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**SUPERB HISTORY, DUBIOUS CONSTITUTIONAL AND  
POLITICAL THEORY: COMMENTS ON UVILLER AND  
MERKEL, *THE MILITIA AND THE RIGHT TO ARMS***

Sanford Levinson\*

I am quoted on the back cover of this fine book<sup>1</sup> as follows:

H. Richard Uviller and William G. Merkel have written an outstanding book. One need not agree with every one of their arguments in order to recognize this as a major contribution to the debate about the intellectual origins of the Second Amendment. Anyone interested in the topic — including the potential implications of the Amendment for contemporary gun control policy — should read this book.

I have no hesitation in reaffirming every word, though the careful reader will be attuned to the fact that my praise is accompanied by the suggestion that I myself might not agree “with every one of their arguments.”<sup>2</sup> This is in fact the case, not least (though, perhaps surprisingly, not most, either) because they subject my own work to a rather vigorous attack. In the brief comments that follow, I want first to explain why I am so enthusiastic about the book, and then turn to what indeed are some of my hesitations about the conclusions that Uviller and Merkel draw from their own arguments with regard to the work particularly of Akhil Reed Amar and of myself. I also want to relate my critique both to some general issues of constitutional interpretation and then, finally, to the continuing relevance of a Lockean (and Jeffersonian) legitimation of armed revolution.

I. WHY THIS BOOK IS VERY GOOD INDEED

One of the great debates among constitutional analysts concerns the meaning of the somewhat elliptical words of the Second Amendment: “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.”<sup>3</sup> Although this passage, like all parts of the Constitution, can be approached through multiple perspectives — or “modalities,”

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<sup>1</sup> H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002).

<sup>2</sup> *Id.*

<sup>3</sup> U.S. CONST. amend. II.

in the word of my colleague Philip Bobbitt<sup>4</sup> — including, among others, an emphasis on the ostensibly pure text or analysis of decided caselaw in various courts, for some reason, the debate about the Second Amendment seems to focus on what Bobbitt terms the “historical” modality: the assignment to the text of the meaning held either by its authors or its initial audience.<sup>5</sup> Both proponents of what might be termed a “strong” Second Amendment — strong because it would rebuff to some significant extent efforts by both state and national governments to regulate arms — and their opponents, who support extensive gun control and, therefore, wish to recognize, at most, only “weak” emanations from the Amendment, seem intent on enlisting James Madison and other members of the founding generation on their side. Both camps seem to agree that judges should be guided, if not indeed controlled, by the purported views of these historical figures.<sup>6</sup> As I shall argue presently, even those committed to the normative importance of historical analysis, or what has come to be called “originalism”<sup>7</sup> — and this most certainly appears to include Uviller and Merkel even as it does not include myself, for all of my interest in constitutional history — must explain exactly why their historical clock stops in 1787 rather than going on to 1868, when the Fourteenth Amendment, with its protection of “privileges or immunities of citizens of the United States,”<sup>8</sup> was added to the Constitution. But this does not gainsay the fact that the thought of the eighteenth century has its own independent significance. Let me begin, then, with 1789 and the proposal by Congress of what became the Second Amendment.

One of the great mysteries attached to the Bill of Rights is figuring out exactly why the Second Amendment was included within that group of twelve amendments proposed by the First Congress and, more importantly, the ten amendments that were in fact ratified by the states and, thus, added to the Constitution.<sup>9</sup> Two broad answers appear to contend for acceptance as to the explanation. One, most capably argued by Jack Rakove, is that the Second Amendment must be read and understood within the context of the “militia clauses” of Article I, Section 8, Clause 16.<sup>10</sup> This provision assigned to Congress the power to “provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed

<sup>4</sup> PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 11 (1991).

<sup>5</sup> *See id.* at 13.

<sup>6</sup> I have written about some aspects of this debate in Sanford Levinson, *The Historians' Counterattack: Some Reflections on the Historiography of the Second Amendment*, in *GUNS, CRIME, AND PUNISHMENT IN AMERICA* 91 (Bernard E. Harcourt ed., 2003).

<sup>7</sup> *See* Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 *CHI.-KENT L. REV.* 103 (2000).

<sup>8</sup> U.S. CONST. amend. XIV.

<sup>9</sup> The Second Amendment was originally fourth on the list of amendments sent to the states. *See* UVILLER & MERKEL, *supra* note 1 at 98 n.131.

<sup>10</sup> *See* Rakove, *supra* note 7, at 125.

in the service of the United States,"<sup>11</sup> though it did reserve "to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."<sup>12</sup> Rakove argues that the Second Amendment was basically a solution to a debate about federalism: "that is, a debate about the respective competence and authority of the national and state governments."<sup>13</sup> It was not at all debate about individual rights, unlike, say, the First Amendment or the self-incrimination clause of the Fifth Amendment.

In contrast to this view — which obviously focuses almost exclusively on the respective rights of governments — is the emphasis on rights of individuals.<sup>14</sup> Proponents of this emphasis have no trouble comparing the Second Amendment to the rest of the Bill of Rights as a guarantee of important rights against unwarranted governmental interference.<sup>15</sup> Still, a key question concerns the purposes for which an individual might be said to have a right to bear arms. Uviller and Merkel repeatedly emphasize that the constitutional protection of a right to bear arms has almost literally nothing to do with "private" life, such as, most certainly, hunting or even their use by individuals as protection against threats by ordinary criminals.<sup>16</sup> Thus, Uviller and Merkel write that "supporters of constitutional right to own weapons for *private purposes* were atypical even within the anti-federalist movement, and they remained insignificant within the nation as a whole."<sup>17</sup> So what kind of "individual right" might be protected? The most interesting — albeit "terrifying"<sup>18</sup> — interpretation of the "individual-rights view" relates the right protected by the Second Amendment to the right of revolution manifested only fourteen years before (and, of course, concluded at the Battle of Yorktown less than a decade before the drafting of the Amendment).<sup>19</sup> I should note immediately that no proponent of such a view has ever defended the "legal" right of an individual to engage in revolutionary violence, if that is taken to mean that the state must remain defenseless against the revolutionary. No legal regime, including that established by the Constitution, has ever recognized such a right, and none ever will. This, of

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<sup>11</sup> U.S. CONST. art. I, § 8, cl. 16.

<sup>12</sup> *Id.*

<sup>13</sup> Rakove, *supra* note 7, at 141.

<sup>14</sup> *See, e.g., id.* at 103.

<sup>15</sup> *See id.* at 106–07.

<sup>16</sup> *See, e.g., UVILLER & MERKEL, supra* note 1, at 86 ("[T]he ratifying convention's concern with the right to arms were plainly directed toward the service of a collective purpose."); *Id.* at 99 ("[T]he Framers' purpose in the drafting of the Second Amendment was to protect the constitutional status of the militia; there is no suggestion of any concern with a personal liberty to carry arms for private purposes.").

<sup>17</sup> *Id.* at 81 (emphasis added).

<sup>18</sup> *See* David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991) (discussing the "terrifying" reality of the Second Amendment-created militia).

<sup>19</sup> *See id.* at 583–84.

course, points to a difficulty in understanding what we mean by an “individual” right to bear arms that differs, on the one hand, from the federalism-oriented view of Rakove,<sup>20</sup> and, on the other hand, from views that Uviller and Merkel label “insurrectionist.”<sup>21</sup>

There is a “solution” to the puzzle, and I believe that Uviller and Merkel do an excellent job in laying it out. This solution requires viewing “the people” as a collective body. As Williams has written, “[T]he militia must be the people acting together, not isolated persons acting individually.”<sup>22</sup> This collective entity has an identity independent of any government that merely serves as their potentially imperfect “representative.” We should, that is, realize that our eighteenth-century forebearers did not collapse “we-the-people” into “we-as-instantiated-in-an-institutional-State.” Eighteenth-century political writers, particularly in the post-Revolutionary period, often referred to “the people out of doors” to distinguish them from the quite restricted segment of the people “inside the doors” of legislatures or even constitutional conventions; and the most complex problem presented to Americans of the revolutionary and constitutionalist generations was to fix on a proper relationship between these two conceptions of “the people.”<sup>23</sup>

Even the most capacious understanding of “the people” and emphasis on the importance of collective action and identity requires, nonetheless, that one recognize that it is composed only of individual, albeit not “isolated,” persons. Such community-oriented individuals might come, one by one, to believe that their government — whatever its self-serving proclamations of legitimacy — is in fact corrupt or even worse. And this collectivity of individuals might well proclaim *their* right of revolution and emulate Washington and others by picking up their arms and taking the field against the forces of a now-discredited state apparatus.

And why not? Did they completely lose such a right of revolution by virtue of the fact that a new constitution had been drafted and accepted by state constitutional conventions? It is hard to believe that a generation that had exercised just such a right — many of them finding intellectual sustenance in John Locke and his apparent support of a revolutionary “appeal to heaven”<sup>24</sup> — had completely turned its back on the right’s legitimacy.<sup>25</sup> To be sure, the great hope of those who

<sup>20</sup> See Rakove, *supra* note 7.

<sup>21</sup> See, e.g., UVILLER & MERKEL, *supra* note 1, at 175 (referring to my own purported views).

<sup>22</sup> David Williams, *supra* note 8, at 554.

<sup>23</sup> See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 319–28 (1969).

<sup>24</sup> JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* 84 (J.W. Gough ed., Oxford 1948) (1640).

<sup>25</sup> “If the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self-defense which is paramount to all positive forms of government.” DAVID WOOTTON, *THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS* xiii (2003) (quoting *THE FEDERALIST* NO. 28 (Alexander Hamilton)). As Wootton

supported — and even those who merely acquiesced in — the Constitution was that it would indeed lead to the realization of a “more perfect Union;” but, of course, aspiration is different from actuality (the Articles of Confederation aspired to a “perpetual” union,<sup>26</sup> and they lasted a grand total of seven years between their 1781 ratification<sup>27</sup> and displacement in 1788 by the ratification of the 1787 Constitution). One of the seminal books published in the *annus mirabilis* of 1776 was Edward Gibbon’s *Decline and Fall of the Roman Empire*,<sup>28</sup> though the colonial Americans scarcely needed to be reminded that even the greatest empires — such as the British Empire — were subject to the diseases of corruption and decay. There were, then, many who foresaw the possibility of governmental decline,<sup>29</sup> perhaps sufficient to warrant the possibility of revolution. It is hard to believe that anyone with such fears would not as well be concerned with protecting the right of at least the virtuous part of the citizenry to “keep and bear arms”<sup>30</sup> against the day when it might be necessary to take them up, organized as a collective citizens’ militia, in order to fully enhance “the security of a free State”<sup>31</sup> threatened by the corruption of governmental officials who, in effect, were trying to seize “the State” for their own nefarious purposes.<sup>32</sup>

I read Uviller and Merkel to offer a basic endorsement of this view, as a historical matter. They write that the Second Amendment is best understood as though it read like this: “*Inasmuch as a well-regulated Militia shall be necessary to the security of a free state and so long as privately held arms shall be essential to the maintenance thereof, the right of the people to keep and bear such arms shall not be infringed.*”<sup>33</sup> They explicitly distinguish their position from “the most

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writes, “If the constitution the *Federalist* advocated failed, it recognized revolution as an appropriate response.” *Id.*

<sup>26</sup> U.S. ARTS. OF CONFEDERATION pmb. (1777).

<sup>27</sup> *Id.* at 10.

<sup>28</sup> EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* (William Benton ed., 1952) (1776).

<sup>29</sup> See WOOD, *supra* note 23, at 413–25 & 513–16.

<sup>30</sup> U.S. CONST. amend. II.

<sup>31</sup> *Id.*

<sup>32</sup> See Rakove, *supra* note 7.

<sup>33</sup> UVILLER & MERKEL, *supra* note 1, at 24. Contrast this with another “linguistically correct reading” that they offer later in their book:

Congress shall not limit the right of the people (that is, the potential members of the state militia) to acquire and keep the sort of arms appropriate to their military duty, so long as the following statement remains true: “an armed, trained, and controlled militia is the best — if not the only — way to protect the state government and the liberties of its people against uprisings from within and incursions or oppression from without.”

*Id.* at 150. The key issue raised by their paraphrase is their omission of the possibility of “oppression from within” government as well as “from without.” The paraphrase in the text is more open to this possibility, which I personally believe is more accurate historically.

devoted of the individual rights advocates,”<sup>34</sup> for, according to their understanding, “the language of the Amendment can not support a right to personal weaponry independent of the social value of a regulated organization of armed citizens notwithstanding comments in other contexts by some of the Founders regarding guns and the ideal of personal responsibility.”<sup>35</sup> Or, as they write elsewhere: “[T]he right associated with [the Second Amendment] cannot be reinterpreted to mean a right to arms for sport *or personal defense* without abandoning the imperative of fidelity”<sup>36</sup> to the thought of the eighteenth century that underlay it. Such fidelity requires recognition that what was at issue was “support for a well-organized military corps.”<sup>37</sup>

The key questions, then, concern what counted as the “social value” of an armed citizenry, and whether “regulation” necessarily entailed complete state control (as against a notion of communal self-regulation). For those committed to a strong version of civic republican ideology — of the kind that had justified revolution and regicide in England and then revolution in America — the social value was obvious. It was the ultimate “check-and-balance” on overly-assertive and potentially illegitimate exertions of state power. Concomitantly, anyone suspicious of the state would scarcely be comfortable giving it exclusive authority to “regulate” the public militia. Or so many — though certainly not all — eighteenth-century Americans believed.

I believe that Uviller and Merkel offer a finely textured, historically nuanced reading of the origins and likely original meaning of the Second Amendment. They offer a truly masterful exposition of the role of an armed populace in “civic republican” political theory in the seventeenth and eighteenth centuries and its transmission from England to America, including changes in emphasis derived from social circumstances in America (such as the lack of a hegemonic aristocracy that could keep ordinary citizens “in their place”).<sup>38</sup> Anyone committed to the far more limited “federalist” argument will have to contend with the arguments raised by Uviller and Merkel, and I, for one, remain skeptical whether anyone can rebut them. At the very least, no participant in the debate can possibly be thought to be well-informed if he or she does not wrestle with the materials uncovered by Uviller (a professor of law) and Merkel (a trained historian). Indeed, Rakove himself is quoted on the back jacket as describing their book as “[a] major advance in Second Amendment studies . . . .”<sup>39</sup>

<sup>34</sup> *Id.* at 24.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 159 (emphasis added).

<sup>37</sup> *Id.*

<sup>38</sup> *See, e.g., id.* at 94–106.

<sup>39</sup> UVILLER & MERKEL, *supra* note 1.

It speaks well for Rakove that he is so enthusiastic about the book, since I read it in substantial measure as a critique of the position to which he himself is committed. One explanation for his enthusiasm, though, may be found when he says that Uviller and Merkel offer “a fundamental challenge to the popular but misguided view that the amendment unequivocally recognizes and protects a strong individual right to own and use firearms, free of public regulation.”<sup>40</sup> He is correct that they do indeed lay down such a challenge, and I turn now to the way that Uviller and Merkel mount their challenge.

One possibility is that Uviller and Merkel, like, say, Daniel A. Farber, simply reject the relevance of originalism, preferring a more “living Constitution” that is regularly updated to take account of present circumstances.<sup>41</sup> This, however, is not the case, for they repeatedly reveal a commitment to the normative importance of history as a guide to constitutional interpretation: they are critical of what they term a “flexible Constitution.”<sup>42</sup> Indeed, they explicitly eschew the “modern, pragmatic” approach of someone like Richard Posner,<sup>43</sup> in favor of “Justice Scalia’s position that the original intention of the Framers, inferred from text according to a hypothetical contemporary understanding, should govern as long as and insofar as critical assumed underlying social and technological factors remain fundamentally unchanged.”<sup>44</sup> It is this last clause that separates them from those originalists — who will otherwise be cheered by the historical analysis of the book — who support a “strong” Second Amendment. Let us, then, see how Uviller and Merkel structure their argument.

I have already mentioned one important aspect of their argument, which is to reject any notion that the constitutional protection of a right to keep and bear arms has anything to do with “private” life, including personal protection against criminals; the rationale for a constitutionally protected gun ownership, they believe, was “public.”<sup>45</sup> As already suggested, their argument is based on an appreciation of the civic-republican ideology that they believe, I think rightly, underlies the Second Amendment as a historical artifact.<sup>46</sup> There can be no doubt that civic-republican ideology allowed some degree of public regulation. Saul Cornell, for example, has pointed out that Pennsylvania had no trouble limiting gun ownership only to “law-abiding” members of the community during the Revolutionary and post-

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<sup>40</sup> *Id.*

<sup>41</sup> See Daniel A. Farber, *Disarmed By Time: The Second Amendment and the Failure of Originalism*, 76 CHI.-KENT L. REV. 167, 183 (2000).

<sup>42</sup> See, e.g., UVILLER & MERKEL, *supra* note 1, at 199.

<sup>43</sup> *Id.* at 36.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 167.

<sup>46</sup> See *id.* at 37–45.



Revolutionary periods.<sup>47</sup> This suggests, at the very least, that there is no historical warrant for the view that the Second Amendment was designed, or read, to preclude *any* state regulation or, more to the point, to tolerate the possession of guns by those who were viewed as antisocial and, therefore, without the requisite civil sensibility to merit owning guns.

This leaves open, of course, the question of whether any such regulation was limited to state governments. It is possible, even within a "federalist" reading, to read the Second Amendment as precluding regulation by the national government and leaving it exclusively to states to decide what regime of regulation they wish to employ. Thus, Uviller and Merkel write:

The Second Amendment was intended to prohibit Congress or the President from disarming state militias by disarming their members. Period. It does not encode a general federal policy with regard to gun ownership by which courts may strangle efforts of *local legislatures* to enact what they deem enlightened social policy.<sup>48</sup>

Consider in this context the Twenty-first Amendment, which in repealing Prohibition, appears to have left it to the states to decide how much they wanted to regulate the internal availability or sale of alcohol.<sup>49</sup>

Given that most contemporary debate concerns the validity of *federal* regulation of arms, a concession that states might be free to regulate,<sup>50</sup> especially if coupled with a view that the national government is seriously estopped from regulation, is scarcely to be welcomed by devotees of gun control. So far more important than this historical point is Uviller and Merkel's much more fundamental challenge to those who assert the Second Amendment as a shield against federal regulation. Understanding this challenge requires paying full attention to the second part of their title: *How the Second Amendment Fell Silent*. In many ways their argument

<sup>47</sup> Saul Cornell, *Commonplace or Anachronism: The Standard Model, The Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENT 221, 229–30 (1999).

<sup>48</sup> UVILLER & MERKEL, *supra* note 1, at 36 (emphasis added).

<sup>49</sup> See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that Congress could condition federal funds on South Dakota's raising of its drinking age, but leaving open whether Congress could directly require a national drinking age); see also *id.* at 212 (Brennan, J., dissenting) (arguing that the Twenty-first Amendment did indeed leave this decision up to South Dakota and therefore precluded Congress from "buying out" its right by conditional assignment of funds).

<sup>50</sup> Though, as a jurisprudential matter, many states have passed their own amendments protecting some degree of a right to possess arms, and regulation in these states would be subject to litigation under the state's constitutional provisions. See, e.g., Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

replicates that of David C. Williams, who similarly argues that the historical meaning of the Second Amendment, insofar as it was indeed designed to protect the possibility of some kind of communal right to revolution by protecting the right of private individuals to possess arms, has been rendered irrelevant inasmuch as the nature of our political regime has indeed been transformed since 1787.<sup>51</sup> That is, civil-republicanism, as a political ideal, rests on a host of assumptions about how society is organized and, just as importantly, how the consciousness of its members is constructed. The image of the “citizen militia” — the “Minuteman” of Revolutionary War fame — suggests individuals who cared deeply about their society and country. Nathan Hale’s regret that he had “but one life to lose”<sup>52</sup> for his country memorably captures what it means truly to identify with a polity, as can John Adams’s willingness to spend years apart from his beloved Abigail because duty to the United States demanded it.<sup>53</sup> To the extent that eighteenth-century America can accurately be described within the terms of civil-republican ideology — itself a hotly debated issue — there seems to be widespread agreement that the United States became considerably more “liberal” in the nineteenth century and afterward.<sup>54</sup>

Part of this development, as already suggested, involves structures of social consciousness. Is one truly constituted, as it were, by membership in the polity, or, instead, does one conceive oneself primarily as an isolated individual or, at best, a member of a nuclear family? If the latter is the case, then all other institutions are increasingly assessed only in terms of whether they contribute to benefitting oneself or one’s family. It becomes ever more difficult to figure out why anyone would subordinate his own interests to those of the polity.

Whether as cause or effect, the institutional structures of the modern state look remarkably different from its eighteenth-century counterpart, not least because there are, for example, organized systems of police, and a vast realm of military organizations ranging from what the eighteenth-century Founders would have called (and some deeply opposed this) a “standing army”<sup>55</sup> to national reserves and national guards. The “citizen-militia,” Uviller and Merkel argue, simply is an anachronism, playing no role in contemporary American life other than the fantasied image of latter day “militias” in woodlands who, if taken seriously,

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<sup>51</sup> See DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* (2002).

<sup>52</sup> Henry P. Johnston, *Captain Nathan Hale*, 61 HARPER’S NEW MONTHLY MAGAZINE 59 (1880), available at <http://www.memory.loc.gov>.

<sup>53</sup> See, e.g., John Quincy Adams & Charles Francis Adams, *Life of John Adams*, 113 THE N. AM. REV. 193 (1871), available at <http://www.memory.loc.gov>.

<sup>54</sup> See, e.g., JOYCE APPLEBY, *LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION* (1992).

<sup>55</sup> See UVILLER & MERKEL, *supra* note 1, at 158.

constitute a threat to, rather than a protection of, our most basic constitutional rights.<sup>56</sup>

To the citizens of the new nation, the militia meant an organization comprising *all eligible men*, armed, and obeying a universal, statutory duty to serve and to stand ready to serve under elected officers. The new Americans, moreover, thought of the militia as the alternative to the dangerous standing army of professional soldiers, the civilian protection against the threat of military oppression.<sup>57</sup>

So far, so good, at least from the perspective of the advocate of a “strong” Second Amendment. Now, however, comes the crucial part of their argument:

It is impossible to read in the modern use of the word militia even the faintest trace of these essential characteristics of the militia as that concept was known to the founding generation. Consequently, as used in the Second Amendment, the word simply has no application in the world we live in.<sup>58</sup>

The actual history of the militia in the nineteenth and twentieth centuries illustrates “such a drastic change in the context of the conception of a militia that we are led to conclude that there is no contemporary, evolved, descendant of the eighteenth-century ‘militia’ on today’s landscape.”<sup>59</sup> Take the National Guard, for example. Today, its members are organizationally “part of the standing army rather than an alternative to it.”<sup>60</sup>

And if today’s National Guard fails to fit the concept of a militia, the notion is little short of ludicrous that the constitutional term applies to the scattered, small, unregulated bands of fatigue-clad, gun-loving, self-appointed libertarians taking secret target practice in the woods while underwriting one another’s bigotry.<sup>61</sup>

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<sup>56</sup> *See id.*

<sup>57</sup> *Id.* at 156–57 (emphasis added). The emphasized words are important precisely because it offers a far more capacious definition of who constituted the relevant militia than would be the case if one emphasized only what is sometimes called the “select militia,” i.e., the actual subset of the general militia that is actually serving in a state-organized institutional militia at any given moment.

<sup>58</sup> *Id.* at 157.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 157–58.

<sup>61</sup> *Id.*

In case we have not yet gotten the message:

[M]odern police obviate any lingering necessity for a militia. Indeed, rather than believing that ad hoc assemblies of armed men are necessary — actually a necessity — for the maintenance of freedom in the states, the overwhelming majority of Americans today probably think of them as themselves a threat to the peace.<sup>62</sup>

Things were not predestined to work out this way: “Had our military establishment evolved into a complex organization that included well-organized local contingents resembling the Israeli or Swiss model of universal military service by citizens for whom soldiering is not their primary vocation, the lineal descendant of the militia might be alive today.”<sup>63</sup> But, obviously, this did not happen. A professionalized military supplanted the citizen militia — even if we pay full heed to those citizen-soldiers called members of the Reserves or the National Guard. Thus, argue Uviller and Merkel, “our militia has not evolved within its original genus; it has, rather, become extinct,”<sup>64</sup> which means that “the Second Amendment has lost meaning today.”<sup>65</sup> It is as if an amendment in the Constitution enjoined us to pay taxes for the protection of unicorns. A worthy sentiment, no doubt, but it would today be devoid of meaning because we know, alas, that there are no unicorns. Similarly, a constitutional protection linked with preserving a citizen militia (and, incidentally, forestalling the development of a large, professionalized standing army) is equally devoid of meaning. Thus this book has the ability at the same time to provide important aid both to those who look to history for evidence of a quite robust protection of a right to bear arms and to those today who wish to engage in full-scale regulation (if not outright prohibition) of private gun ownership.

## II. SOME PROBLEMS WITH THE ARGUMENT

### *A. The Originalist Tendencies of Uviller and Merkel*

The principal problem with their argument is its commitment to a desiccated version of originalism. That is, with regard to understanding what the Second Amendment “really means,” they resolutely stop at 1789–91 — the dates of the

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<sup>62</sup> UVILLER & MERKEL, *supra* note 1, at 158.

<sup>63</sup> *Id.* at 159.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

proposal and ratification of the Amendment.<sup>66</sup> As I have stated, I am in much more sympathy with their historical analysis than are other Second Amendment scholars such as my friend Randy Barnett. One reason these scholars are so vigorous in their advocacy of the individual rights perspective is precisely because they share with Uviller and Merkel their originalist commitment.<sup>67</sup> For those of us who do not, what happened in the eighteenth century may be of great intellectual and historical interest, but, of course, that is not at all the same as according it great — if, indeed, *any* — weight in ascertaining the meanings we should today ascribe to legal texts.

Indeed, even hard-core originalists agree at the end of the day that understandings, however defined, are not sufficient to provide legal guidance for us today.<sup>68</sup> Thus, Robert Bork, who famously proclaimed that original meaning was the “only” legitimate way of approaching constitutional questions,<sup>69</sup> nonetheless conceded, both in testimony before the Senate during his ill-fated nomination to the Supreme Court,<sup>70</sup> and in his book published thereafter,<sup>71</sup> that precedent has its own claims, whatever the fidelity of a decision to the views its original authors or audiences. As Philip Bobbitt has notably argued, “text” and “history” are only two of the (at least) six “modalities” of legal argument.<sup>72</sup> At least as legitimate — and for the practicing lawyer, far, far more likely to be his or her stock in trade — is the “doctrinal” argument by which Bobbitt means careful attention to precedents — whether judicial opinions, or constitutional interpretations manifested by Congress, Presidents, or, indeed, the American people.<sup>73</sup>

Uviller and Merkel, however, basically pay almost no attention to the doctrinal development of “the right to bear arms” post-1791 and, especially, in the run-up to the Fourteenth Amendment in 1868.<sup>74</sup> To this extent, they indeed seem to embrace the approach of Antonin Scalia in rejecting the very idea of a living constitution that must be understood, at least in part, in terms of ongoing developments, even if these

<sup>66</sup> See *id.* at 37–106 (discussing the Second Amendment in chapters 2 and 3).

<sup>67</sup> See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

<sup>68</sup> See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

<sup>69</sup> See *id.* at 143.

<sup>70</sup> See *NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT*, S. EXEC. DOC. NO. 100-7, at 21–29 (1987).

<sup>71</sup> See *id.* at 158. For a more general discussion of this point, see SANFORD LEVINSON, *How Many Times Has the United States Constitution Been Amended?* (A) <26; (B) 26; (C) 27; (D) >27: *Accounting for Constitutional Change, in* *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 13, 35–36 (Sanford Levinson ed., 1995) [hereinafter *How Many Times*].

<sup>72</sup> See BOBBITT, *supra* note 4, at 12–13.

<sup>73</sup> *Id.* at 18.

<sup>74</sup> See *supra* note 65 and accompanying text.

developments might well surprise the original authors and audiences of a given text.<sup>75</sup>

To be sure, the record is mixed. No lawyer is unaware of the complexities of interpreting precedent. But consider, for starters, the key passage from Chief Justice Taney's opinion in *Dred Scott v. Sandford*<sup>76</sup> where he lists among the "privileges and immunities of citizens" the right "to keep and carry arms wherever they went."<sup>77</sup> Perhaps *Dred Scott* deserves its status as the most reviled opinion in American judicial history, but, surely, not because of Taney's generous view of the rights attached to American citizenship. Indeed, a major reason that Taney (and many others) could not envision blacks as citizens is precisely their assumption that citizenship brought with it a robust right to keep and bear arms, wholly unrelated, so far as one can tell, to militia service. Nor was Taney aberrational in his view. Consider the fact that a year before *Dred Scott*, the platform of the new Republican Party protested the infringement of the "right of the people to keep and bear arms."<sup>78</sup> This occurred, as prize-winning historian Mark Neely points out, precisely "at a time when, as the Whig party platform of 1856 expressed it, 'a portion of the country [was] being ravaged by civil war.'"<sup>79</sup> The Republican commitment to a right to arms was equally unrelated to civic-republican theory of an organized militia. And eight years later, the Democrats, too, invoked the Second Amendment in their own platform by way of expressing "concern over 'interference with and denial of the right of the people to bear arms in their defense.'"<sup>80</sup>

One might well agree with Uviller and Merkel that Taney, the Republicans, and the Democrats, were all equally mistaken in their history and that they, in effect, were embracing a quite different Second Amendment from the one proposed and ratified in 1791.<sup>81</sup> But so what? Isn't this the way that American constitutional law has developed, over and over? It is safe to say that no supporter of the First Amendment in 1789 believed that it would someday be interpreted to prevent the criminalization of blasphemy or the award of civil damages for libeling public figures. Would Uviller and Merkel really confine the meaning of the First Amendment to what its proponents assumed they were doing in 1789? Or, think of the Fourteenth Amendment in this regard. Indeed, consider the use made of the

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<sup>75</sup> See UVILLER & MERKEL, *supra* note 1, at 199–200 ("In our conservative view, amendment of the Constitution is not accomplished *sub silentio*, nor does the wish — or even express intention — of some contemporaries implicitly rewrite a standing text.").

<sup>76</sup> 60 U.S. (19 How.) 393 (1857).

<sup>77</sup> *Id.* at 417.

<sup>78</sup> See MARK E. NEELY, JR., *THE UNION DIVIDED: PARTY CONFLICT IN THE CIVIL WAR NORTH* 160 (2002).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See generally UVILLER & MERKEL, *supra* note 1, at 94–106.

Fifth Amendment by the Supreme Court in *Bolling v. Sharpe*,<sup>82</sup> which invalidated school segregation in the District of Columbia in spite of the extreme implausibility of believing that anyone in 1791 could possibly have imagined that the Due Process Clause of that Amendment might be used for such a purpose.<sup>83</sup> Even Robert Bork pledged to the Senate that he would not vote to overrule *Bolling*, whatever its conflict with his favored theory of original intent.<sup>84</sup> Examples are legion precisely because one cannot conceivably understand the actualities of the American constitutional system by looking to what its designers intended or initial audiences understood.<sup>85</sup>

There is, then, a tendentious quality to their assertion that “the Second Amendment right to arms remains firmly fixed in its seventeenth-century English heritage. It never evolved from the particular to the general, never grew from one of the historically conditioned rights of Englishmen into one of the unconditional and universal rights of humankind.”<sup>86</sup> One might well agree that it never developed into an “unconditional and universal right[] of humankind,” whatever precisely that might mean, without conceding that there was no evolution at all from its seventeenth-century origins to the mid-nineteenth-century conception epitomized by Taney and the Democratic and Republican Parties alike. To be sure, none of them spoke on behalf of all humankind; they were satisfied to rely on the notion that American citizenship had its prerogatives, including the right to keep and bear arms.<sup>87</sup>

### *B. Uviller and Merkel Fail to Confront the Original Meaning of the Fourteenth Amendment*

Their post-1791 historical amnesia is most striking with regard to the Fourteenth Amendment. They devote a number of pages to attacking the work of Yale Professor of Law Akhil Reed Amar, who argues (I believe convincingly) that by 1868 the general understanding of the Second Amendment was far more

<sup>82</sup> 347 U.S. 497 (1954).

<sup>83</sup> *Id.* at 499.

<sup>84</sup> See NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, S. EXEC. DOC. NO. 100-7, at 28–29 (1987). After first testifying that he could not “justify” *Bolling’s* application of the Due Process Clause and that he had been unable subsequently to think of an acceptable “rationale” for it. Bork returned, after a recess in the hearings, to emphasize that he did not, however, mean that he would support its reversal. *Id.*

<sup>85</sup> See, e.g., STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 186–87 (1996).

<sup>86</sup> UVILLER & MERKEL, *supra* note 1, at 164.

<sup>87</sup> See, e.g., AKHIL REED AMAR, THE BILL OF RIGHTS 216–18 (1998).

“individualist” than was the case in 1791.<sup>88</sup> One reason, of course, was precisely the need of Southern blacks and their white allies to use arms to protect themselves against the depredations of the Ku Klux Klan.<sup>89</sup> In effect, there are *two* “Second Amendments” that the historian must consider: one is the version proposed and ratified in 1789–91; the other is what well-trained lawyers believed they were referring to and supportive of in 1868. Uviller and Merkel seem completely uninterested in this latter version, to the detriment of their general argument.

Consider a contemporary lawyer who announces his or her embrace of the First Amendment. Generally speaking, we would not interpret this as restricted to the original meaning of the Amendment; we would assume, unless clearly corrected, that “the First Amendment” as a reference in ordinary speech today includes the accretion of interpretations built up over the past two centuries and, most importantly, those of the twentieth century. Somebody who went abroad and advised a country to adopt “the First Amendment” would not be advising her listeners to read eighteenth-century history but, almost certainly, would be suggesting that they turn to contemporary caselaw for the easiest entry point into grasping what she is referring to. It would, indeed, be absolutely perverse if the judges of this new country, faced with the task of interpreting the words of our First Amendment, that now appeared in its own constitutional text, then limited their inquiries when faced with interpretive dilemmas to eighteenth-century materials. So it is with those who sought to change the U.S. Constitution in 1868 by placing the states under an obligation not to impair the “privileges or immunities” of U.S. citizenship.<sup>90</sup> We must be attentive to what *they* were referring to, and it is this lack of attentiveness that mars Uviller and Merkel as guides to constitutional analysis.<sup>91</sup>

A crucial point, of course, is that Amar, like other scholars, believes that the framers of the Fourteenth Amendment intended to “incorporate” many of the Bill of Rights amendments against the states through the aegis of the Privileges and Immunities Clause.<sup>92</sup> This theory was, of course, rejected in the Court’s dreadful opinion in the *Slaughterhouse Cases*,<sup>93</sup> which adopted a very limited reading of the transformation affected by the Fourteenth Amendment (and even more to the point, the recently completed war that took the lives of two percent of all Americans).<sup>94</sup> Equally obvious, though, is the fact that much of the Bill of Rights (though not the Second Amendment) has subsequently been incorporated through the inept use of

<sup>88</sup> See *id.* at 202–09.

<sup>89</sup> See LOU FALKNER WILLIAMS, *THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871–1872*, at 75 (1996).

<sup>90</sup> U.S. CONST. amend. XIV, § 1.

<sup>91</sup> See UVILLER & MERKEL, *supra* note 1, at 148–49.

<sup>92</sup> *Id.* at 204.

<sup>93</sup> 83 U.S. (16 Wall.) 36 (1872).

<sup>94</sup> See PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH* (1999).



the Due Process Clause.<sup>95</sup> One may or may not believe that the Second Amendment should join the First, Fourth, Fifth, Sixth, and Eighth Amendments in constraining the states. And if one is not an originalist with regard to 1787 or 1791, there is no stronger reason to feel bound by the intentions or understandings of 1868. But this is a wholly different issue from attempting to understand the way that the Second Amendment has functioned in the actual structures of legal arguments offered by well-trained lawyers and politicians over the past two hundred years. Uviller and Merkel, who otherwise seem extremely sophisticated in their actual use of pre-1791 historical materials, exhibit a paucity of such sophistication with regard to the materials examined by Amar. For them, meaning is crystallized in constitutional amber, to be changed only through formal Article V amendment.<sup>96</sup> As I have argued elsewhere, this commitment to Article V formalism generates an almost willful misunderstanding of American constitutional development.<sup>97</sup>

Let me be very clear: nothing I have said suggests that a contemporary judge should necessarily invoke the Second Amendment to restrict state or national regulation of firearms. Answering such a question would require full-scale discussion of methods of constitutional interpretation—including what role, if any, should be played by reference to historical materials. But Uviller and Merkel *do* offer advice to contemporary judges that is ostensibly based on their own commitment to historical and textual fidelity.<sup>98</sup> Even if one believes, as I do, that originalism is a dubious approach to constitutional meaning, one should be aware that they offer an extraordinarily crabbed version of originalism inasmuch as they basically ignore the relevant caselaw such as *Dred Scott* and the sea change in American constitutionalism that was intended by the Fourteenth Amendment.

### III. A POINT OF PERSONAL PRIVILEGE

As noted earlier, Uviller and Merkel select me out for vigorous criticism, not in the least because they assign an article of mine<sup>99</sup> a significant causal role for the generation of interest in the Second Amendment on the part of “mainstream” legal academics.<sup>100</sup> They describe my piece as a “short, oddly casual comment.”<sup>101</sup> This is, in fact, a quite accurate description. That is, it was never my intention to suggest that I had engaged in a truly extensive study of the Second Amendment or, even

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<sup>95</sup> For a discussion of “incorporation” and a listing of the relevant cases, see PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 402–10 (4th ed. 2000).

<sup>96</sup> See UVILLER & MERKEL, *supra* note 1, at 207.

<sup>97</sup> See *How Many Times*, *supra* note 71, at 86–87.

<sup>98</sup> See UVILLER & MERKEL, *supra* note 1, at 217–18.

<sup>99</sup> See Sanford Levinson, *The Embarrassing Second Amendment*, 99 *YALE L.J.* 637 (1989).

<sup>100</sup> See UVILLER & MERKEL, *supra* note 1, at 168–78.

<sup>101</sup> *Id.* at 169.

more, that I had written the last words on the subject. Indeed, the point of my essay was precisely that the Second Amendment had received almost no serious attention from legal academics and that this was a shame for two, quite different, reasons. The first is simply that the Second Amendment raises a host of fascinating conundrums, some of which have already been explored.<sup>102</sup> Anyone seeking to understand the intellectual world from which the Bill of Rights emerged, certainly had an obligation to confront the Second Amendment and to stop pretending that it simply did not exist, which was the general posture of the legal academy as late as the 1980s.<sup>103</sup> A second concern was that it was a sign of an unfortunate disrespect (contempt is probably the more accurate word) on the part of elite liberal academics (like myself) for the millions of Americans who were members of the National Rifle Association and similar organizations that took the Second Amendment extremely seriously.<sup>104</sup> It was past time for the elite academy to treat such people with sufficient respect and seriousness as to confront their arguments and to indicate where, if at all, they were mistaken, rather than to dismiss them as beneath notice.<sup>105</sup> Whatever else may be said about my article, I confess that I take a genuine satisfaction in the extent to which I may be said to have played some role in provoking such fine scholarship (whatever my reservations about their constitutional theory) as that revealed in the book under discussion.

Uviller and Merkel are principally unhappy with me because they ascribe to me a desire to embrace a "neo-Lockean assertion that, in the final analysis, the right of armed resistance or insurrection is a necessary safeguard against a tyrannical state."<sup>106</sup> They argue, instead, that the adoption of the Constitution in effect negated any need for such a right, because the Constitution itself offered peaceful ways by which political conflicts could be settled and tyranny averted.<sup>107</sup> As they write: "After 1787, with remedies against usurpation defined in the constitutional instrument itself, recourse to external bodies of law or theory was no longer required to right the ship of state if the government became corrupted. For purposes of American constitutionalism, Lockean resistance theory was therefore relegated into irrelevancy."<sup>108</sup> To embrace, even as a theoretical matter, the potential validity of "Lockean resistance theory" in our own time is to give aid and comfort to "insurrectionists," which, of course, is precisely what they accuse me of doing.<sup>109</sup>

I have no hesitation in saying that I agree with Uviller and Merkel, that violent revolution is currently unwarranted in the United States. I also have no hesitation

<sup>102</sup> See Levinson, *The Embarrassing Second Amendment*, *supra* note 99, at 642.

<sup>103</sup> See *id.*

<sup>104</sup> See *id.*

<sup>105</sup> See *id.*

<sup>106</sup> UVILLER & MERKEL, *supra* note 1, at 170.

<sup>107</sup> See *id.*

<sup>108</sup> *Id.* at 173.

<sup>109</sup> See *id.* at 174-75.

in saying that I would therefore support the use of state power first to resist and then vigorously to punish any “insurrectionist” who actually picked up his or her gun and attempted to use it for such purposes. As noted earlier, no one has ever inferred from an abstract “right of revolution” the duty of any and all governments to accept the recourse to such a right by simply surrendering to the ostensible revolutionary.<sup>110</sup> To assert a right of revolution is not only, in Locke’s famous words, to “appeal to heaven,”<sup>111</sup> but more to the point, to appeal to one’s fellow citizens and community members to recognize that the situation is indeed sufficiently desperate as to justify the extreme measure of armed rebellion. If that appeal is unsuccessful (as was the case, for example, in 1861, when, from one perspective, Virginia joined ten other states in revolutionary violence against the United States), then it will be suppressed, by any means necessary, and great monuments may well be built for those who put out the fires of revolution. If, on the other hand, the appeal is successful, then great monuments will be built to the revolutionary leaders.

One may hope — as obviously I do — that the Constitution of the United States indeed will serve to achieve the great goals set out in the Preamble. But, of course, it did not always do so, and I am unwilling to concede that the revolutionary ideals that inspired George Washington and Thomas Jefferson expired in 1787 with the creation of the U.S. Constitution. Would Uviller and Merkel, for example, deny that chattel slaves retained a full measure of a “right of revolution” at least until the passage of the Thirteenth Amendment in 1865?

Our Constitution today is considerably more just than it was prior to war and reconstruction, but no one ought to believe that it is necessarily destined to remain so. The Preamble is an aspiration; it is not a description of ordinary reality. So long as we can even imagine the possibility of sufficient corruption and injustice once again pervading our own country, with judicial acquiescence, then the Lockean vision remains an important — and living — part of the American heritage.

The Free Speech Clause of the First Amendment requires the protection of all sorts of louts and brutes, so long as their loutishness takes the form of vile speech instead of overt physical attack. I suspect (and certainly hope) that Uviller and Merkel would not criticize me for having represented the Ku Klux Klan, as a volunteer attorney for the American Civil Liberties Union, when the city of Austin, Texas, attempted to deprive the Klan of their right to march down the city’s principal avenue for a political protest. One must take certain risks on behalf of a robust regime of civil liberty. Whatever risk is posed by the Klan’s marching — and it would be foolish to deny that there is *any* risk that at least one onlooker will be seduced by their pernicious ideas — is outweighed, for most of us, by the greater

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<sup>110</sup> See *supra* notes 23–31 and accompanying text.

<sup>111</sup> LOCKE, *supra* note 24, at 12.

risk of giving to the state the power to play favorites with regard to such things as access to public streets and the like. It is not clear to me that similar arguments do not apply with regard to the Second Amendment. There are surely many louts and brutes who claim its protection, but, as with the First Amendment, it may be a significant error to assume that it is *only* louts who do so.

For better and worse, American political and constitutional thought has always featured a mistrust of the state and an awareness of the temptations of state officials to abuse their powers. There is nothing abstract or hypothetical about the potential for abuse: just look at remarkable claims to basically unfettered authority made by the current administration with regard to an open-ended "war on terrorism."<sup>112</sup>

What keeps me interested in the Second Amendment is that it does indeed force us to confront the most basic issues of political theory and constitutional meaning. But, of course, Uviller and Merkel know that as well, which is what led them to write a book of genuine excellence even if, at the same time, I reserve (and exemplify) my right to disagree with important aspects of their argument.

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<sup>112</sup> See, e.g., *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).