2008

Heller and Insurrectionism

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HELLER AND INSURRECTIONISM

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The Supreme Court does not merely decide legal issues. It is an authoritative voice about national values. Much of its authoritative power flows from being the quasi-official interpreter of the Founders' visions of America, as expressed in the Constitution. The Constitution, of course, is more than a legal document; it is the scripture of American political theology. What the Founders believed when they wrote that document—or more precisely, what we believe they believed—influences our own visions about America. The most significant aspect of *District of Columbia v. Heller* is the Court's pronouncement that the Founders intended to guarantee an individual right to keep and bear arms.[1] But there is another idea lurking in the Court's opinion with potentially great ramifications of its own: the idea that the Founders gave us a right to keep and bear arms as an ultimate check against governmental tyranny.[2] This is an insurrectionist theory because it legitimizes a right of the people to be armed, potentially to go to war against their own government.[3] The Court, however, so far, has embraced this idea tentatively and perhaps not irrevocably. This essay is a plea that it reconsider its endorsement of insurrectionism.

To understand what is at stake, it helps to consider the differences between the American and French revolutions. Notwithstanding the oxymoronic sound of it, America's break with England was a conservative revolution. Americans did not seek to radically alter their society.[4] They were not fundamentally suspicious of government; they believed

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1. 128 S. Ct. 2783, 2799 (2008).

2. *Heller*, 128 S. Ct. at 2801-02.

3. For more about insurrectionism, see Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 386-04 (1998); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107, 110 (1991) (coining the term).

4. *See, e.g.*, ARTHUR M. SCHLESINGER, JR., THE POLITICS OF HOPE 84 (Princeton U. Press 2008) (1963) (arguing that in contrast to the French Revolution and other revolutions seeking to overthrow feudal systems, "The American Revolution was . . . a revolution of limited liability, aiming at national independence more than at social change.").

government was necessary to protect liberty. Nor were they even opposed to the British form of government, though they devised ways to improve upon it. They believed England's government failed them because they were unrepresented in Parliament.

Americans undertook a revolution to preserve more than to destroy. Even though they went to war to secure independence, Americans never lost faith in ordered liberty. By contrast, as historian William Doyle puts it: "The initial impulse of the French Revolution was destructive. The revolutionaries wanted to abolish what, by the end of 1789, everybody was calling the old or former order, the ancien régime."[5] French revolutionaries sought liberty through violence—and came to romanticize violence. Some 16,000 were guillotined or otherwise executed during the Terror, and approximately 150,000 more died in factional fighting.[6]

The Russian and Chinese revolutions were stepchildren of the French Revolution.[7] According to Mao Tse-tung: "War is the continuation of politics. . . . When politics develops to a certain stage beyond which it cannot proceed by the usual means, war breaks out to sweep the obstacles from the way."[8] "Revolutions and revolutionary wars are inevitable in class society, and without them it is impossible to accomplish any leap in social development and to overthrow the reactionary ruling classes and therefore impossible for the people to win political power."[9] "Political power grows out of the barrel of a gun."[10]

Consider how the Founders reacted when, following the Revolution, Americans threatened force against their own government. In 1786, Shays' Rebellion broke out in western Massachusetts. Complaining that the government had become tyrannical because courts were permitting creditors to seize their property to satisfy delinquent debts, a thousand small farmers and shop owners—armed with muskets—closed the courts and began to threaten the state government. Thomas Jefferson, then ambassador to France on the eve of the French Revolution, was momentarily swept away. In a letter to Madison, Jefferson remarked that "a little rebellion now and then is a good thing."[11] Madison would have

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[5] WILLIAM DOYLE, THE FRENCH REVOLUTION 65 (2001).

6. *Id.* at 98.

7. *Id.* at 9.

8. Mao Tse-tung, *On Protracted War, in* II SELECTED WORKS 1937-1938 at 152-53 (1954). Mao was, of course, borrowing from Carl von Clausewitz who wrote that "war is nothing but a continuation of political intercourse, with a mixture of other means." CARL VON CLAUSEWITZ, ON WAR 121 (1908).

9. Mao Tse-tung, *On Contradiction, in* I SELECTED WORKS 1937-1938 at 344 (1954).

10. Mao Tse-tung, *Problems of War and Strategy,* II SELECTED WORKS, at 224 (1938).

11. *See* Bogus, *The Hidden History of the Second Amendment, supra* note 3 at 393 (and

none of it and in his reply, Madison called Shays' Rebellion treason.[12] The governor of Massachusetts raised an army to crush the rebellion. His action was endorsed not only by Madison but by Samuel Adams, John Jay, George Washington, Benjamin Franklin, and John Marshall.[13]

In the Whiskey Rebellion of 1794, backcountry farmers in Pennsylvania and Kentucky threatened tax collectors and otherwise used intimidation to obstruct collection of a federal tax on whiskey. They carried muskets and marched as militia under banners proclaiming "Liberty and Equality" and other slogans of the French Revolution. Washington said allowing such conduct would bring an "end to our Constitution & laws," and he personally led 12,000 troops to extinguish the rebellion.[14]

Interpreting the Second Amendment is about more than the government's authority to regulate guns: it is about whether we place our ultimate faith in the Constitution or in guns. The Founders were deeply concerned about abuse of power, but their solution was to create a system where too much power could not be consolidated in one place. Alexander Hamilton wrote:

> The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of people in the legislature by deputies of their own election . . . . [These] are means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided.[15]

To Hamilton's list we may add other protections as well, including freedom of speech and press.[16]

The Founders understood that tyranny may come not only from rulers but from the people themselves. Hamilton wrote:

> It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in a state of perpetual vibration

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sources cited therein).

12. *Id.* at 394-95.

13. *Id.*

14. SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 77 (2006).

15. THE FEDERALIST No. 9 (Alexander Hamilton).

16. Hamilton also included "enlargement of the orbit within which such systems are to revolve," by which he meant the protections against abuse by small fractions or parochialism that come with a large, heterogeneous nation. *Id.*

between the extremes of tyranny and anarchy.[17]

In *Reflections on the Revolution in France*, Hamilton's contemporary, Edmund Burke, brilliantly examined how legitimizing force within society leads to chaos, blood, and ultimately despotism.[18] And speaking about the governmental system devised by the American Founders, Barry Goldwater wrote: "The system of restraints, on the face of it, was directed not only against individual tyrants, but also against a tyranny of the masses."[19]

Proponents of insurrectionism often cite *Federalist No. 46* in which Madison said that should the federal government become tyrannical, its army would be opposed by more powerful state militia composed of "citizens with arms in their hands . . . fighting for their common liberties, and united and conducted by governments possessing their affections and confidence."[20] When one reads that statement in context, however, one sees that Madison does not suggest that such an eventuality could come to pass. Quite the reverse: he says this fear is an Anti-Federalist pipe dream. Madison writes:

> That the people and the States should, for a sufficient period of time, elect an uninterrupted succession of men ready to betray both [the state and federal governments]; that the traitors should throughout this period, uniformly and systematically pursue some fixed plan for the extension of the military establishment; that the governments and the people of the States should silently and patiently behold the gathering storm, and continue to supply the materials, until it should be prepared to burst on their own heads, must appear to every one more like the incoherent dreams of a delirious jealousy, or the misjudged exaggerations of a counterfeit zeal, than like the sober apprehensions of genuine patriotism.[21]

"Extravagant as the supposition is, let it however be made," Madison writes, and he proceeds to respond to what he considers an absurd argument on its own terms.[22] All of this precedes the line about the "citizens with arms in their hands" going to war with an invading federal government.[23] Madison's point is not that guns are the ultimate check on tyranny but that the constitutional structure is the full protection of liberty.

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17. *Id.*

18. *See generally*, EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Frank M. Turner ed., Yale U. Press 2003) (1790).

19. BARRY GOLDWATER, THE CONSCIENCE OF A CONSERVATIVE 10 (CC Goldwater ed., Princeton U. Press 2007) (1960).

20. THE FEDERALIST No. 46 (James Madison).

21. *Id.*

22. *Id.*

23. *Id.*

But even if we attach undeserved significance to Madison's line about war between the federal army and the state militia, it should be noted that Madison was not talking about armed citizens—mobs—taking matters into their own hands, but about action by the state militia. And whatever legitimacy that latter idea had was extinguished by the Civil War.

The fundamental problem with legitimizing insurrectionism as an acceptable last resort is that there are always people who believe that governmental tyranny is not merely a future prospect, but a present reality. Insurrectionism has been present throughout American history, but until relatively recently it primarily has been popular with vigilantes and paramilitary groups; it was the philosophy of Jefferson Davis, John Wilkes Booth, and Timothy McVeigh. But it is a view that some conservatives—perhaps unthinkingly—have started to endorse. In so doing, they are abandoning faith in ordered liberty embraced by traditional conservatives, such as Burke, in favor of a new conservatism that has more in common with Robespierre and Mao Tse-tung.

Heller settled the longstanding debate about whether the Second Amendment granted a collective or an individual right. The traditional view of the Second Amendment—the collective rights or the militia-based model—is that the Amendment grants the people a right to keep and bear arms only within the constitutionally-mandated militia, in effect guaranteeing the states armed militia to provide for their own security.[24] Advocates of this model often say that guaranteeing armed militia to the states ameliorated Anti-Federalist worries about standing armies because the existence of robust militia made large standing armies unnecessary.[25] There is, however, good reason to believe that James Madison wrote the Amendment to assure the South that Congress could not undermine the slave system by disarming the militia, upon which the southern states relied for slave control.[26]

The *Heller* majority rejected the collective rights model in favor of the individual rights model, which holds that the Second Amendment grants the people a right to keep and bear arms for their own purposes, untethered from militia membership.[27] The main rationales offered for the individual rights theory are self-defense, aiding firearms proficiency within the militia by having a general population accustomed to firearms, and

24. Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 4 (2000).

25. Bogus, *The Hidden History of the Second Amendment*, *supra* note 3, at 347-48; United States v. Emerson, 270 F.3d 203, 259-60 (5th Cir. 2001).

26. Bogus, *The Hidden History of the Second Amendment*, *supra* note 3, at 335-37.

27. *Heller*, 128 S. Ct. at 2799.

insurrectionism. Some individual rights theorists rely on one or two of those rationales; some rely on all. The insurrectionist rationale has become increasingly romanticized and emphasized by individual rights advocates. Prior to *Heller,* eleven federal courts of appeals considered the Second Amendment—nine endorsed the collective rights model, and two endorsed the individual rights model.[28] The first Federal Court of Appeals to endorse the individual rights view of the Second Amendment, the Fifth Circuit, provided at most a vague endorsement of insurrectionism.[29] That court wrote: "The Anti-Federalists feared that the federal government's standing army could be used to tyrannize and oppress the American people. Without a militia to defend against the federal government's standing army, the states and their citizens would be defenseless."[30]

The court did not dwell on the disturbing prospect of another civil war, pitting state militia against the army, nor did it proceed any further with insurrectionist explanations.[31] Having walked to the edge and peered into the abyss, the court sensibly turned round and looked for another rationale for the individual rights model. The right to bear arms, said the court, "tends to enable, promote or further the existence, continuation or effectiveness of that 'well-regulated Militia' which is 'necessary to the security of a free State.'"[32] This, of course, is a weak rationale for the Amendment. Having a citizenry well-versed in the use of arms may be a boon to the militia—and for the same reason to the federal military services as well—because it is easier to train "firearms-familiar citizens" to shoot and care for firearms.[33] But how likely is it that the Founders were so worried about having a draft pool unaccustomed to firearms that they decided to foster shooting skills by giving the people an individual right to keep and bear arms? There are more direct ways to promote proficiency with arms. Moreover, the real concern at the time was not that militia

28. *See* Silveira v. Lockyer, 312 F.3d 1052, 1063 (9th Cir. 2003); Gillespie v. City of Indianapolis, 185 F.3d 693, 710 (7th Cir. 1999); United States v. Wright, 117 F.3d 1265, 1273-74 (11th Cir. 1997); United States v. Rybar, 103 F.3d 273, 286 (3d Cir. 1996); Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995); United States v. Hale, 978 F.2d 1016, 1019-20 (8th Cir. 1992); Thomas v. Members of City Council of Portland, 730 F.2d 41, 42 (1st Cir. 1984); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976) (all endorsing the collective rights model). *See* Parker v. District of Columbia, 478 F.3d 370, 394-95 (D.C. Cir. 2007), *cert. granted sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2007); *Emerson,* 270 F.3d at 229 (supporting the individual rights model).

29. *See Emerson,* 270 F.3d at 259-260.

30. *Id.* at 238-39.

31. *See Emerson,* 270 F.3d at 259-60.

32. *Id.* at 233.

33. *Id.* at 259.

members were unaccustomed to firearms but that they were unaccustomed to discipline.[34]

The Fifth Circuit backed still further away from insurrectionism by suggesting that the Second Amendment was a political compromise. The Anti-Federalists "desired a bill of rights, express provision for increased state power over the militia, and a meaningful express limitation of the power of the federal government to maintain a standing army."[35] Meanwhile, "Federalists wanted to please the Anti-Federalists as much as possible without fundamentally altering the balance of federal-state power," and they "had no qualms with recognizing the individual right of all Americans to keep and bear arms."[36] And—abracadabra!—Federalists satisfy Anti-Federalists' concerns about allocation of power over the military organizations by giving individuals a "right to keep and bear arms *whether or not they are a member of a select militia or performing active military service or training.*"[37]

The best one might say for this less-than-logical conclusion is that political compromises are not always rational. That may be so; nevertheless, the Fifth Circuit's explanation is an awkward stretch compared to the more straightforward explanation that Madison and his fellow Federalists, who controlled the First Congress, wrote the Second Amendment to assuage Anti-Federalists fears about disarming the militia. The purpose of giving people a right to keep and bear arms in connection to militia service—in which the possession and use of those weapons is unquestionably subject to regulation by the militia—was that if the federal government did not provide arms for the militia, militia members themselves could do so. That, in fact, is how the militia was then armed; militia members were required to supply their own muskets.[38] But intent upon arriving at the conclusion that the Second Amendment grants an individual right, the Fifth Circuit found itself on the horns of a dilemma. Self-defense was a problematic rationale because it is nonsensical to read the Amendment as saying, *[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms for their own self-defense and unconnected with Militia service shall not be*

34. Bogus, *The Hidden History of the Second Amendment*, *supra* note 3, at 339-44.

35. *Emerson*, 270 F.3d at 259.

36. *Id.*

37. *Id.* at 260 (emphasis added).

38. *See* CORNELL, *supra* note 14, at 12 and 123 (describing requirements that militia members arm themselves incorporated in both the pre-Revolution militia acts in the colonies and the federal Uniform Militia Act of 1792).

infringed. The insurrectionist rationale was even worse because it is antithetical to fundamental notions of constitutional democracy. That, I suspect, is why the Fifth Circuit settled on a fuzzy rationale that was neither self-defense nor insurrectionism.

In the *Heller* case, the District of Columbia Circuit became the second federal circuit to endorse the individual rights interpretation of the Second Amendment, and the first to embrace the insurrectionist rationale.[39] The court not only peered into the abyss, it jumped in. The court actually settled on self-defense and insurrectionism, collapsing both into a single rationale that it labeled "the right of self-preservation."[40] That right, the court said, "was understood as the right to defend oneself against attacks by lawless individuals, or, if absolutely necessary, to resist and throw off a tyrannical government."[41] Yet the court apparently found its own explanation somehow inadequate. By the end of its opinion, it opted for the kitchen sink approach and threw in hunting and threats of foreign invasions for good measure.[42] According to the court, the Second Amendment "was premised on the private use of arms for activities such as hunting and self-defense, the latter being understood as resistance to either private lawlessness or the depredations of a tyrannical government (or a threat from abroad)."[43] The court failed to explain why the federal government cannot be trusted to keep the nation armed and ready to repel invasions, or why the Founders might have been worried that rampant gun control would interfere with hunting. Then, having already swallowed the poison pill of insurrectionism, the D.C. Circuit—uneasy but perhaps not sure why—threw into the kitchen sink the rationale about an armed populace indirectly supporting the militia. The court explained that, "[i]n addition, the right to keep and bear arms had the important and salutary civic purpose of helping to preserve its citizen militia. . . . by ensuring that citizens would not be barred from keeping the arms they would need when called forth for militia service."[44] The last interpretation, of course, runs into the problem of saying the Amendment is about supporting the militia yet independent of militia service. The court simply reemphasizes: "Despite the importance of the Second Amendment's civic purpose, however, the activities it protects are not limited to militia service, nor is an

39. Parker v. District of Columbia, 479 F.3d 370 (2007). The name of the case changed on appeal to the Supreme Court of the United States.

40. *Id.* at 383.

41. *Id.*

42. *Id.* at 395.

43. *Id.*

44. *Parker*, 478 F.3d at 395.

individual's enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia."[45] The phrase *continued or intermittent enrollment in the militia* is a revealing slip. Why simply not say the right is not "contingent upon enrollment in the militia?" Isn't that what the court means? By subtly suggesting that everyone is in the militia sometime—something that was not true when the Second Amendment was written and is not even remotely true today—the court hopes to somehow gloss over the problem that what it claims is the purpose of the right (to promote the militia) does not fit with what it claims is the nature of the right (a private right unconnected to militia service).[46]

It was against this background that Justice Scalia sat down to write the majority opinion in *Heller*. Justice Scalia alluded to insurrectionism twice, but each time just briefly.[47] His first reference comes as he is discussing why the Founders considered the militia to be "necessary to the security of a free state."[48] He says the reasons are many but lists only three.[49] He first names "repelling invasions and suppressing insurrections" and rendering "large standing armies unnecessary," citing Alexander Hamilton for the second rationale.[50] Then, without any citation, Justice Scalia declares: "Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny."[51] He next alludes to insurrectionism when rebutting arguments advanced by the District of Columbia. He writes:

> If, as [the District believes], the Second Amendment right is no more than the right to keep and use weapons as a member of the organized militia—if, that is, the *organized* militia is the sole institutional beneficiary of the Second Amendment's guarantee—it does not assure the existence of a 'citizens' militia' as a safeguard against tyranny.[52]

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45. *Id.*

46. In 1792, the militia consisted of "free able bodied while male citizens" eighteen to forty-five years of age. SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 67 (2006). By excluding women, free and enslaved blacks, the disabled, and men younger than eighteen and older than forty-five, the militia included only a fraction of the population. Today an even smaller fraction is enrolled in the National Guard.

47. *Heller*, 128 S. Ct. at 2800, 2802. Strictly speaking, Justice Scalia mentions insurrectionism three times, but his third reference occurs not while describing the Court's reasoning but the reasoning in Aymette v. State, reasoning the *Heller* Court does not adopt. *Id.* at 2809 (discussing 21 Tenn. 154 (1840)).

48. *Id.* at 2800.

49. *Id.* at 2800-01.

50. *Id.*

51. *Id.* at 2801.

52. *Heller*, 128 S. Ct. at 2802 (internal citation omitted) (emphasis in original).

Once again, this reference to insurrections is a naked declaration, devoid of authority.

For anyone who previously doubted it, *Heller* should make clear that when it comes to the Second Amendment, even Supreme Court Justices are, at bottom, driven not by a dispassionate analysis of history or public policy but by ideology. After all, how likely is it that nine justices of the Supreme Court are moved entirely by their objective evaluation of history yet divide 5-4, along perfectly ideological lines? To say this is not to suggest that the justices did not try their best to put aside their own views and decide the case on a good faith analysis of history and law. It is to suggest only that they are human, and, whether or not they are aware of it, moved by deeper instincts.

What in their ideology drives modern conservatives to the individual rights view of the Second Amendment, and for some, even further to the insurrectionist rationale? For the most part, the five conservative justices are not traditional conservatives in the mold of Edmund Burke and his modern heirs, such as George F. Will, who believe that "strong government—properly constructed"—is the guarantor of liberty, but movement conservatives who are suspicious of, and even hostile to, government.[53] In the main, the modern conservative movement's general antipathy to government flows from two sentiments: first, it sees government as generally inefficient and often incompetent; second, it sees governmental power and personal freedom as inversely correlated, that is, as a general matter, the more powerful the government, the less free the individual.[54] These are the assumptions that lead to the conservative movement's constant paean for "limited government."

I have been speaking so far about sentiments that infuse conservative ideology but it may be helpful to briefly consider political philosophy. Perhaps the most extreme edge of modern conservative cries for limited government may be found in libertarian philosophy, which seeks to articulate how governmental functions should be delimited. Libertarians believe that government should be limited to only three functions: protecting citizens against violence or fraud, providing a justice system to resolve disputes, and protecting the nation against foreign invasion.[55]

Under libertarian philosophy, it is a legitimate function of government

53. *See* Carl T. Bogus, *Rescuing Burke*, 72 MO. L. REV. 387, 388, 390-91 (2007).

54. GOLDWATER, *supra* note 19, at 8-9, 11-12.

55. FRANK S. MEYER, IN DEFENSE OF FREEDOM 99-100 (1996). *See also* DAVID BOAZ, LIBERTARIANISM: A PRIMER 186 (1997) (stating that the role of government is "to protect our rights, creating a society in which people can live their lives and undertake projects reasonably secure from the threat of murder, assault, theft, or foreign invasion").

to maintain police departments to protect citizens against criminal assaults. But do libertarians consider it legitimate for government to regulate, even ban, handguns? I assume most libertarians believe government may properly prohibit the private ownership of substances such as anthrax, sarin, or plutonium. That, after all, is part of the government's role of protecting individuals against violence. As a matter of political philosophy, banning handguns is the same kind of decision. If the legislature may decide that anthrax presents risks to public safety that are not warranted by its utility, then— whether or not one happens to agree with its judgment—it is proper for the legislature to make the same kind of decision concerning handguns. Nevertheless, libertarians are passionately hostile to gun control. For example, libertarian David Boaz writes:

> One popular solution that will *not* reduce crime is gun control. There are more than 200 million privately owned guns in the United States, and no gun-control measure will ever change that. Law-abiding citizens have a natural and a constitutional right to keep and bear arms, not just for hunting but for self-defense and in the last resort for defense of freedom.[56]

Notice that Boaz is not merely arguing that gun control is bad public policy. In the last sentence set forth above, he is stating that it is illegitimate for a legislature to enact gun control. But why? Libertarian philosophy concedes that one of the proper roles of government is to protect citizens against threats of violence. If, therefore, the legislature determines that firearm regulations will help do that, how is it somehow philosophically illegitimate to legislate accordingly? Boaz says doing so will violate the natural and constitutional rights of citizens. We shall put the constitutional right aside because we are trying to figure what—beyond an objective analysis of constitutional history—makes conservatives want to conclude that the Second Amendment grants an individual right. Boaz suggests that citizens have a natural right to keep and bear arms. Some libertarians believe in natural rights, but while they may argue that people have a natural right of self-defense, I doubt that they claim people have a natural right to own particular weapons, whether swords, guns, or bombs. Boaz, I suspect, has confused what he sees as a right of self-defense with a right to possess arms. I submit that Boaz's thinking actually runs as follows: (1) people have a natural right of self-defense; (2) to exercise that right effectively they need to own guns; and (3) the legislature cannot be entrusted to make judgments balancing the utility of guns for self-defense

56. *See* Boaz, *supra* note 55, at 239 (emphasis in original). Boaz is the Executive Vice President of the Cato Institute.

against the risks to self-defense created by wide-spread gun ownership.

I happen to disagree with him on these points,[57] as do some conservatives[58] and libertarians.[59] For present purposes, however, let me concede, *arguendo*, all three points. Still, this line of reasoning, or perhaps more accurately this collection of sentiments, only explains why one would be disposed to find that the Second Amendment protects private gun ownership; it does not explain why one would want to premise that right on an insurrectionist platform. Yet David Boaz, like Antonin Scalia, attached the insurrectionist rationale to the end of his reasoning, even though it is unnecessary to either their respective arguments or perhaps even to ideological sentiments deep in their breasts.

Insurrectionism has metastasized from gun rights literature, to political and legal literature, to courts, and now to the Supreme Court. In many instances, I believe, insurrectionism has been added as a rationale for the individual rights theory of the Second Amendment with little thought, attached to the end of arguments almost as cabooses are attached to the end

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57. *See generally* Carl T. Bogus, *Gun Control and America's Cities: Public Policy and Politics*, 1 ALB. GOV'T L. REV. 440 (2008); Carl T. Bogus, *Pistols, Politics and Products Liability*, 59 U. CIN. L. REV. 1103 (1991); *and* Carl T. Bogus, *The Strong Case for Gun Control*, AM. PROSPECT, Summer 1992, at 19 (examining the relative risks and benefits of handguns for public safety).

58. Conservative constitutional scholar Douglas W. Kmiec has written:

> [T]he words 'a well regulated militia, etc.' have an obvious meaning. The history reveals an individual right to possess a gun for the purpose of joining with other members of one's state in a militia to protect against external threat and the internal risk of tyranny from one's own government.
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> . . . .
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> Yet when Justice Scalia and four other members of the Court decided D.C. v. Heller, they nullified D.C.'s gun law and cast doubt upon the laws of every state. From their high bench on that morning, it would not be the democratic choice that mattered, but theirs. Constitutional text, history, and precedent all set aside.
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> The long-winded rationalization given supplies no persuasive reason for misconstruing the Second Amendment to support access to handguns well beyond any militia service or purpose.

Douglas W. Kmiec, *Guns and the Supreme Court: Dead Wrong*, TIDINGS ONLINE, July 11, 2008, http://www.the-tidings.com/2008/071108/kmiec.htm. *See also* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. (forthcoming Apr. 2009), *available at* http://ssrn.com/abstract=1265118 (arguing that *Heller* represents "the Court's failure to adhere to conservative judicial methodology" because it was not sufficiently committed to textualism, has embarked on an endeavor that will force it to create something akin to a code of regulations, failed to adequately respect legislative judgments, and rejected principles of federalism). Judge Wilkinson is both a distinguished jurist and conservative thinker.

59. *See* Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, THE NEW REPUBLIC, Aug. 27, 2008, at 32 (Posner, who is widely considered to be a libertarian, argues that *Heller* was wrongly decided).

of trains. It has become almost part of the background music about the Amendment. Modern conservatism may be skeptical of government, yet insurrectionism reflects more than skepticism or even mistrust of government. It springs from a deep fear and hostility toward the government. It sees the militia not as an instrument for preserving order and suppressing insurrections, but as an instrument for promoting insurrection. It does not solve the problem to say that the militia or the people may only take up arms against the government "if necessary" or "as a last resort." Tyranny, like beauty, can be in the eye of the holder. When he leapt to the stage after murdering Abraham Lincoln, John Wilkes Booth shouted: *"Sic semper tyrannis"* (thus always to tyrants).[60]

We are dealing with powerful symbols. As the Court's division in *Heller* demonstrates, we are moved not as much by analysis as by instincts—instincts shaped by images, legends, anecdotes, and parables. When the Supreme Court says the Founders believed in something, it affects sentiments in much the same way as does a church when it says what saints believed. Most people, of course, do not read Supreme Court opinions. However, ideas migrate, and ideas have consequences. The Republic will endure only as long as its citizens have an unyielding faith in constitutional democracy and the rule of law. Romanticizing insurrectionism corrodes that essential faith; and the Court powerfully romanticizes insurrectionism when it states, with the authority only it possesses, that the Founders embedded it in the Constitution.

Heller is likely the first in a line of Supreme Court opinions about the Second Amendment. We must hope that no matter how the Court ultimately maps the constitutional boundaries of gun control, it will recognize both the lack of necessity for the insurrectionist rationale and the perniciousness of legitimizing that idea—and that it will not merely ignore insurrectionism in its future opinions, but expressly reject it.

60. Bogus, *The Hidden History of the Second Amendment*, *supra* note 3, at 387 n.383.

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