HISTORY: A SURVEY 111 (3d ed. 1971))).

¹⁶⁰ In the early 1980s, the NRA lobbyist Neal Knox got in a conflict with Reagan’s advisor Edwin Meese over plans to reorganize the Bureau of Alcohol, Tobacco, and Firearms; Knox was thereafter dismissed, in what appears to have been an effort to smooth relations with the Administration. See sources cited *infra* note 188. For a gun rights critique of Reagan’s commitment to gun rights, see Keep and Bear Arms, What Do You Think of This Politician?: A Follow-up to the KABA Poll (June 14, 2003), <http://www.keepandbeararms.com/NewsArchives/XcNewsPlus.asp?cmd=view&articleid=2955>.

New Right was making about the Second Amendment and other parts of the Constitution. In *The Constitution in the Year 2000*, originalism advanced the “social issues” agenda of the New Right by delegitimizing rights recognized by the Warren and Burger Courts; originalism was a tool for criticizing *courts*, not for challenging legislatures. By contrast, the individual rights claim on the Second Amendment was a New Right right, at odds with judicial precedent and in tension with New Right complaints about judicial activism. Its recognition would require a federal bench prepared to advance original understanding as a reason for invalidating *legislative* action.

At the end of the 1980s, the bench and bar still did not see the Second Amendment as authorizing judicial intervention of that kind. In 1991, former Chief Justice Warren Burger appeared on the *MacNeil/Lehrer News Hour* to call individual rights claims under the Second Amendment “the subject of one of the greatest pieces of fraud, I repeat the word ‘fraud,’ on the American public by special interest groups that I have ever seen in my lifetime.”¹⁶¹ Former Solicitor General Erwin Griswold was equally sharp in chastising the “National Rifle Association and its friends in Congress”: “[T]o assert that the Constitution is a barrier to reasonable gun laws, in the face of the unanimous judgment of the federal courts to the contrary, exceeds the limits of principled advocacy.”¹⁶² These remarks disparaging the NRA’s Second Amendment claims reflected what then remained the widespread view in the profession, even among conservative critics of the Warren and Burger Courts. In 1989, Robert Bork asserted that the Second Amendment operates “to guarantee the right of states to form militia, not for individuals to bear arms,” and indicated his belief that all state gun control is “probably constitutional.”¹⁶³ Even though the number of law review articles on the right to bear arms increased in the 1980s, at least nineteen of the twenty-seven articles written between 1970 and 1989 espousing the view that the Second Amendment protected an individual right to bear arms were “written by lawyers who had been directly employed by or represented the NRA or other

¹⁶¹ *The MacNeil/Lehrer NewsHour* (PBS television broadcast Dec. 16, 1991) (quoting former Chief Justice Warren Burger); see also Joan Biskupic, *Guns: A Second (Amendment) Look*, WASH. POST, May 10, 1995, at A20.

¹⁶² Erwin N. Griswold, *Phantom Second Amendment “Rights,”* WASH. POST, Nov. 4, 1990, at C7.

¹⁶³ Claudia Luther, *Bork Says State Gun Laws Constitutional*, L.A. TIMES, Mar. 15, 1989, at B5; see also Miriam Bensimhorn, *Advocates: Point and Counterpoint, Laurence Tribe and Robert Bork Debate the Framers’ Spacious Terms*, LIFE, Fall 1991 (Special Issue), at 96, 98 (“[T]he National Rifle Association is always arguing that the Second Amendment determines the right to bear arms. But I think it really is people’s right to bear arms in a militia. The NRA thinks that it protects their right to have Teflon-coated bullets. But that’s not the original understanding.” (quoting Robert Bork)).

gun rights organizations, although they did not always so identify themselves in the author's footnote."¹⁶⁴

This was to change in the years after Sanford Levinson published his 1989 article, *The Embarrassing Second Amendment*,¹⁶⁵ in the pages of the *Yale Law Journal*, followed by Akhil Amar's articles *The Bill of Rights As a Constitution*¹⁶⁶ and *The Bill of Rights and the Fourteenth Amendment*,¹⁶⁷ also in the *Yale Law Journal*.¹⁶⁸ Now prominent law professors were beginning to examine constitutional understandings of the right to bear arms as a republican strategy of the founders for resisting government tyranny¹⁶⁹ and as part of the liberal individual rights guarantees that emerged from Reconstruction.¹⁷⁰ Levinson emphasized to liberal colleagues in the academy then enamored of republicanism that republican understandings of the founders might blur the boundaries between the individualist and collectivist accounts of the Second Amendment. "[T]he implications of republicanism might push us in unexpected, even embarrassing, directions," he observed; "just as ordinary citizens should participate actively in governmental decision-making through offering their own deliberative insights . . . , so should ordinary citizens participate in the process of law enforcement and defense of liberty rather than rely on professionalized peacekeepers, whether we call them standing armies or police."¹⁷¹ In 1992, the NRA responded to the favorable publicity Levinson's article generated by creating a new foundation called Academics for the Second Amendment (A2A), headed by a member of the NRA board of directors, and

¹⁶⁴ Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, in *THE SECOND AMENDMENT IN LAW AND HISTORY* 1, 4 (Carl T. Bogus ed., 2000). Sixteen were written or co-written by Stephen P. Halbrook, Robert Dowlut, Richard Gardiner, David Hardy, or David Caplan, all current or former lawyers for the NRA. Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 *CHI-KENT L. REV.* 349, 379 n.157, app. at 387–92 (2000). Another was written by Alan Gottlieb, founder of the Citizens Committee for the Right to Keep and Bear Arms and the Second Amendment Foundation, *GUNS IN AMERICAN SOCIETY*, *supra* note 80, at 527, and two more were written by Don Kates, a Second Amendment Foundation lawyer, see *Quilici v. Second Amendment Foundation*, 769 F.2d 414, 415 (7th Cir. 1985). Spitzer, *supra*, app. at 389–917.

¹⁶⁵ Sanford Levinson, *The Embarrassing Second Amendment*, 99 *YALE L.J.* 637 (1989).

¹⁶⁶ Akhil Reed Amar, *The Bill of Rights As a Constitution*, 100 *YALE L.J.* 1131 (1991).

¹⁶⁷ Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *YALE L.J.* 1193 (1992).

¹⁶⁸ For discussion of this phase of scholarship, see Bogus, *supra* note 164, at 1, 4–13.

¹⁶⁹ See, e.g., Amar, *supra* note 166, at 1163 ("[T]he people's right to alter or abolish tyrannous government invariably required a popular appeal to arms."); Levinson, *supra* note 165, at 646–51; *id.* at 651 ("[T]he citizenry itself can be viewed as an important third component of republican governance insofar as it stands ready to defend republican liberty against the depredations of [the federal government and the states], however futile that might appear as a practical matter.")

¹⁷⁰ Amar, *supra* note 167, at 1262 (describing the transformation of the Second Amendment after Reconstruction to "an essentially 'civil' right").

¹⁷¹ Levinson, *supra* note 165, at 650–51.

in 1994 it began awarding an annual “Stand Up for the Second Amendment” prize, with first place winning \$25,000.¹⁷²

*D. Conflict and Compromise: Second Amendment
Rights from Militias to Culture Wars*

The decade in which new understandings of the Second Amendment would be taken up in the legal academy was marked by escalating political struggle over gun rights. It was an era of increasing public support for gun control, of violent countermobilization, and ultimately of unstable forms of political accommodation, affecting both the tenor of gun rights advocacy and boundaries of acceptable gun control regulation. At stake was the question of how political claims on the Second Amendment would be asserted: as an outgrowth of a republican tradition that understood the militia as defense against government tyranny, or as grounded in a more classically liberal tradition concerned with the individual’s right to defend himself and his family from crime.

The newest phase of struggle over gun rights unfolded in a period of escalating crime and civilian violence.¹⁷³ Throughout the 1990s, sixty to eighty percent of the American public expressed support for the idea that “laws covering the sale of firearms should be made more strict.”¹⁷⁴ Support for increasing gun regulation likely reflected changes in politics as well. After the drive for a national handgun ban foundered in the 1970s,¹⁷⁵ advocates for gun control had organized in new ways, with groups forming at the local as well as national level and advocating incremental restrictions on gun ownership, as well as local bans of the kind Morton Grove had enacted.¹⁷⁶

With President Clinton’s election in 1992, a supporter of gun control was now in the White House, and Democrats controlled both

¹⁷² See Bogus, *supra* note 164, at 6–7. “The N.R.A. was so delighted by Levinson’s unexpected article that the group reprinted thousands of copies, which prompted a wave of fan mail for the professor.” Andrea Sachs, *Why the Second Amendment Is a Loser in Court*, TIME, May 29, 1995, at 22, 22; see also Letter from John Ashcroft, U.S. Att’y Gen., to James Jay Baker, Exec. Dir. of NRA (May 17, 2001), available at <http://www.nra.org/images/Ashcroft.pdf> (citing Levinson, as well as Amar, van Alstyne, and Kates, to support an individual rights interpretation of the Second Amendment).

¹⁷³ Between 1987 and 1994, the firearms homicide rate rose by forty percent and gun-related robberies by nearly thirty percent, GOSS, *supra* note 69, at 46, and the media intensively covered recurrent mass shootings, *see id.*

¹⁷⁴ Gallup Poll Editorial Staff, *Gallup Summary: Americans and Gun Control*, GALLUP, Apr. 18, 2007, <http://www.gallup.com/poll/27229/Gallup-Summary-Americans-Gun-Control.aspx>.

¹⁷⁵ See GOSS, *supra* note 69, at 44.

¹⁷⁶ *Id.* at 45–46.

houses of Congress. In 1993 Congress enacted the Brady Bill¹⁷⁷ — named after the Reagan press secretary who had been critically injured in the attempted assassination of Ronald Reagan. The Brady Bill was incremental rather than categorical in its reach. It created a background check mechanism to enforce the provisions of the 1968 Act that barred high-risk classes of persons (drug addicts, minors) from purchasing weapons.¹⁷⁸ The following year, Congress enacted another incremental restriction on gun ownership, the 1994 assault weapons ban, which prohibited sale to civilians of certain semiautomatic “assault weapons.”¹⁷⁹

The passage of incremental gun control legislation early in Clinton’s administration worked to provoke and mobilize the NRA,¹⁸⁰ first to oppose the legislation and then to press for its repeal — an aim the NRA pursued by joining forces with House Speaker Newt Gingrich and the Republican Party.¹⁸¹ The Republican victory in the 1994 election was credited in significant part to the NRA’s “massive effort . . . to punish Democrats who supported the Brady handgun law and the crime bill including a ban on assault weapons.”¹⁸² The NRA spent more than \$3.2 million on GOP campaigns and helped win nineteen of twenty-four “priority” races the organization targeted, leading to a House with a majority of members who were “A-rated” by the NRA.¹⁸³ Thereafter, Neal Knox assured the NRA membership that, as part of its new “Contract with America,” the leadership of the Republican Party had promised to attempt repeal of the assault weapons

¹⁷⁷ Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. §§ 921–922).

¹⁷⁸ GOSS, *supra* note 69, at 177.

¹⁷⁹ Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

¹⁸⁰ See Neal Knox, *Mr. Newt’s “Second Amendment Strategy,”* AM. RIFLEMAN, Mar. 1995, at 14, 14 (recounting promise of Republican leadership to attempt to repeal the assault weapons ban as part of the “Contract with America”).

¹⁸¹ Cf. DECONDE, *supra* note 47, at 255 (noting that in August of 1994, “the Republican National Committee threatened to condemn and deny campaign funds to any party representatives who voted for the ban on assault weapons,” but that party members nonetheless broke ranks to enact the ban).

¹⁸² David S. Broder, *A Historic Republican Triumph*, WASH. POST, Nov. 9, 1994, at A1, A14; see also Jeffrey H. Birnbaum, *Under the Gun*, FORTUNE, Dec. 6, 1999, at 211, 214 (reporting that the NRA “played a major role in the surprising Republican takeover of the House of Representatives in 1994,” helping defeat “such powerful Democrats as Speaker Thomas Foley . . . and Congressman Jack Brooks . . . , chairman of the House Judiciary Committee[,] . . . because they supported the assault weapons ban,” and reporting President Clinton’s observation that “[t]he NRA is the reason the Republicans control the House”).

¹⁸³ Michael Isikoff et al., *Of Tobacco, Torts and Tusks*, NEWSWEEK, Nov. 28, 1994, at 30, 30.

ban and adopt a “coherent Second Amendment strategy to define gun ownership as a constitutional right, not a duck-hunting right.”¹⁸⁴

Republicans had turned the 1994 election into a referendum on the competence of government,¹⁸⁵ and Gingrich appealed to gun rights to express themes about government and the body politic that had been echoing since the Johnson era. In *To Renew America*, Gingrich identified gun control as an issue that distinguished liberals and conservatives: “The Second Amendment is a political right written into our Constitution for the purpose of protecting individual citizens from their own government. . . . Generally, liberals neither understand nor believe in the constitutional right to bear arms.”¹⁸⁶ He proudly asserted a conservative claim on the Second Amendment grounded in law and order challenges to the Great Society. “[W]e should be concerned not with legislating against weaponry but with legislating against crime,” Gingrich observed, illustrating this claim by invoking in rapid succession the racially charged examples of O.J. Simpson, Willy Horton, and a serial rapist: “For some psychological reason, liberals are antigun but not anti-violent criminal.”¹⁸⁷

Hostility to government was even more pronounced within the NRA itself, and it was assuming new forms. In 1991, Neal Knox, who participated in the 1977 NRA takeover with Harlon Carter and was expelled in 1982 for lobbying tactics that may have alienated Edwin Meese,¹⁸⁸ staged a return to power in a campaign pledging opposition to all forms of gun control.¹⁸⁹ With Knox’s return, Tanya K. Metaksa became Executive Director of the ILA and the NRA moved right.¹⁹⁰ Metaksa underscored the NRA’s position of “no compromise” on gun control and drew attention to its demand for repeal of the assault weapons ban by spelling her name for reporters: “It’s ‘ak’ as in AK-47 and ‘sa’ as in semi-automatic.”¹⁹¹

¹⁸⁴ Knox, *supra* note 180, at 14 (quoting Newt Gingrich’s response to President Clinton’s 1995 State of the Union speech) (internal quotation marks omitted). The budget for the ILA increased from \$17.7 million in 1990 to \$28.3 million in 1994. Fox Butterfield, *Aggressive Strategy by N.R.A. Has Left Its Finances Reeling*, N.Y. TIMES, June 26, 1995, at A1.

¹⁸⁵ See Broder, *supra* note 182, at A1.

¹⁸⁶ NEWT GINGRICH, *TO RENEW AMERICA* 202 (1995).

¹⁸⁷ *Id.* at 203.

¹⁸⁸ See Paul Taylor, *Chief NRA Lobbyist’s Ouster Seen, Triggered by Opposition to Meese*, WASH. POST, April 17, 1982, at A4 (recounting Neal Knox’s opposition to Meese’s plan to transfer responsibilities of the Bureau of Alcohol, Tobacco, and Firearms to the Secret Service); see also David Brock, *Wayne’s World*, AM. SPECTATOR, May 1997, at 36, 39 (reporting that “Ed Meese told Harlon [Carter], ‘Don’t ever send me this man Knox to see me again.’” (quoting Warren Cassidy, ILA director) (internal quotation marks omitted)).

¹⁸⁹ Butterfield, *supra* note 184, at A12.

¹⁹⁰ See *id.*

¹⁹¹ Charles M. Sennott, *NRA Becomes Militias’ Beacon*, BOSTON GLOBE, Aug. 13, 1995, at 1 (quoting Tanya Metaksa) (internal quotation marks omitted); see also Birnbaum, *supra* note 182.

Under Knox and Metaksa's leadership, the NRA was openly entangled with militias. A 1994 resolution declared: "Although the NRA has not been involved in the formation of any citizen militia units, neither has the NRA discouraged, nor would NRA contemplate discouraging, exercise of any constitutional right."¹⁹² A militia movement of growing numbers understood itself in constitutional terms, arguing that "the federal government had no authority at the state and local level."¹⁹³ Bloody confrontations with the Bureau of Alcohol, Tobacco, and Firearms, first at Ruby Ridge (1992) and then at Waco (1993), had escalated the militia movement's profound mistrust of the federal government: "Gun Control is for only one thing[:] . . . people control."¹⁹⁴

The militias believed themselves to be exercising their Second Amendment right to bear arms for the core purpose for which the Second Amendment was intended: resisting tyranny.¹⁹⁵ Calling themselves "Christian Patriots, Constitutionalists, Freemen and sovereigns,"¹⁹⁶ and explaining their bonds and mission in openly racial terms, the militias grew their own, violent forms of dissenting community,¹⁹⁷ which they explained as based in the Constitution and the Bible.¹⁹⁸ The militias' Second Amendment was related to the libertarian and populist Second Amendment Reagan had invoked, but more completely estranged from government — and, often, more blunt in its racial views.¹⁹⁹

The militia movement's estrangement from government was enacted in graphic terms when Timothy McVeigh organized the bombing of the federal building in Oklahoma City in 1995. McVeigh, a member of the NRA, earned a living as an unlicensed dealer in paramilitary

¹⁹² Sennott, *supra* note 191, at 15 (quoting NRA's Civilian Militia Statement of Nov. 10, 1994) (internal quotation marks omitted).

¹⁹³ DECONDE, *supra* note 47, at 257.

¹⁹⁴ *Id.* at 258–59.

¹⁹⁵ For an in-depth analysis of the militia movement's "theory of the Second Amendment," see DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* 191–219 (2003). See also LANE CROTHERS, *RAGE ON THE RIGHT: THE AMERICAN MILITIA MOVEMENT FROM RUBY RIDGE TO HOMELAND SECURITY* 25–35 (2003).

¹⁹⁶ MICHELE SWENSON, *DEMOCRACY UNDER ASSAULT: THEOPOLITICS, INCIVILITY AND VIOLENCE ON THE RIGHT* 135 (2004).

¹⁹⁷ See MORRIS DEES WITH JAMES CORCORAN, *GATHERING STORM: AMERICA'S MILITIA THREAT* (1996); SWENSON, *supra* note 196, at 130–51.

¹⁹⁸ See WILLIAMS, *supra* note 195, at 217–18.

¹⁹⁹ See RICHARD FELDMAN, *RICOCHE: CONFESSIONS OF A GUN LOBBYIST* 234–35 (2008) ("Among the more disturbing aspects of the militia movement were the anti-Semitic and white supremacist nature of several groups. . . . The BATF's gun-grabbing, black-clad storm troopers were seen as the foot soldiers of the [Zionist Occupation Government]."); Walter Goodman, *Militia Family Life, Before It Goes Undercover*, N.Y. TIMES, Sept. 3, 1997, at C16 (quoting members of the Rocky Mountain Militia saying "We should celebrate the day [Martin Luther King, Jr.] got shot" and "[h]ave a white Christmas and a Jew-free New Year").

gear at gun shows where he sold copies of *The Turner Diaries*, a key text of the militia movement that tells the tale of an ex-soldier on a “mission to blow up a federal building in the first overt act against a government ‘overrun by blacks and Jews.’”²⁰⁰ McVeigh “believed the federal government intended to disarm the American public gradually and take away the right to bear arms under the Second Amendment,” pointing to events at Ruby Ridge as proof.²⁰¹ The Oklahoma bombing, which killed 168 people, was staged on the anniversary of the Battle of Lexington and Concord and the end of the Waco siege, and appears to have been modeled on the FBI bombing recounted in *The Turner Diaries*.²⁰²

The question for the NRA after Oklahoma City was how rapidly it would distance itself from the militias, and from its leadership’s frequent characterization of federal agents as “jack-booted thugs.” It did not act quickly, prompting the resignation of former President George H.W. Bush.²⁰³ Thereafter, Wayne LaPierre unrepentantly asserted that the organization’s description of “jack-booted thugs” applied only to Bureau of Alcohol, Tobacco, and Firearms agents, not to others in law enforcement.²⁰⁴ In this same unrepentant spirit, the NRA named as its “Law Enforcement Officer of the Year” Richard Mack, who gained notoriety for openly endorsing the militia movement.²⁰⁵ “People get all upset when they hear about militias, but what’s wrong with it?” Mack asked in an interview. “Paul Revere called out the militia. It’s part of our history. I wouldn’t hesitate for a minute to call out my

²⁰⁰ Charles M. Sennott, *Mainstream, Fringe Cross Paths at Gun Shows*, BOSTON GLOBE, Aug. 13, 1995, at 14; see also CROTHERS, *supra* note 195, at 123–44; WILLIAMS, *supra* note 195, at 1–2. One must read *The Turner Diaries* to appreciate how central race is to its gun-control dystopia. See generally ANDREW MACDONALD, *THE TURNER DIARIES* (Barricade Books 1996) (1978).

²⁰¹ LOU MICHEL & DAN HERBECK, *AMERICAN TERRORIST: TIMOTHY MCVEIGH & THE OKLAHOMA CITY BOMBING* 108 (2001) (account of bombing based on interviews with McVeigh during the period of his incarceration); see also *id.* at 39 (recounting influence on McVeigh of *The Turner Diaries*).

²⁰² *Id.* at 226–28 (recounting that McVeigh chose April 19 as the date of the Oklahoma City bombing because it was the 220th anniversary of the Battle of Lexington and Concord that began the American Revolution and because it was the second anniversary of the end of the Waco siege, and that McVeigh prepared for his capture by taking with him to the bombing a collection of documents including a pamphlet on the militia movements of 1775, a copy of the Declaration of Independence, and a quote from the protagonist of *The Turner Diaries*).

²⁰³ See Letter from George Bush to National Rifle Association (May 3, 1995), in N.Y. TIMES, May 11, 1995, at B10.

²⁰⁴ John Mintz, *NRA Members Take Aim at Critics*, WASH. POST, May 20, 1995, at A1, A12.

²⁰⁵ Mack referred to the militia movement as “the civil rights movement of the ‘90s.” *Militia Movement Seeks Allies With Guns, Badges*, CHRISTIAN SCI. MONITOR, Apr. 15, 1996, at 11 (quoting Richard Mack) (internal quotation marks omitted). This was a common refrain among militia members. See, e.g., *Militia Movement*, USA TODAY, Mar. 12, 1996, at 3A; *Talk Back Live* (CNN television broadcast Apr. 5, 1996).

posse against the federal government if it gets out of hand.”²⁰⁶ (The NRA selected Mack as plaintiff in its challenge to the Brady Bill, whose registration provisions the Supreme Court would declare unconstitutional in *Printz v. United States*²⁰⁷ in a decision written by Justice Scalia, holding that the temporary federal registration provisions of the act “commandeer[ed]” local law enforcement officials, contrary to the original understanding of the federalist scheme.²⁰⁸)

The NRA’s failure to distance itself from the militias in the wake of Oklahoma City had palpable consequences. By 1996, the organization’s membership had declined by twelve percent, and its contributions to political action committees had dropped by more than a fifth.²⁰⁹ Thereafter Wayne LaPierre, in an effort to save the NRA’s standing in government and among voters, recruited Charlton Heston to help oust Knox and transform the organization’s social profile.²¹⁰ In pursuit of the NRA’s presidency, Heston appeared on radio programs where he distanced himself from the “extremist element” in the NRA, said the Brady Act wasn’t worth the energy to repeal (because local police ignored it, “I don’t care if they keep the Brady Act forever”),²¹¹ and announced repeatedly that “AK-47’s are entirely inappropriate for private use.”²¹² With Heston’s takeover, the NRA began visibly to cultivate a new, more family-friendly public image. Advertisements promised that the NRA’s new magazine, *American Guardian*, would feature “home & self-defense,” “family recreational shooting,” “women’s issues,” “handgun carry options,” and “high-tech home security: locks, lights, alarms & more.”²¹³ Heston gave the law-and-

²⁰⁶ Sennott, *supra* note 191 (quoting Richard Mack) (internal quotation marks omitted). Mack later distanced himself from the militias, “den[ying] . . . reports in the *Los Angeles Times* and *The Boston Globe* that he . . . raised an armed citizen posse in Arizona to help enforce the law. He . . . publicly acknowledged that he organized a posse, but [claimed] that the only enforcement duties it ever took on were directing traffic.” Dan Harrie, *Libertarian Throws His Hat into Utah’s Governor Race*, SALT LAKE TRIB., Nov. 7, 2003, at B3.

²⁰⁷ 521 U.S. 898 (1997).

²⁰⁸ *Id.* at 914.

²⁰⁹ Ian Brodie, *Foot Soldiers Desert the Gun Lobby*, TIMES (London), Apr. 1, 1996.

²¹⁰ RAYMOND, *supra* note 57, at 262–63. For Knox’s account of the takeover, see Neal Knox, *The Mutiny at NRA*, URBAN ARMORY, Jan. 1, 1999, <http://www.urban-armory.com/nealknox010199.htm>.

²¹¹ RAYMOND, *supra* note 57, at 265 (internal quotation marks omitted).

²¹² James N. Thurman, *NRA’s New Aim: To Soften Its Edges and Re-enlist Moderates*, CHRISTIAN SCI. MONITOR, June 10, 1998, at 5. For Neal Knox’s account of the positions Heston was taking in the media in the period he was seeking control of the NRA, see Knox, *supra* note 210 (discussing Heston’s statements in his various TV and radio appearances). See also Robert W. Lee, *Heston, for the Record*, NEW AM., Apr. 13, 1998, at 15 (reporting Heston’s comments in radio interview about accepting the Brady Act and his intention “to get ‘the right-wing folks off the [NRA] board and out of the picture’”).

²¹³ *The National Rifle Association Introduces American Guardian*, AM. RIFLEMAN, Aug. 1997, at 11.

order Second Amendment a constitutional pedigree, emphasizing that the Second Amendment guaranteed Americans the ability to defend themselves against threats to liberty “whether it be King George’s Redcoats or today’s criminal predators,” and spoke of gun ownership as a family “tradition” that parents had a duty to teach their children.²¹⁴ In this period, some prominently positioned interpreters of the Second Amendment emphasized the forms of gun control the Constitution allowed, while others excluded from the amendment’s protection paramilitary activity.²¹⁵

But even as Charlton Heston ceded ground on some issues, distancing the NRA from the militias and from its call for repeal of the Brady Bill and the assault weapons ban, he went on the political offensive, asserting Second Amendment rights in a populist register that recalled the claim’s roots in the New Right’s challenge to the Great Society and the Warren Court. Invoking the republican claim that the “purpose of the Bill of Rights was to protect the people from the state,” Heston told the NRA in 1996:

Our founders refused to ratify a constitution that didn’t protect individual liberties. Maybe they’re just a bunch of wise, old, dead, white guys, but they meant what they said. The Second Amendment isn’t about the National Guard or the police or any other government entity. It is about law-abiding, private U.S. citizens, period. You are of that same bloodline. You are sons and daughters of the Boston tea-spillers.²¹⁶

Heston’s filiopiety was unmistakably racialized. “And no amount of oppression, no FBI, no IRS, no big government, no social engineers, no

²¹⁴ Charlton Heston, *The President’s Column*, AM. RIFLEMAN, Feb. 2000, at 12, 12 (“Don’t let the right to keep and bear arms be forsaken or forgotten. Share these vital lessons, virtues and values with the young people in your life.”).

²¹⁵ See, e.g., Brannon P. Denning, *Palladium of Liberty? Causes and Consequences of the Federalization of State Militias in the Twentieth Century*, 21 OKLA. CITY U. L. REV. 191, 244 (1996) (“Most regulations of firearms would remain in place, as would state prohibitions against paramilitary activity, since those are not aimed at an individual’s right to bear arms. . . . [T]he exercise of Second Amendment rights would be dominated neither by the state (as is true under a collectivist interpretation of the Second Amendment) nor by wholly private entities (as urged by many in the neomilitia movement.”); Thomas B. McAfee, *Constitutional Limits on Regulating Private Militia Groups*, 58 MONT. L. REV. 45, 77 (1997) (“[T]he Second Amendment gives no protection to private armies waiting for an opportunity to confront the larger community with force.”); cf. Laurence H. Tribe & Akhil Reed Amar, Op-Ed., *Well-Regulated Militias, and More*, N.Y. TIMES, Oct. 28, 1999, at A31 (“The fact is, almost none of the proposed state or Federal weapons regulations appears to come close to offending the Second Amendment’s core right to self-protection. The right to bear arms is certainly subject to reasonable regulation in the interest of public safety.”). These themes carried over into the *Heller* litigation. See *infra* note 265 and accompanying text.

²¹⁶ CHARLTON HESTON, THE COURAGE TO BE FREE 164, 168 (2000) (remarks before the 125th annual meeting of the NRA, March 30, 1996). For another compilation of Heston’s speeches, see Varmint Al’s Gun Rights & Politics, <http://www.varmintal.com/apoli.htm#Heston> (last visited Oct. 5, 2008).

matter what and no matter how, they cannot cleave the genes we share with our Founding Fathers.”²¹⁷

The following year, after assuming the Vice-Presidency of the NRA, Heston delivered a speech at Weyrich’s Free Congress Foundation, where he announced, “I have come to realize that a cultural war is raging across our land . . . storming our values, assaulting our freedoms, killing our self-confidence in who we are and what we believe, where we come from.”²¹⁸ Heston identified gun owners who lacked confidence to reveal themselves as “victim[s] of the cultural war,” and equated the position of gun owners with “Pentecostal Christians, or pro-lifers, or right-to-workers, or Promise Keepers, or school voucherers.”²¹⁹ Heston exhorted his audience at the Free Congress Foundation to make common cause with gun owners:

I am not really here to talk about the Second Amendment or the NRA, but the gun issue clearly brings into focus the war that’s going on.

Rank-and-file Americans wake up every morning, increasingly bewildered and confused at why their views make them lesser citizens. . . . Heaven help the God-fearing, law-abiding, Caucasian, middle class, Protestant, or — even worse — Evangelical Christian, Midwest, or Southern, or — even worse — rural, apparently straight, or — even worse — admittedly heterosexual, gun-owning or — even worse — NRA-card-carrying, average working stiff, or — even worse — male working stiff, because not only don’t you count, you’re a downright obstacle to social progress. . . . That’s why you don’t raise your hand. That’s how cultural war works. And you are losing.²²⁰

Again, Heston specifically appealed to white racial consciousness: “The Constitution was handed down to guide us by a bunch of those wise old dead white guys who invented this country.” Observing that “some flinch when I say that,” he asked “[w]hy?” insisting:

It’s true . . . they were white guys. So were most of the guys who died in Lincoln’s name opposing slavery in the 1860s. So why should I be ashamed of white guys? Why is “Hispanic pride” or “black pride” a good thing, while “white pride” conjures up shaved heads and white hoods? . . . I’ll tell you why: Cultural warfare.²²¹

In fighting the culture war, Heston defended traditional ways against equality claims of all kinds:

Mainstream America is depending on you . . . to draw your sword and fight for them[,] . . . to battle . . . the fringe propaganda of the homosexual

²¹⁷ HESTON, *supra* note 216, at 168.

²¹⁸ Charlton Heston, First Vice President, Nat’l Rifle Assoc., Address at the Free Congress Foundation’s 20th Anniversary Gala (Dec. 7, 1997) (alteration in original), *available at* <http://www.vpc.org/nrainfo/speech.html>.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* (first alteration in original).

coalition, the feminists who preach that it's a divine duty for women to hate men, blacks who raise a militant fist with one hand while they seek preference with the other²²²

He closed with an appeal for constitutional restoration: "It's the same blueprint our founding fathers left to guide us. Our enemies see it as the senile prattle of an archaic society. I still honor it as the United States Constitution"²²³

In embracing the rubric of the culture war — a theme Patrick Buchanan made notorious in a speech endorsing George Bush's nomination at the 1992 Republican National Convention²²⁴ — Heston transmuted the NRA's affair with the militias into a different and more politically acceptable form, expressing a creed that he repeated at every opportunity.²²⁵ He consolidated these themes in a speech, *Winning the Cultural War*, delivered at Harvard Law School in 1999, which circulated widely on the internet once it was read on air by Rush Limbaugh.²²⁶ Warning his audience that he believed "we are again engaged in a great civil war, a cultural war that's about to hijack your birthright," Heston urged:

²²² *Id.*

²²³ *Id.*

²²⁴ Although "culture war" terminology has been in use since the German *Kulturkampf* in the 1870s, it reemerged as a way of talking about contemporary American society in 1987 with the publication of *Cultural Conservatism: Toward a New National Agenda*, a survey commissioned by Paul Weyrich that advocated that conservatives take up a culture war, arguing that conservatives would be much more successful if they mobilized around social rather than economic issues. FREE CONGRESS RESEARCH & EDUC. FOUND., *CULTURAL CONSERVATISM: TOWARD A NEW NATIONAL AGENDA* 8–9 (1987); see also JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 173 (1991) (stating that five areas in which culture war rages most intensely are the family, education, the popular media, law, and electoral politics). The culture war hit the mainstream with Patrick Buchanan's speech at the 1992 Republican National Convention, when he declared the '92 election a "cultural war . . . for the soul of America," in which "Clinton and Clinton are on the other side, and George Bush is on our side." Patrick J. Buchanan, *Speech at the 1992 Republican National Convention* (Aug. 17, 1992), available at <http://www.buchanan.org/pa-92-0817-rnc.html>. Buchanan's war was a moral one — to save "God's country" from "radical feminism," from "abortion on demand, a litmus test for the Supreme Court, homosexual rights, discrimination against religious schools, women in combat." *Id.* Despite Paul Weyrich's declaration in 1999 that religious conservatives had lost the culture war, see Dale McConkey, *Whither Hunter's Culture War? Shifts in Evangelical Morality, 1988–1998*, 62 *SOC. RELIGION* 149, 149 (2001), the 2004 election saw its resurgence, with "the left and the right mobilizing furiously around those hot-button social issues," Robin Toner, *Below the Campaign Radar, a Values War*, *N.Y. TIMES*, Apr. 17, 2004, at A10; see also Robin Toner, *The Nation: To the Barricades*, *N.Y. TIMES*, Feb. 29, 2004, at WK1.

²²⁵ See, for example, the speeches collected in the appendix of HESTON, *supra* note 216. See also *NRA: "Armed with Pride," AM. RIFLEMAN*, Mar. 1998, at 30, 31, 33 (interview with Charlton Heston and Wayne LaPierre) (Heston, speaking of a "cultural war," urges NRA members to "feel proud again" and warns them "[d]on't run for cover when the cultural cannons roar. Remember who you are and what you believe, and . . . stand up and speak out.").

²²⁶ See TruthOrFiction.com, *Charlton Heston's Speech at Harvard Law School*, <http://www.truthorfiction.com/rumors/h/heston-harvard.htm> (last visited Oct. 5, 2008).

As I have stood in the crosshairs of those who target Second Amendment freedoms, I've realized that firearms are not the only issue. No, it's much, much bigger than that.

I've come to understand that a cultural war is raging across our land, in which, with Orwellian fervor, certain acceptable thoughts and speech are mandated.²²⁷

Heston responded to the storm of criticism his earlier remarks had generated, objecting to being called a "racist" or a "homophobe" for asserting his constitutional rights:

For example, I marched for civil rights with Dr. King in 1963 — long before Hollywood found it fashionable. But when I told an audience last year that white pride is just as valid as black pride or red pride or anyone else's pride, they called me a racist.

I've worked with brilliantly talented homosexuals all my life. But when I told an audience that gay rights should extend no further than your rights or my rights, I was called a homophobe.²²⁸

Denouncing these complaints as if he resented the imputation, Heston instead defiantly asserted *his* constitutional identity: "But I am not afraid. If Americans believed in political correctness, we'd still be King George's boys — subjects bound to the British crown."²²⁹

Heston's cry for constitutional restoration touched themes that extended to the very roots of the mobilization for gun rights in the late twentieth century — a movement that grew up in the shadow of civil rights struggle. *This* Second Amendment accepted *Brown*: it renounced claims of race privilege voiced by Southern conservatives in the initial years of white resistance, and was versed in forms of racial group assertion that could withstand charges of racism.²³⁰ Yet, this Second Amendment unmistakably carried the memory of civil rights

²²⁷ Charlton Heston, *Winning the Culture War*, Address at Harvard Law School (Feb. 16, 1999), available at <http://www.varmintal.com/heston3.htm>.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Although not every advocate invoking culture war references guns, gun advocates often invoke the culture war — in terms that, like Heston's, directly or indirectly raise racial concerns. See Wayne LaPierre, Executive Vice President, Nat'l Rifle Assoc., Speech Before the NRA Annual Meeting in Charlotte, N.C. (May 20, 2000), available at <http://www.nra.org/Speech.aspx?id=6032> ("And the dirty little secret is [criminals are] overwhelmingly black and hispanic. But everybody's so scared of being called a racist they won't admit the level of killing among non-white teenaged gangbangers."); see also Paul Blackman, *The Federal Factoid Factory on Firearms and Violence: A Review of CDC Research and Politics*, 7 J. ON FIREARMS & PUB. POL'Y 21, 30 (1995) (arguing that violence "is epidemic only among young blacks and Hispanics"). Blackman, a research coordinator for the Institute for Legislative Action of the NRA, later argues that "studies of homicide victims," who he has earlier identified as largely people of color, "suggest they are frequently criminals themselves and/or drug abusers. It is quite possible that their deaths, in terms of economic consequences to society, are net gains." *Id.* at 51–52; see also *infra* note 231 (lecture by assistant counsel of the NRA on guns and culture).

struggle, and with it a deep sense of social division; it imagined society as divided into kinds, the “law-abiding citizen” and the “criminal,” the deserving and the undeserving — and resented government when it identified with the undeserving other. This law-and-order Second Amendment recalled the founding as the time *before* the constitutional (un)settlements of the late twentieth century.²³¹

III. *HELLER*, ORIGINALISM, AND THE CULTURE WARS

You see, I have my rules that confine me. I know what I’m looking for. When I find it — the original meaning of the Constitution — I am handcuffed. . . . Though I’m a law-and-order type, I cannot do all the mean conservative things I would like to do to this society. You got me.

— Justice Scalia, remarks delivered at the Woodrow Wilson International Center for Scholars, Washington, D.C., March 14, 2005.²³²

The boundary between law and politics is forged in constitutional culture.²³³ *Heller*, and most federal opinions that recognized or re-

²³¹ Addressing the Conservative Political Action Conference in 1997, Heston invoked “’50s-vintage movies, news clippings, . . . TV shows like *Beaver* and *Lucy* and *Father Knows Best* . . . portraying traditional family units, cops who’re on your side, clergy who aren’t kooky, safe schools, certain punishment, manageable conflict,” and urged:

America yearns to be true to itself again, to return to that warm fireside of common sense and common values. Remember how we once felt about our safety, our schools, our police, our employers, our media, our parents, our neighbors? Remember when we trusted the federal government to do the right thing? Today only one in four of us does.

. . . . Americans want to be American again.

Charlton Heston, *Be Yourselves, O Americans*, Remarks Before the Conservative Political Action Conference (Jan. 25, 1997), in HESTON, *supra* note 216, 170, 172; see also James H. Warner, Assistant Gen. Counsel, Nat’l Rifle Assoc., *Heritage Lecture: Guns, Crime, and the Culture War 6–7* (July 2, 1992), available at http://www.heritage.org/Research/Crime/upload/92266_1.pdf (“Guns do not get young girls pregnant. Guns do not create drug addiction. Guns did not create a welfare system which traps young women in dependency and keeps them in its thrall. Guns do not create music which glorifies hatred. Guns do not teach young children that they are not part of America, and that they have no share in its culture. Guns do not cause people to urinate in the halls nor to defecate in the stairwells of public housing projects. . . . But each of these conditions can be traced back to the enemies of our culture There is no reason why the streets of Washington, D.C., could not be as safe as the streets of Lyndonville, Vermont, or Bismarck, North Dakota. But this will not happen until all Americans are assimilated into one country with one, common culture.”).

²³² Antonin Scalia, *Constitutional Interpretation the Old Fashioned Way* (Mar. 14, 2005), available at http://www.cfif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.htm.

²³³ See Siegel, *Constitutional Culture*, *supra* note 10, at 1327 (employing “the framework of constitutional culture to analyze the ways mobilized citizens influence officials who enforce the Constitution” and showing “how constitutional culture supplies the understandings of role and the practices of argument through which citizens and officials can propose new ways of enacting the society’s defining commitments. . . . Constitutional culture preserves and perpetually destabilizes the distinction between politics and law.”).

marked favorably upon an individual right to bear arms in the decades preceding it, were written by judges whom President Reagan appointed.²³⁴ Originalism helps transmute their constitutional politics into constitutional law. Even as Justice Scalia changes constitutional law in ways that vindicate the values of the New Right, he presents himself as self-denying, “confine[d]” by “rules,” “handcuffed.”²³⁵ Only the judge who enforces the original understanding is constrained by law, Justice Scalia claims.²³⁶

In dissent, where Justice Scalia speaks out most forcefully,²³⁷ he regularly depicts his own views as fidelity to law, while denouncing his liberal colleagues for injecting their values into judging. In 1996, when the Court held that the Constitution prohibited government from expressing animus to gays, Justice Scalia famously objected, “I think it no business of the courts (as opposed to the political branches) to take sides in this culture war,”²³⁸ in a dissent that expressed views about gays remarkably like those Charlton Heston would express in his culture war speeches for the NRA. Justice Scalia’s dissents in cases concerning “social issues” (as Paul Weyrich called them)²³⁹ or

²³⁴ See *Heller*, 128 S. Ct. 2783 (Scalia, J.); *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007) (Silberman, J.) (holding D.C.’s handgun ban unconstitutional under the Second Amendment); *United States v. Emerson*, 270 F.3d 203, 232 (5th Cir. 2001) (Garwood, J.) (“The plain meaning of the right of the people to keep arms is that it is an individual, rather than a collective, right and is not limited to keeping arms while engaged in active military service or as a member of a select militia such as the National Guard.”); see also *Printz v. United States*, 521 U.S. 898 (1997) (Scalia, J.) (upholding NRA claims that background-check provisions temporarily imposed by the Brady Bill amounted to federal commandeering of local law enforcement, contrary to the original understanding); *Silveira v. Lockyer*, 328 F.3d 567, 569–70 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc); *Koog v. United States*, 79 F.3d 452 (5th Cir. 1996) (Jolly, J.) (holding unconstitutional the provision of the Brady Bill held unconstitutional in *Printz*); *United States v. Lopez*, 2 F.3d 1342, 1345, 1364 n.46 (5th Cir. 1993) (Garwood, J.) (characterizing in dicta the Second Amendment as “something of a brooding omnipresence” and noting that “some applications” of the statute at issue “might raise Second Amendment concerns.”); *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994) (Lovell, J.). A prominent exception is Justice Thomas, appointed by President George H.W. Bush. See *Printz*, 521 U.S. at 938 n.2 (Thomas, J., concurring) (“Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the ‘right to keep and bear arms’ is, as the Amendment’s text suggests, a personal right.”).

²³⁵ See Scalia, *supra* note 232.

²³⁶ See *id.* (“You either tell your judges, ‘Look, this is a law, like all laws, give it the meaning it had when it was adopted.’ Or, you tell your judges, ‘Govern us.’”).

²³⁷ Cf. Jonathan Riehl, *The Federalist Society and Movement Conservatism: How a Fractious Coalition on the Right Is Changing Constitutional Law and the Way We Talk and Think About It* 254 (2007) (unpublished thesis, University of North Carolina at Chapel Hill) (interviewing Justice Scalia) (“I still consider myself a teacher. That’s the main reason I write my dissents,” [Justice Scalia] said. ‘I think the main point of the dissent is perhaps to try to change the future, and that will occur not by persuading my colleagues, who have made their mind up, but by persuading the next generation.’”).

²³⁸ *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting); *id.* at 636 (“The Court has mistaken a Kulturkampf for a fit of spite.”).

²³⁹ See *supra* p. 213.

“cultural war” issues (as Pat Buchanan and Charlton Heston called them)²⁴⁰ often voice resentments of the New Right *as* fidelity to law.²⁴¹ When the Court invalidated a law criminalizing same-sex relations in *Lawrence v. Texas*, Justice Scalia complained that “the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed,” and objected that “[w]hat Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new ‘constitutional right’ by a Court that is impatient of democratic change.”²⁴²

It might seem inconsistent for Justice Scalia to denounce his colleagues for “tak[ing] sides in the culture war,” yet vote in *Heller* to strike down a law that was viewed by legally literate lawyers in the twentieth century, until the rise of the gun rights movement, as “well within the range of traditional democratic action.”²⁴³ But *Heller* recognizes a New-Right right. *Heller* vindicates what Justice Scalia calls “original values” and so, in his view, requires no Article V amendment to change the law.²⁴⁴ When Justice Scalia sides with a social movement, he does not present himself — and may well not understand himself — as taking sides in the culture wars. Like Heston, Justice Scalia views the gun rights movement as rescuing the founders’ Constitution *from* the politics of the culture wars. Like Heston, Justice Scalia recognizes, as part of the founders’ Constitution, a Second Amendment that “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”²⁴⁵

²⁴⁰ See *supra* note 224 and accompanying text (discussing Buchanan’s cultural war speech).

²⁴¹ Shortly after joining the Court, Justice Scalia denounced its decision upholding affirmative action in the promotion of a road dispatcher, lamenting that:

[T]he only losers in the process are the Johnsons of the country, for whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals — predominantly unknown, unaffluent, unorganized — suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent.

Johnson v. Transp. Agency, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting). When the Supreme Court required the Virginia Military Institute to admit women, Justice Scalia elegiacally warned of the threat to gender roles the decision posed, including in his dissent the full text of the school’s traditional “Code of a Gentleman.” See *United States v. Virginia*, 518 U.S. 515, 603 (1996) (Scalia, J., dissenting). When the Court reaffirmed its decision in *Miranda*, Justice Scalia denounced the Court for attempting “to write a prophylactic, extraconstitutional Constitution, binding on Congress and the States. . . . This is not the system that was established by the Framers.” *Dickerson v. United States*, 530 U.S. 428, 461, 465 (2000) (Scalia, J., dissenting).

²⁴² *Lawrence v. Texas*, 539 U.S. 558, 602–03 (2003) (Scalia, J., dissenting).

²⁴³ See also *Printz v. United States*, 521 U.S. 898 (1997) (upholding NRA claims that background-check provisions temporarily imposed by Brady Bill amounted to federal commandeering of local law enforcement, contrary to the original understanding).

²⁴⁴ See *supra* note 137.

²⁴⁵ *Heller*, 128 S. Ct. at 2821.

This could reflect some coincidental alignment of the original understanding and the values around which the New Right has mobilized. Or, this coincidence could teach us something about the social processes that shape interpretation of particular claims about the founding and imbue constitutional rulings with popular authority.

Consider *Heller*. The correspondence between the law-and-order Second Amendment forged in culture wars of the New Right and the original public meaning of the Second Amendment that *Heller* vindicates is striking. When Justice Scalia explains that the Second Amendment protects rights of the “law-abiding, responsible citizens to use arms in defense of hearth and home,” he echoes Harlon Carter, Ronald Reagan, and Charlton Heston, who all claim the Second Amendment protects rights of the “law-abiding” and invoke the distinction between citizens and criminals to explain the Second Amendment.²⁴⁶ The coincidence is deeper, manifest not only in the rhetoric of the *Heller* opinion, but also in its account of the Second Amendment’s core purposes. Justice Scalia’s Second Amendment protects the law-abiding citizen’s ability to defend himself and his family from criminals — and not the republican vision of a militia prepared to defend against government tyranny.

Twentieth-century conflict helped tutor intuitions about the Second Amendment’s core and periphery. For most of the twentieth century, literate lawyers read the Second Amendment in light of the republican purposes enunciated in its first clause; but decades of gun rights mobilization transformed the “natural” meaning of the Constitution’s text so that, for increasing numbers of Americans, a law-and-order Second Amendment simply appeared there *as* the founders’ Constitution: “The Second Amendment is clear, or ought to be,” Governor Reagan urged in 1975. “It appears to leave little, if any, leeway for the gun control advocate.”²⁴⁷ In the ensuing decades, Congress gathered evidence to support the New Right’s reading of the amendment,²⁴⁸ the Reagan Justice Department appointed judges sympathetic to an originalist and law-and-order understanding of the Constitution,²⁴⁹ academics of note began to recognize the Second Amendment as a site of individual rights, while others affiliated with the gun rights movement began to develop a lawyerly case for recognizing judicially enforceable rights there. Nelson Lund, for example, helped shift the focus of Second Amendment interpretation by characterizing its first clause as “prefatory” and its second clause as “operative” — and received a Second

²⁴⁶ See *supra* pp. 208–09 (quoting Harlon Carter in 1970s); *supra* p. 210 (quoting Ronald Reagan in 1975); *supra* p. 232 (quoting Charlton Heston in 1990s); see also *supra* p. 233 (same).

²⁴⁷ Reagan, *supra* note 81.

²⁴⁸ See *supra* note 116 and accompanying text.

²⁴⁹ See *supra* section II.C.

Amendment chair funded by the NRA for his work.²⁵⁰ Decades of mobilization inside and outside the academy forged modes of interpreting the Second Amendment that make libertarian, law-and-order concerns central to its meaning and republican concerns peripheral. These movement-tutored presumptions make plausible Justice Scalia's claim that the antecedents of the common-law right of self-defense are in the English Bill of Rights — even though the English Bill of Rights was motivated by the *abuse of political power* (the selective disarmament of Protestants by a Stuart monarch), not crime, and designed to vindicate *parliamentary supremacy*, not the rights of an individual against the legislature.²⁵¹

The mobilization of living Americans around the text and history of the Second Amendment did more than tutor popular and professional intuitions about the amendment's core and peripheral purposes; it imbued the amendment with compelling contemporary social meaning by connecting the right to bear arms to some of the most divisive questions of late twentieth-century constitutional politics. These de-

²⁵⁰ A Hein Online search for the terms “operative,” “prefatory,” and “second amendment” suggests that Nelson Lund was the first academic to introduce this terminology into the Second Amendment literature. See Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1 (1996). Nelson Lund is the Patrick Henry Professor of Constitutional Law and the Second Amendment at the George Mason University School of Law. This position was created thanks to a one million dollar commitment to GMU School of Law by the National Rifle Association Foundation announced in 2003. Press Release, \$1 Million Endows Professorship at George Mason University (Jan. 28, 2003), available at <http://eagle.gmu.edu/newsroom/display.php?rid=399&keywords=>. Justice Scalia relies on the distinction between “prefatory” and “operative” in describing the relationship of the amendment's first and second clause. See, e.g., *Heller*, 128 S. Ct. at 2789 (“The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause.”).

²⁵¹ See *Heller*, 128 S. Ct. at 2798 (observing of the English Bill of Rights provision guarding against disarmament of Protestants, “[t]his right has long been understood to be the predecessor to our Second Amendment. It was clearly an individual right, having nothing whatever to do with service in a militia.”) (citations omitted). But see *id.* at 2837–38 & n.30 (Stevens, J., dissenting) (objecting to majority's claim that the provision of the English Bill of Rights guaranteeing arms for Protestants is appropriately understood as a predecessor to the Second Amendment).

For historical accounts of the Second Amendment that emphasize its republican pedigree, see AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 324 (2005) (observing that “Founding history confirms a republican reading of the Second Amendment, whose framers generally envisioned Minutemen bearing guns, not Daniel Boone gunning bears,” and noting that a military usage of arms similarly appears in state constitutions and the English Bill of Rights of 1689); SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006); and Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000). See also Brief of Amici Curiae Jack N. Rakove, Saul Cornell, David T. Konig, William J. Novak, Lois G. Schworer et al. in Support of Petitioners, *Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 157183. Historians including Jack Rakove and Saul Cornell emphasize that the Second Amendment was responsive, not to the need for private self-defense, but rather to a deep fear of a standing army and the debate over how control over militias would be allocated between the federal and state governments. *Id.* Indeed, the first laws resembling contemporary gun control were not passed until after the War of 1812, well after ratification. See CORNELL, *supra*, at 142.

bates made arguments for Second Amendment rights intelligible as arguments about guns, and much more.²⁵² Commonly, advocates asserted Second Amendment rights in a language of law and order that associated restoration of the constitutional order with restoration of the traditional social order.

Law-and-order critics of the Warren Court accepted the *Brown* settlement, and developed an identity and an idiom emphasizing fidelity to law that was self-consciously *not* racial, in part to enable Americans fighting over the reach of the *Brown* settlement to express concerns about race while fending off charges of racism. The gun rights movement employed this law-and-order idiom to defend the traditional social order in matters of race, family, and faith. Making common cause with critics of the Warren and Burger Courts as part of a New Right coalition, gun rights advocates armed for a “cultural war” to secure government’s fidelity to the founders’ true heirs.²⁵³

The New Right embraced originalism as the jurisprudential vehicle for these claims. Now that conservatives were beginning to exercise authority in the Republican Party, and from Congress, the Justice Department, and the bench, the original understanding provided authority that could legitimate their new exercises of public authority *as* the Constitution — supplying reason, not only to limit judicial review, but to expand it in new ways.²⁵⁴

The New Right’s understanding of the original understanding was populist and popular, but clearly partisan — by no means consensual, or even majoritarian. Its gun-rights agenda had majority support in only the thinnest of senses. Because the leaders of the gun rights movement could deliver single-issue voters who would decide elections at the margin and punish insufficiently responsive officials, the movement was able to secure the cooperation of government and defeat gun control efforts, even on issues where the gun rights movement lacked public support.²⁵⁵

²⁵² See *supra* sections II.A and II.D; cf. Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1293–94 (2003) (“As one southern Democratic senator recently put it, the gun debate is ‘about values’ — ‘about *who* you are and who you aren’t.’ Or in the even more pithy formulation of another group of politically minded commentators, ‘It’s the Culture, Stupid!’”) (footnotes omitted).

²⁵³ See *supra* sections II.C and II.D.

²⁵⁴ See THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 7 (2004) (presenting a political history of “the emergence of conservative activism” on the Rehnquist Court); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 608–09 (2004) (distinguishing traditional judicial restraint from a “new originalism” that while emphasizing “the limited authority of the judicial role in the constitutional system . . . may often require the active exercise of the power of judicial review in order to keep faith with the principled commitments of the founding.”).

²⁵⁵ See BILL CLINTON, *MY LIFE* 630 (2004) (“After the [1994 midterm] election I had to face the fact that the law-enforcement groups and other supporters of responsible gun legislation,

Heller enforces the original understanding in ways that are responsive to this complex mandate. After decades of gun mobilization, a large majority of Americans believe that the Second Amendment protects an individual right to bear arms.²⁵⁶ But a large majority of Americans *also* believe that government can regulate gun ownership and prohibit military-style weapons through laws such as the assault weapons ban.²⁵⁷ *Heller* seems to register this complex of popular beliefs when it holds that the Second Amendment protects weapons that the law-abiding citizen needs to defend himself and his family from crime — but not the military weapons citizens need to resist government tyranny.²⁵⁸

These two dimensions of *Heller*'s holding shed light on the kind of authority *Heller* exercises — the ways its originalism connects the constitutional convictions of Americans dead and living. The *Heller* Court bitterly divides over whether there is historical evidence for reading the Second Amendment as codifying a common law right of self-defense, but agrees that the framers of the Second Amendment sought to prevent government tyranny.²⁵⁹ Yet the majority treats

though they represented the majority of Americans, simply could not protect their friends in Congress from the NRA. The gun lobby outspent, outorganized, outfought, and outdemagogued them.”); FELDMAN, *supra* note 199, at 229 (describing the NRA's successful campaign to unseat Jack Brooks, “the longest serving member of the House” at the time, as “payback for Jack’s vote for the crime bill that contained the assault weapons ban,” despite the fact that Brooks had been “one of the NRA’s oldest and closest congressional allies”); Noam N. Levey, *NRA’s Political Clout Is Waning*, L.A. TIMES, June 14, 2008, at A1. For polling data, see *infra* notes 256–257.

²⁵⁶ See Joan Biskupic, *Do You Have a Legal Right to Own a Gun?*, USA TODAY, Feb. 27, 2008, at 1A (“Nearly three out of four Americans — 73% — believe the Second Amendment spells out an individual right to own a firearm . . .”); ICR Survey Research Group Poll, Aug. 15–19, 1997, The Roper Center at the University of Connecticut [hereinafter Roper Center Database], study no. USICR1997-933M, available at LEXIS, News Library, RPOLL file (reporting that sixty-eight percent of respondents believed that the Second Amendment “guarantees individuals the right to own guns”).

²⁵⁷ National majorities have opposed a handgun ban since the 1970s, see *Gallup’s Pulse of Democracy: Gun Laws*, Gallup, <http://www.gallup.com/poll/1645/Guns.aspx> (last visited Oct. 5, 2008), but a majority of Americans, and even President Bush, support an assault weapons ban. See *Senate Defeats Gun Liability Bill*, 60 CONG. Q. ALMANAC 12-13, 12-14 (2004) (reporting that the House had passed a bill to rescind the handgun ban in Washington, D.C., while “White House officials had signaled President Bush’s support for an extension of the [assault weapons] ban”); *Assault Weapons Ban Works: Plug Holes and Let Law Live*, Editorial, USA TODAY, Sept. 8, 2004, at 14A, available at http://www.usatoday.com/news/opinion/2004-09-07-assaultweapons-ourview_x.htm (“A University of Pennsylvania National Annenberg Election Survey in April found that 71% of respondents, including 64% of those in households with guns, support a renewal of the [assault weapons] ban.”); Los Angeles Times Poll, Mar. 16–17, 1989, Roper Center Database, *supra* note 256, study no. USLAT1989-177 (reporting that fifty-nine percent of those polled believed that “[i]n the case of semi-automatic assault rifles . . . the interests of public safety outweigh” the Second Amendment).

²⁵⁸ See *supra* Part I.

²⁵⁹ See, e.g., *Heller*, 128 S. Ct. at 2801–02 (arguing that the Second Amendment was codified to “assure the existence of a ‘citizens’ militia’ as a safeguard against tyranny”); *id.* at 2840 (Stevens,

weaponry traditionally used for individual self-defense as presumptively protected and military weaponry as presumptively regulable. In 2008, Americans can appeal to the law-and-order Second Amendment as the founders' Second Amendment and can make claims on others outside their normative community through it — as they could not if they were to embrace a republican Second Amendment that authorized violent insurrection and the forms of originalism the militias practiced in the 1990s. Thus, even if, on further examination of the historical sources, we continued to debate whether the founders codified a right of self-defense, we can learn from the *Heller* Court's reticence to protect arms needed to resist government tyranny that originalism implicitly depends on contemporary popular convictions for its authority.

The shape of the right *Heller* protects demonstrates how a judicial decision claiming original authority may nonetheless employ practices of responsive interpretation associated with democratic constitutionalism.²⁶⁰ At the same time, it illustrates how constitutional politics can guide and discipline judicial review. As one of many factors that give shape to law,²⁶¹ movement conflict constrains, as well as motivates, the claims mobilized Americans make on their courts.²⁶² After decades of argument, advocates recognize that the public responds, fitfully, to the claims of *both* the gun rights and gun control movements, and so each movement has come to incorporate, at least in part, the claims of the other. When gun control leaders could not win support for a national handgun ban, they began to argue that the category of “assault weapons”²⁶³ could be regulated under the Second Amendment. Just as many who support gun control now, cautiously, acknowledge the Second Amendment's authority,²⁶⁴ many who embrace the original under-

J., dissenting) (describing Justice Story's explanation of “the virtues of the militia as a bulwark against tyranny”); *see also supra* note 39 and accompanying text.

²⁶⁰ *See* Post & Siegel, *Originalism as a Political Practice*, *supra* note 10; Post & Siegel, *Roe Rage*, *supra* note 10.

²⁶¹ There are a variety of constraints shaping *Heller*, from the historical evidence over which a divided Court argued to the appointments process that produced the divided Court.

²⁶² *See* Siegel, *Constitutional Culture*, *supra* note 10, at 1330–31 (“As movement and counter-movement struggle to persuade (or recruit) uncommitted members of the public, each movement is forced to take account of the other's arguments, and in time may even begin to incorporate aspects of the other's argument into its own claims Bitter constitutional dispute can be hermeneutically constructive, and has little noticed socially integrative effects.”).

²⁶³ JOSH SUGARMANN, *ASSAULT WEAPONS AND ACCESSORIES IN AMERICA* (1988), *available at* <http://www.vpc.org/studies/awacont.htm>.

²⁶⁴ For example, New York Senator Charles Schumer, who in 1995 declared that “[t]he [S]econd [A]mendment does not guarantee the mythical individual right to bear arms,” *Gun Laws and the Need for Self-Defense: Hearing Before the H. Subcomm. on Crime of the H. Comm. of the Judiciary*, 104th Cong. 3 (1995), in 2002 articulated “the broad principle that there is an individual right to bear arms,” *Reforming the FBI in the 21st Century: Hearing of the S. Judiciary Comm.*, 107th Cong. 163 (2002). *See also* DEMOCRATIC NAT'L CONVENTION, *STRONG AT HOME*, RE-

standing of the Second Amendment are prepared to renounce its republican purposes.²⁶⁵ Movement conflict can create these forms of apparent consensus without securing agreement.²⁶⁶ Constitutional conflict of this kind structures disagreement; it enables exercises of judicial review that can officially entrench new understandings of the Constitution as law — without immunizing them from renewed popular challenge.²⁶⁷

SPECTED IN THE WORLD: THE 2004 DEMOCRATIC NATIONAL PLATFORM FOR AMERICA 18 (2004), <http://www.democrats.org/pdfs/2004platform.pdf> (affirming the Democrats' commitment to "protect Americans' Second Amendment right to own firearms"); Michael Powell, *For Obama, a Pragmatist's Shift Toward the Center*, N.Y. TIMES, June 27, 2008, at A14 (quoting Senator Barack Obama as saying "I have always believed the Second Amendment protects the right of individuals to bear arms."). But these shifts in rhetoric do not necessarily indicate consensus. See *infra* note 266.

²⁶⁵ See Respondent's Brief at 30, *Heller*, 128 S. Ct. 2783 (No. 07-290), 2008 WL 336304 ("Respondent does not suggest that members of private paramilitary organizations have a right to commit violent acts under the auspices of acting as a citizen militia."); cf. Brief for the United States as Amicus Curiae, *Heller*, 128 S. Ct. 2783 (No. 07-290), 2008 WL 157201 ("Although the court of appeals correctly held that the Second Amendment protects an individual right, . . . the Second Amendment, properly construed, allows for reasonable regulation of firearms . . ."); Brief for Amici Curiae Former Senior Officials of the Department of Justice in Support of Respondent at 3-4, *Heller*, 128 S. Ct. 2783 (No. 07-290), 2008 WL 40551 ("The Second Amendment's protection was never understood to extend to unfit persons or to unusual and especially dangerous firearms.")

²⁶⁶ Underlying the Democrats' and the NRA's increasingly similar formulations of the right remain vastly different views about its regulability. See Jonathan Martin, *NRA Plans \$40M Fall Blitz Targeting Obama*, POLITICO, June 30, 2008, <http://www.politico.com/news/stories/0608/11452.html> (reporting the NRA's plans to spend fifteen million dollars "portraying Barack Obama as a threat to the Second Amendment rights upheld" in *Heller*); Jacob Sullum, *Isn't Self-Defense Common Sense?*, REASONONLINE, Feb. 27, 2008, <http://www.reason.com/news/show/125180.html> ("Although [Senator Obama] has learned to pay lip service to the Second Amendment, the details of his past and present positions on gun control suggest he neither understands nor respects the right to keep and bear arms."). Progressives who now recognize individual rights under the Second Amendment generally believe the Constitution allows many more forms of gun control than do conservatives. Compare *The O'Reilly Factor* (Fox News Channel television broadcast Apr. 23, 2007) (featuring Sen. Charles Schumer saying "I think certain kinds of licensing and registration is a reasonable limitation. We do it for cars."), with NRA-ILA, *Fact Sheet: Licensing and Registration*, Oct. 7, 2000, <http://www.nra.org/Issues/FactSheets/Read.aspx?id=28> ("[T]hose who wonder what motivates American gun owners should understand that perhaps only one other word in the English language so boils their blood as 'registration,' and that word is 'confiscation.' Gun owners fiercely believe those words are ominously related."). The Democrats recently adopted a party platform that provides:

We . . . will preserve Americans' Second Amendment right to own and use firearms. We believe that the right to own firearms is subject to reasonable regulation, . . . [and] [w]e can work together to enact and enforce commonsense laws and improvements — like closing the gun show loophole, improving our background check system, and reinstating the assault weapons ban, so that guns do not fall into the hands of terrorists or criminals.

DEMOCRATIC NAT'L CONVENTION, RENEWING AMERICA'S PROMISE: THE 2008 DEMOCRATIC NATIONAL PLATFORM FOR AMERICA 50, available at <http://www.democrats.org/alparty/platform.html>.

²⁶⁷ See Siegel, *Constitutional Culture*, *supra* note 10.

The Court's judgment in *Heller* will exert authority as law, to the extent that its account of the original understanding can sustain inter-generational identification. As the rift in the *Heller* Court testifies, struggle over the meaning of constitutional memory is a medium through which community in disagreement is forged. Long public struggle endowed memories of the founding with significance for living Americans and assembled a Court to recover them; but that Court and the nation to which it speaks remain, visibly, riven. In 2008, the Supreme Court, the Republican Party platform, and the Democratic Party platform all recognize that the Second Amendment confers some form of individual right. Yet, at the dawn of the twenty-first century, the scope of this right and its constitutional implications remain to be decided.²⁶⁸

²⁶⁸ As this Comment goes to press, the Republican presidential nominee has energized his campaign by selecting an anti-abortion, pro-gun female vice-presidential running mate, who, when introduced at the party's nominating convention, demonstrated her qualifications by mocking the "community organizing" experience of the first black presidential candidate ever nominated by a major political party — with apparent impunity and to great partisan acclaim. Cf. Erik Engquist, *Attack on Obama Carries Racial Overtones, Says Paterson*, CRAIN'S N.Y. BUSINESS.COM, Sept. 9, 2008, <http://mycrains.crainsnewyork.com/paterson/2008/09/attack-on-obama-carries-racial.html> ("Gov. David Paterson this morning said that Republicans' ridiculing of Sen. Barack Obama's community organizing carries racial overtones. . . . McCain spokesman Peter Feldman [countered] '[t]his is a tactic that the Obama campaign has used before, and which McCain campaign manager Rick Davis correctly called "divisive, shameful, and wrong."'). The party's platform affirms the right to bear arms and calls for a President who will appoint judges who will interpret the Constitution as *Heller* did. REPUBLICAN NAT'L CONVENTION, 2008 REPUBLICAN PARTY PLATFORM 51 (2008), <http://platform.gop.com/2008Platform.pdf> ("We applaud the Supreme Court's decision in *Heller* affirming [the right to own firearms], and we . . . call on the next president to appoint judges who will similarly respect the Constitution.").