

DUCKING THE BULLET:
DISTRICT OF COLUMBIA V. HELLER
AND THE STEVENS DISSENT

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D*ISTRICT OF COLUMBIA V. HELLER*¹ ESTABLISHED THAT THE Second Amendment's right to arms existed as an individual right, with no requirement that the rights-holder be functioning as part of a well-regulated militia. While the majority opinion has been subjected to extensive review and commentary,² the Steven dissent, joined by four members of the Court, has not. The dissent came within one vote of becoming the majority; it clearly merits close examination.

Had the dissent become law, the Court would have informed the American people, seventy percent of whom believed they had an individual right to arms,³ that their rights-consciousness was sadly mistaken. If done on the basis of sound research and reasoning, this would involve no more than the Court performing its duty. An examination of the dissent suggests, however, that the Court would have been taking this position based upon surprisingly thin reasoning and evidence.

As we will see below, the dissent has great difficulty even

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¹ 128 S. Ct. 2783 (2008).

² Volume 56 of the UCLA Law Review alone contains thirteen articles devoted to *Heller*. See also Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145 (2008); Michael P. O'Shea, *The Right to Defensive Arms after District of Columbia v. Heller*, 111 W. VA. L. REV. 349 (2009); Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246 (2008).

³ *Second Amendment Supreme Court Ruling Matches With Public Opinion from The Harris Poll*, HARRIS INTERACTIVE, June 26, 2008, available at http://www.harrisinteractive.com/harris_poll/index.asp?PID=922 (Harris Poll No. 68). Forty-one percent indicated that the Second Amendment protects only an individual right; twenty-nine percent more felt it protected both an individual right and a State's right to a militia.

enunciating its understanding of the Second Amendment. Its treatment of case law, and of pre-1789 history, is replete with glaring errors that suggest hasty and careless research. Its discussion of legislative history omits the most crucial events which, when considered, seriously undercut its conclusions. Its treatment of the early constitutional commentators contains serious errors, where one commentator's discussion of Congress' power over the militia is substituted for his discussion of the Second Amendment, and major commentators are overlooked in favor of the opinion of a little-known writer of form books.

Had the dissent become the majority, the Court would have been in an unenviable position: informing the American people that they did not have a right which the great majority believed they held, on bases that were demonstrably incorrect, with supposed support assembled so carelessly as to suggest that the Court ruled by *fiat* rather than careful thought.

I. THE DISSENT'S CONCEPTUALIZATION OF THE ISSUE IN *HELLER*

As a threshold inquiry, we might ask what the Stevens dissent sees as the dividing line, the core issue, between its desired outcome and the outcome of the majority opinion.

As background, we should examine the schools of second amendment thought that prevailed prior to *Heller*.

A. *Background: A History of "Collective Rights"*

The dispute over the meaning of the Second Amendment was traditionally seen as a conflict between the individual rights and the collective rights viewpoints. The former saw the Amendment as protecting an individual right comparable to other enumerated rights; this would become the position of the *Heller* majority.⁴

⁴ As the focus of this article is Justice Stevens' dissent, we will here primarily discuss collective rights approaches. For expositions of the individuals rights view, see AKHIL AMAR, *THE BILL OF RIGHTS* 50–55, 216–218, 264–66 (1998); STEPHEN P. HALBROOK, *THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* (2008); LEONARD LEVY, *ORIGINS OF THE BILL OF RIGHTS* 133–49 (1999); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 *DUKE L.J.* 1236 (1994); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist*

The collective rights alternative to this view had at least three variants, all of which saw the Second Amendment as aimed at protecting State-run militia systems rather than individuals' rights to arms for non-State purposes.

The first form we can term the *Pure States' Rights* approach; this postulated that the right to arms was a poorly worded protection of States' rights to have an organized militia system. The second form is the *Militia-Suitable Weapons* approach; this saw the right to arms as an individual right, for private purposes, but held that the protected "arms" were those with military or militia uses, not daggers or brass knuckles. The third and most narrow form we can term the *Militia Use* approach; this held that the right to arms was limited to use during actual service in a militia, or (even more narrowly) in a well regulated militia.⁵

"Pure States' Rights" Test. This approach views the Second Amendment, and its State analogs, as protecting a power of the State to form a militia; the individual has no direct interest in, or right to invoke, this guarantee. This view dates to the very invention of the collective rights, in an 1842 concurrence,⁶ and to its first judicial acceptance, the 1905 Kansas decision of *City of Salina v. Blaksley*.⁷ There the court reasoned that the State right to arms guarantee "refers to the people as a collective body" and "deals exclusively with the military; [therefore] individual rights are not considered in this section."⁸

In the mid and late twentieth century, many later Federal cases accepted this approach,⁹ to the point where the Fourth Circuit could conclude that the lower courts had "uniformly" held that the Second Amendment "preserves a collective, rather than individual, right."¹⁰ The strongest assertion of this position came in the Ninth Circuit,

Reconsideration, 80 GEO. L.J. 309 (1991); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 637-659 (1989).

⁵ The first and third forms have a great deal of similarity in practice: under either, the Second Amendment is, in the modern world, effectively neutralized.

⁶ *State v. Buzzard*, 4 Ark. 18, 29 (1842) (Dickinson, J., concurring).

⁷ 83 P. 619 (1905).

⁸ *Id.* at 620. The court also ruled out any claim that citizens might form a voluntary militia and come within the constitutional protection: "In the absence of constitutional or legislative authority no person has the right to assume such duty." *Id.*

⁹ See *Love v. Pepersack*, 47 F.3d 120, 123-24 (4th Cir. 1995); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir.) ("It is clear that the Second Amendment guarantees a collective rather than an individual right."), *cert. denied*, 426 U.S. 948 (1976); *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942) ("[The Second Amendment] was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power."), *rev'd on other grounds*, 319 U.S. 463 (1973).

¹⁰ *Pepersack*, 47 F.3d at 123-24.

which twice denied that individuals could even raise the Second Amendment issue, since they had no standing to invoke the rights of third parties, i.e., States.¹¹

“Militia-Suitable Weapon Test:” Could the Weapon Have Militia/Military Uses? This approach likewise had a reasonably early origination, arising in the nineteenth century, as State courts upheld laws largely directed at non-firearm weapons, such as brass knuckles and fighting blades (bowie knives and “Arkansas toothpicks”). These courts limited the term “arms” to weapons useful for militia and military purposes, essentially rifles, muskets, and handguns or large handguns.¹² Provided that weapons met this definition of “arms,” these rulings accepted that there was an individual right to their possession for private purposes.

This approach achieved modest popularity among the Federal circuits over the years.¹³

“Militia Purpose Test”: Does the Possession and Actual Use of the Weapon Have a Sufficient Militia Purpose? This variant is far narrower than its predecessor; it is not enough that the arm in question have a militia utility; its possessor must demonstrate that the possession or use was directly related to the operation of a militia¹⁴ or perhaps a “well regulated” militia.¹⁵ While this approach did have a Federal origin in

¹¹ *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2003); *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir.), *cert. denied*, 519 U.S. 912 (1996).

¹² *See, e.g., Wilson v. State*, 33 Ark. 557 (1878); *Fife v. State*, 31 Ark. 455, 458 (1876) (State can forbid carrying of small pocket pistols but not of larger military handguns); *Andrews v. State*, 50 Tenn. (3 Heisk) 165, 178–79 (1871); *English v. State*, 35 Tex. 473, 475 (1872) (applying both State constitution and the Federal Second Amendment). I have elsewhere termed this the “hybrid view” of the right, since it protects use for individual purposes, but only of militia-suitable weapons. David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL’Y 559, 618 (1986) [hereinafter Hardy, *Armed Citizens*].

¹³ *See Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982) (holding that the right “extends only to those arms which are necessary to maintain a well regulated militia” and does not include handguns), *cert. denied*, 464 U.S. 863 (1983).

¹⁴ *See United States v. Graves*, 554 F.2d 65, 66 n.2 (3d Cir. 1977) (“narrowly construing” the Second Amendment to guarantee right to arms “as a member of a militia”).

¹⁵ The emphasis upon “well regulated” came after defendants began noting that existing militia statutes included in the unorganized militia definition all males of military age. 10 U.S.C. § 311 (2006); *see United States v. Parker*, 362 F.3d 1279, 1284 (10th Cir. 2004) (“[A]n individual has a right to bear arms, but only in direct affiliation with a well-organized state-supported militia.”); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (military nature of arm insufficient to establish Second Amendment claim; its use must also relate to a well regulated militia); *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992). Other courts have phrased the test in terms of whether the statute at issue prevents a well regulated militia. *Cody v. United States*, 460 F.2d 34, 36–37 (8th Cir. 1971) (holding that a statutory prohibition does not “obstruct[] the maintenance of a well regulated militia”). This test would be still narrower: a law might disarm a considerable number of active militiamen without materially impairing the organization’s overall function.

the 1940s,¹⁶ its broader acceptance by the circuits came after 1970.¹⁷

This test shares a practical attribute with the first, States' rights, test: both deny that the Second Amendment has any practical scope at the current time.¹⁸

Which of the Alternatives Does the Dissent Endorse or Repudiate? As will be noted below, the dissent's explanation of its right to arms is none too consistent. It is enough here to examine what approaches the dissent *rejects*, and here the dissent is reasonably clear. It opens:

The question presented by this case is not whether the Second Amendment protects a "collective right" or an "individual right." Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.¹⁹

From the very outset the dissent thus repudiates the "States' Rights" approach, arguably the oldest of the militia-linked approaches. By inference it rejects the "Militia-Suitable Arms" variant, the one rival for the historical title, as well.²⁰ What the dissent endorses is not entirely clear, as we shall see, but it appears to be a variant, or number of variants, of the Militia Use test. This approach is inconsistent with the "States' Rights" test in that it recognizes a right (however potential and inchoate) that can be invoked by the individual, and inconsistent with the "Militia-Suitable Arms" test in that it holds that ownership and use of a militia or military-type arm for private purposes is unprotected.

This does result in a bit of a paradox. A few pages farther, the dissent invokes the reliance interest of the lower courts,²¹ arguing that "hundreds of judges," including eleven Circuits, had relied upon what is here the position of the dissent.²² Yet of the Circuit rulings invoked, three are actually States' Rights rulings,²³ and two are Militia-Suitable

¹⁶ See *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943).

¹⁷ See *supra* notes 6–11.

¹⁸ Thus in Prof. O'Shea's taxonomy, both are classed together as "weak Miller." O'Shea, *supra* note 2, at 354–61.

¹⁹ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2822 (2008).

²⁰ For example, the dissent argues that "use or ownership of weapons *outside the context of service* in a well-regulated militia" is unprotected. *Id.* at 2827 (emphasis supplied).

²¹ This seemingly suggests that the Supreme Court should follow the teachings of the Circuits. This may be an illustration of a point made to the author by Prof. Eugene Volokh. If there *were* such a thing as a living, evolving Constitution, we must ask in whose eyes must the evolution occur before it has legal effect. The dissent's argument from reliance interest suggests that it sees the proper reference point as the eyes of the judiciary, rather than that of the people, the States, or the Congress.

²² *Heller*, 128 S. Ct. at 2823 & n.2.

²³ *United States v. Napier*, 233 F.3d 394, 402 (6th Cir. 2000) ("Since the Second

Arms determinations.²⁴ Five of the eleven circuit court rulings that the dissent cites in support are actually based on reasoning that the dissent repudiates.

B. *The Dissent's Conceptualization of the Right*

A second difficulty is the dissent's inability to clearly describe its own view of the meaning of the Second Amendment. The dissent describes its interpretation of the Amendment in multiple, and not always consistent, ways.

Does the Second Amendment Protect a Collective Political Right to Have a Well-Regulated Militia? In the words of the dissent:

The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia.²⁵

This approaches the State's Rights approach, which the dissent repudiated in its opening words. The rather clumsy wording is necessary to explain away the Amendment's use of "right of the people." Rather than assigning the right to the States, it assigns it to "the people of . . . the States."

This conceptualization poses several difficulties. If "right of the people of each of the States" implies "acting through their legislatures," then it is hard to justify the dissent's claim that its view recognizes an individual right. If the reference is literally to the people of the States, then this phrasing suggests that the individual has a legal right to a well-regulated militia, i.e., that he has standing to force his State to

Amendment right 'to keep and bear Arms' applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm."); *United States v. Scanio*, No. 97-1574, 1998 WL 802060, at *2 (2nd Cir. Nov. 12, 1998) ("[T]he Second Amendment right to keep and bear arms is meant solely to protect the right of the states to keep and maintain armed militia."); *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996) ("[T]he Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen.").

²⁴ *Thomas v. City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984) ("[T]he Second Amendment applies only to weapons that have a 'reasonable relationship to the preservation or efficiency of a well regulated militia.'" (citing *United States v. Miller*, 307 U.S. 174 (1939))); *United States v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971) (quoting *Miller* language regarding inability to take judicial notice of relation of arm to militia). The dissent also cites *Sandidge v. United States*, 520 A.2d 1057 (D.C. 1987), which could equally well be treated as a States' Rights or Militia Purpose decision, i.e., as inconsistent or consistent with the dissent's approach.

²⁵ *Heller*, 128 S. Ct. at 2822.

create one, or that he and others have a right to create one on their own. (We must remember that at the time “well regulated” meant orderly or disciplined, rather than government-controlled—thus Samuel Johnson’s famous dictionary equated “well regulated” with “orderly,”²⁶ and eighteenth and nineteenth century authors referred to well regulated minds,²⁷ appetites,²⁸ and families.²⁹ Thus also the Framers saw no inconsistency in describing voluntary private militia groups as well regulated.)³⁰

In either event, the choice of wording suggests that the matter was hastily conceived. One of the purposes of the “Militia Uses” test was to get around the barrier posed by “right of the people,” by contending that individuals do have a right—but only in connection with a proper militia, which happens not to exist.

Or Does the Second Amendment Protect an Individual Right to Arms, But Only in Connection with Service in a Well-Regulated Militia? Elsewhere the dissent notes:

[T]he words “the people” do not enlarge the right to keep and bear arms to encompass use or ownership of weapons outside the context of service in a well-regulated militia.³¹

This is quite a different concept: the individual has (or “the people” have) no right to a well regulated militia; they have a right to bear arms, but only as necessary to service in such a militia—should it exist, and a court endorse it, as “well regulated.”³²

Or Perhaps the Amendment Protects an Individual Right to Arms, But Only in Connection with Service in a State-Organized (Not Merely Well-

²⁶ 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, n. pub., 5th ed. 1773) (defining “Orderly” as “Not tumultuous; well regulated.”).

²⁷ CHARLES GOBINET, THE INSTRUCTION OF YOUTH IN CHRISTIAN PIETY 121 (Dublin, P. Wogan, 5th ed. 1793); 1 SIR WALTER SCOTT, THE WAVERLY NOVELS, at xxv (Edinburgh, Adam & Charles Black 1856) (1814).

²⁸ *Epistolary Gossipings of Travel, and its Reminiscences No. XI*, 6 RUSSELL’S MAG. 38 (1859) (“He was aware of the value of a well regulated appetite, and his craving placed before him the moderate gratification of a cool mint-julep.”).

²⁹ *The Elements of Conversation; or Talking Made Easy*, THE NEW MONTHLY MAGAZINE AND LITERARY JOURNAL, pt. 2, at 198, 205 (London, Henry Colburn 1836) (“Anyone who requires enlightenment will be sure to find one of either class in every well-regulated family.”).

³⁰ See STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 60–62 (2d Ed. 1994) (voluntary militia groups in Virginia and Delaware invoked the “well regulated militia” in their charters).

³¹ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2827 (2008).

³² This may pose some difficulty. The Framers never defined a “well regulated” militia. Alexander Hamilton, for instance, thought that it would be unproductive to require more of the people at large than that they be “properly armed and equipped,” and assemble to prove this once or twice in a year. THE FEDERALIST NO. 29 (Alexander Hamilton).

Regulated) Militia? The dissent employs this formulation as well:

[T]he “right to keep and bear arms” protects only a right to possess and use firearms in connection with service in a state-organized militia.³³

The problem here is that, as we have noted above, to the Framing generation “well regulated” and “government controlled” were different things, and the dissent does not explain why one should be synonymous with the other.

Or Might the Amendment Protect a State’s Power to Impose Militia Duty? The dissent advances this view, as well:

[I]t is the collective action of individuals having a duty to serve in the militia that the text directly protects and, perhaps more importantly, that the ultimate purpose of the Amendment was to protect the States’ share of the divided sovereignty created by the Constitution.³⁴

This is the most strained view of all. There is an individual constitutional *right* to be *forced* to discharge a legal *duty*. Rather a strange “right”!

Or, Finally, Might the Amendment Protect Only a State’s Right to a Well-Regulated Militia, Permitting Any Congressional Action that Did Not Destroy Such? The dissent hints at this interpretation, too:

Until today, it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia.³⁵

This is narrower than any of the above interpretations: it would allow even Federal legislation that prevented execution of some militia duties, or disarmed some members of a well-regulated militia, so long as it did not go so far as to extinguish the militia itself.

In sum, the dissent bears the hallmarks of a work that was rushed through rather than thought out. It invokes Circuit rulings which are in fact inconsistent with its own view, and, while clear on what meaning it rejects (an individual right for individual purposes), it is quite foggy as to what meaning it proposes.

³³ *Heller*, 128 S. Ct. at 2828.

³⁴ *Id.* at 2827. It is noteworthy that some opponents of the individual right interpretation rejected it because they saw it as “insurrectionary.” Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107, 110 (1991). In this view, it is the collective interpretation that becomes clearly insurrectionary. The Amendment is seen as enabling the States to use coercive military power in defense of their sovereignty.

³⁵ *Heller*, 128 S. Ct. at 2846; *see also id.* at 2843–44, 2844 n.36.

II. THE DISSENT'S TREATMENT OF CASE LAW

Here, too, the dissent shows signs of having been rushed without much reflection. The Second Amendment issue is not one burdened with a great deal of case law. The dissent, however, makes several significant errors in describing what little there is.

United States v. Miller. Justice Stevens' dissent cites *United States v. Miller*³⁶ as the Court's key precedent, and expounds at length upon its teaching.³⁷ The dissent describes *Miller*'s posture as “[u]pholding a conviction under [the National Firearms] Act.”³⁸

Even a quick reading of *Miller* would reveal that there was no conviction involved, and the Supreme Court reversed, rather than upheld, the ruling below. The third paragraph of the *Miller* opinion notes “The District Court held that section eleven of the Act violates the Second Amendment. It accordingly sustained the demurrer and quashed the indictment.”³⁹ *Miller* closes with: “We are unable to accept the conclusion of the court below and the challenged judgment must be reversed. The cause will be remanded for further proceedings.”⁴⁰

Perpich v. Department of Defense. The dissent explains that “[i]n 1901, the President revitalized the militia by creating ‘the National Guard of the several States,’”⁴¹ citing to *Perpich v. Department of Defense*.⁴² Actually, the cited portions of *Perpich* state only that (1) in 1901 Congress repealed the Militia Act of 1792 and (2) later that year, the President asked Congress to reorganize the National Guard. The relevant revitalization occurred in 1903, not 1901, and was an act of Congress, not of the presidency.⁴³ This would have been disclosed by reading one footnote further into *Perpich* opinion.⁴⁴

Lewis v. United States. The dissent quotes a footnote from *Lewis v. United States*,⁴⁵ which held that a felony conviction obtained without

³⁶ 307 U.S. 174 (1939).

³⁷ *Heller*, 128 S. Ct. at 2822–24, 2845–46.

³⁸ *Id.* at 2822–23.

³⁹ *Miller*, 307 U.S. at 177.

⁴⁰ *Id.* at 183.

⁴¹ *Heller*, 128 S. Ct. at 2844.

⁴² 496 U.S. 334, 341 & nn.9–10 (1990).

⁴³ See Act of Jan. 21, 1903, ch. 196, 32 Stat. 775.

⁴⁴ The Stevens dissent cites *Perpich*, 496 U.S. at 341 nn.9–10; the 1903 statute is cited in *id.* at 342 n.11.

⁴⁵ 445 U.S. 55 (1980).

appointment of counsel could nonetheless serve as a predicate for a felon-in-possession conviction. As the majority notes,⁴⁶ the Second Amendment was not at issue in *Lewis*; it was an equal protection case. The dissent quotes the footnote as stating that a ban on firearms possession by felons does not “entrench upon any constitutionally protected liberties.”⁴⁷ *Lewis* actually reads “trench upon.”⁴⁸ Not a major error, but one that suggests “dictated but not read” imprecision rather inappropriate to a decision of our highest court.

Dred Scott. The citation of *Lewis* brings into question why another non-Second Amendment case was ignored by the dissent: *Dred Scott v. Sanford*.⁴⁹ Writing for six members of the Court, Chief Justice Taney concluded that free blacks could not be citizens of a State or of the United States. Two portions of the Court’s reasoning are significant, and directly contradict the *Heller* dissent’s thesis that the right to arms went no farther than militia duty. First, the Court notes that the Militia Act of 1792 excluded free blacks from membership and duties;⁵⁰ this it took as proof they were not members of the polity. Second, the Court argued that the slave States could not have ratified the Constitution in the belief that free blacks were citizens, since then they would then have the rights of citizens, including rights to free speech and assembly and the right to “keep and carry arms wherever they went.”⁵¹ The Court plainly regarded the right to arms as covering non-militia use, and indeed covering persons specifically barred from militia membership.

Aymette v. State. The dissent discusses *Aymette v. State*,⁵² noting that the State court (construing a constitution that protected keeping and bearing arms “for the common defense,” with a proviso that the legislature might regulate the carrying of arms⁵³) held that to “bear arms” had a military connotation.⁵⁴

There are several problems with the dissent’s invocation of *Aymette*. First, *Aymette* was a “bear arms” case, dealing with restrictions on

⁴⁶ *Heller*, 128 S. Ct. at 2816 n.25.

⁴⁷ *Id.* at 2823 & n.3.

⁴⁸ *Lewis*, 445 U.S. at 65 n.8.

⁴⁹ 60 U.S. (19 How.) 393 (1857).

⁵⁰ *Id.* at 420.

⁵¹ *Id.* at 416–17.

⁵² 21 Tenn. 154 (1840).

⁵³ See Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 501 (1995).

⁵⁴ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2828–30, 2329 n.10 (2008).

carrying arms, while *Heller* involved a “keep arms” challenge to a statute prohibiting mere possession. When a “keep arms” case did come before the same court, it held that to “keep” arms had no such military connotation,⁵⁵ which is *contra* the dissent’s argument that “keep” is coextensive with “bear” in this respect, and both have a military link.⁵⁶

Second, even as to bearing/carrying arms, *Aymette* did not hold that arms-bearing was only protected in connection with militia service, which is the dissent’s understanding of the right to arms. It rather held that carrying *of non-military arms* (in this case a bowie knife) was unprotected, making the nature of the weapon, not the reason for its carrying, or “bearing,” the key.

“*No New Evidence.*” After citing *Lewis v. United States*, the 1980 ruling discussed above, the dissent announces: “No new evidence has surfaced since 1980 supporting the view that the Amendment was intended to curtail the power of Congress to regulate civilian use or misuse of weapons.”⁵⁷

This assertion is absolutely staggering. In 1980, Second Amendment scholarship was just beginning. In the previous decade there had been just two law review articles on the Amendment,⁵⁸ devoting 38 pages to the subject, and sketching out some historical evidence: the text of the English Declaration of Rights, State bills of rights and proposals for a Federal bill of rights, the Federalist Papers and some antifederalist pamphlets.

It is difficult to list all the evidence that emerged after that date. A short list would begin with Joyce Lee Malcolm’s studies of the British right to arms,⁵⁹ and then include at least the following discoveries:

- Madison’s notes showing that the Amendment went beyond the English right;⁶⁰
- The Journal of the First Senate, showing that body had rejected adding “for the common defense” to the right to arms;⁶¹

⁵⁵ *Andrews v. State*, 50 Tenn. (3 Heisk.) 165 (1871).

⁵⁶ *Heller*, 128 S. Ct. at 2827–30.

⁵⁷ *Id.* at 2823.

⁵⁸ David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31 (1976); David T. Hardy & John Stompoly, *Of Arms and the Law*, 51 CHI-KENT L. REV. 62 (1974).

⁵⁹ JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994); Joyce Lee Malcolm, *The Right of the People To Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983).

⁶⁰ Hardy, *Armed Citizens*, *supra* note 12, at 608.

⁶¹ *Id.* at 611.

- Evidence that both Madison and Jefferson had used “bear arms” to describe hunting, demonstrating that the term had non-military usage;⁶²
- Tench Coxe’s newspaper articles, published in major newspapers as the Amendment was being debated and read by James Madison, which told readers it would protect “their private arms”;⁶³
- The early constitutional commentators—Tucker, Rawle, Story and Cooley—and their discussions of the Amendment;⁶⁴
- Similar discussions by commentators of lesser note—Joel Tiffany, Timothy Farrar, Chancellor Kent and others;⁶⁵
- Long-forgotten early Supreme Court case law establishing exclusive Federal control over the militia,⁶⁶ which set up the majority’s point that if the right to arms were dependent upon militia membership and service, then the right would be subject to plenary control by the government it was meant to check;⁶⁷ and
- The exhaustive studies of treatment of the right to arms in popular writings of the eighteenth century, undertaken by Stephen Halbrook⁶⁸ and considerably extended by David E. Young.⁶⁹

The dissent’s assertion that no significant new scholarship had emerged after 1980 is suggestive that the dissent made little inquiry into the matter before making that claim.

⁶² Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to “Bear Arms,”* 49 LAW & CONTEMP. PROBS. 151, 153 (1986) (citing legislation drafted by Jefferson and introduced by Madison which punished any convicted poacher who thereafter “shall bear a gun out of his inclosed ground, unless whilst performing military duty”).

⁶³ HALBROOK, *supra* note 30, at 76–77.

⁶⁴ HALBROOK, *supra* note 30, at 89–93; Hardy, *Armed Citizens*, *supra* note 12, at 611–15.

⁶⁵ David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1468–1504.

⁶⁶ J. Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 79 U. DET. MERCY L. REV. 39 (2001).

⁶⁷ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2802 (2008).

⁶⁸ STEPHEN P. HALBROOK, *supra* note 30, at 58–80.

⁶⁹ DAVID E. YOUNG, *THE FOUNDERS’ VIEW OF THE RIGHT TO BEAR ARMS* (2007); DAVID E. YOUNG, *THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS* (2d ed. 2001).

III. THE DISSENT'S TREATMENT OF ANTECEDENT VIEWS OF RIGHTS TO ARMS

A. *The 1689 English Declaration of Rights*

This Declaration was adopted by Parliament after James II was forced out in the Glorious Revolution: William and Mary were required to accept it as a condition of their succeeding to his throne.⁷⁰ The Declaration identifies several rights that, a century later, would be included (and often expanded upon) in the American Bill of Rights, including the right to petition, rights against excessive bail and cruel and unusual punishments, and the right to arms.⁷¹

The Declaration stated that Parliament “do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties declare: . . . That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law.”⁷²

The Declaration makes no reference to militia or to militia service limitations, and the *Heller* majority cited this as evidence that the common law recognized an individual right to arms.⁷³ The dissent argued to the contrary that the purpose was much more narrow.

First, the dissent correctly noted that the preamble to the Declaration accused James II of “causing several good Subjects being Protestants to be disarmed at the same time when Papists were both armed and Employed contrary to Law,” and incorrectly that “Article VII of the Bill of Rights was a response to that selective disarmament.”⁷⁴ The dissent cites to a 1981 book,⁷⁵ apparently unaware that the argument had since been decisively refuted decades ago.⁷⁶ Parliamentary records showed that the reference to disarmament when Catholics were armed was added by the Lords late in the legislative process, and as (in their words) a “further aggravation fit to be added to

⁷⁰ The Bill of Rights, 1689, 1 W. & M., ch. 2 (Eng.).

⁷¹ “That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal; . . . That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” *Id.* § 7.

⁷² *Id.*

⁷³ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008).

⁷⁴ *Id.* at 2838.

⁷⁵ LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS, 1689*, app. 1, at 295, 297 (1981); see *Heller*, 128 S. Ct. at 2838.

⁷⁶ See MALCOLM, *supra* note 59, at 114–21; Hardy, *Armed Citizens*, *supra* note 12, 581–83.

the clause.”⁷⁷ In fact, Lord Somer’s notes on proceedings in the House of Commons showed many Members protesting that they had personally been disarmed by the servants of James II.⁷⁸ Historian Joyce Malcolm’s magisterial 1994 treatise, which goes unmentioned in the dissent, reviewed the legislative history in detail and concluded:

[I]t is particularly ironic that some modern American lawyers have misread the English right to have arms as merely a “collective” right inextricably tied to the need for a militia. In actual fact, the Convention retreated steadily from such a position and finally came down squarely, and exclusively, in favor of an individual right to have arms for self-defense.⁷⁹

The dissent notes that the guarantee was “restricted to those of adequate social and economic status (‘suitable to their Condition’)” and was “subject to regulation by Parliament (‘as allowed by Law’).”⁸⁰ Again, it had been demonstrated long ago that Americans saw the English Declaration as an Alpha, not their Omega: their Second Amendment would not be so limited. Thus the early American commentator St. George Tucker listed Blackstone’s reference to the English Declaration, contrasted the American Second Amendment, and noted:

The right of the people to keep and bear arms shall not be infringed. Amendments to C. U.S. Art. 4, and this without any qualification to their condition or degree, as is the case in the British government.⁸¹

Finally, the dissent notes that Parliament’s action in the Declaration bound only the monarchy.⁸² This is true to a certain degree, but reflects a rather shallow understanding of the issue. The British unwritten constitution knew no higher authority than Parliamentary decision-making. The best that Parliament (or here, a rather irregular “convention” of its members not summoned by the reigning monarch) could do was pass a declaration that bound the

⁷⁷ Hardy, *Armed Citizens*, *supra* note 12, at 583.

⁷⁸ See 2 PHILLIP, EARL OF HARDWICKE, MISCELLANEOUS STATE PAPERS: FROM 1501 TO 1726, at 416, 417 (London, n. pub. 1778).

⁷⁹ MALCOLM, *supra* note 59, at 119–20.

⁸⁰ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2838 (2008).

⁸¹ 2 WILLIAM BLACKSTONE, COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 143 n.40 (St. George Tucker ed., Philadelphia, Birch & Small 1803). Tucker uses the original numbering of the Bill of Rights, in which the Second Amendment was proposed as the Fourth.

⁸² *Heller*, 129 S. Ct. at 2838 n.31.

monarch directly and subsequent parliaments weakly, by appeal to precedent and tradition. Again, Americans of the framing period noted this limitation and meant their own Bill of Rights to overcome it.⁸³

B. *Early State Constitutions*

The dissent correctly notes that the Declarations of Rights of Pennsylvania and Vermont guaranteed the people a right to “bear arms for the defence of themselves and the State,” and argues that the omission of “for the defense of themselves” in the Second Amendment is evidence against a broad personal right.⁸⁴

The difficulty here is that the argument from omission cuts both ways. The Framers also had available the Massachusetts model of a right to keep and bear arms “for the common defense,”⁸⁵ which had encountered local opposition precisely because it might permit seizure of non-militia arms.⁸⁶ The failure to include common defense language is more significant than the failure to include “defense of self” language: in the First Congress, as we shall see, there actually was a motion to add “for the common defense” to the Second Amendment; the motion failed.⁸⁷ We thus know that the omission of common defense language reflects a conscious decision by the First Congress.

IV. THE DISSENT’S TREATMENT OF THE LEGISLATIVE HISTORY OF THE SECOND AMENDMENT

The *Heller* majority expressly endorses original popular understanding (i.e., determining meaning from the standpoint of the American people who indirectly ratified the measure) as its interpretative tool.⁸⁸ The dissent is far less clear, but appears to rely upon legislative intent (determining meaning from the standpoint of the measure’s drafters, or perhaps from that of the First Congress).⁸⁹

⁸³ See *infra* note 109.

⁸⁴ *Heller*, 128 S. Ct. at 2825–26.

⁸⁵ 3 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS 1892 (1909).

⁸⁶ THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONVENTION OF 1780, at 624 (Oscar & Mary Handlin eds., 1966).

⁸⁷ See *infra* note 101 and accompanying text.

⁸⁸ *Heller*, 128 S. Ct. at 2788.

⁸⁹ See, e.g., *Heller*, 128 S. Ct. at 2822, 2823, 2832 (referring to purpose of the framers); *id.* at 2837 n.28 (objecting to use of post-1791 authority as the equivalent of “postenactment

The difficulty here is that a careful examination of legislative intent *rules out* the interpretation espoused by the *Heller* dissent.⁹⁰ The dissent sees the Second Amendment as motivated by fears that the new national government might “disarm the State militias” (i.e., by failing to provide arms or mandate their purchase) thereby threatening “the sovereignty of the several States.”⁹¹ The dissent quotes George Mason in the Virginia ratifying convention, concerned that “Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has the exclusive right to arm them.”⁹²

Thereafter the Virginia convention ratified, but with a call for a bill of rights that would include:

17th. That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State.⁹³

The dissent treats the Virginia proposal—a direct ancestor of the Second Amendment—as intended to redress the fears of Mason and others regarding Congressional inaction toward the militia, and the inability of States to fill the void.⁹⁴

The problem here is that we can be confident that this was *not* the intent behind item 17 of Virginia’s proposals. Those proposals had two parts: (1) a proposed “declaration or bill of rights,” and (2) a list of proposed amendments that would substantively modify the Constitution. In the latter section, the Virginians inserted what *was* meant to address George Mason’s concern about the militia:

11th. That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same.⁹⁵

legislative history”).

⁹⁰ The majority does not point this out, possibly because its focus was upon popular meaning rather than legislative intent.

⁹¹ *Heller*, 128 S. Ct. at 2822.

⁹² *Id.* at 2833.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 660 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 1891)

The Virginians were capable of clearly addressing a problem, and did so here. They treated this militia proposal as something separate from their right to arms guarantee. The militia issue concerned the allocation of military power between States and the new government; the right to arms concerned individual rights.

This becomes even clearer when we examine a timetable:

June 8–11, 1788: George Mason (in conjunction with a group of Virginia antifederalist delegates) drafts a set of proposals for additions to the proposed Constitution. These have two parts: a bill of rights, and a list of structural amendments to the Constitution.⁹⁶ When finished, Mason sends a copy to New York antifederalists who had sought advice from their Virginia counterparts.

The bill of rights draft contains the ancestor of the Second Amendment. It reads “the People have a Right to keep & to bear Arms; that a well regulated Militia, composed of the Body of the People, trained to Arms, is the proper natural and safe Defense of a free State.”⁹⁷

Neither set of proposals contains anything regarding States organizing and arming their militias if Congress fails to act.

June 14, 1788: In a speech to the VA ratifying convention, Mason *for the first time* raises the question of whether Congress might neglect to provide for organizing and arming the militia, thereby letting it decay. The *Heller* dissent quotes one paragraph of this, in which Mason expresses his fear that Congress may “neglect to provide for aiming and disciplining the militia,” making the militia of no use.⁹⁸

The dissent omits the next, key, sentence: “I wish, that in case the general government should neglect to arm and discipline the militia, that there should be an express declaration, that state governments might arm and

[hereinafter ELLIOT’S DEBATES].

⁹⁶ *Resolutions Drafted by Mason for the Virginia Ratifying Convention*, in 3 THE PAPERS OF GEORGE MASON 1054 (Robert A. Rutland ed., 1970) [hereinafter 3 GEORGE MASON PAPERS]; *Proposed Amendments Agreed Upon by the Antifederal Committee of Richmond and Dispatched to New York*, in 3 GEORGE MASON PAPERS, *supra*, at 1068.

⁹⁷ *Id.* at 1070–71.

⁹⁸ *Heller*, 128 S. Ct. at 2833.

discipline them.”⁹⁹

June 27, 1788: The Virginia convention ratifies the proposed constitution, keeping the ancestor of the Second Amendment, and adding to the proposed amendments a new proviso: “11th. That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same.”¹⁰⁰

This sequence shows quite clearly that: (1) The Second Amendment’s ancestor was created before the Virginians began worrying about Congressional neglect of the militia; (2) The Virginians did not see the proto-Second Amendment as covering the militia neglect issue, and added item 11.

There is a simple reason why we do not see item 11 in our Constitution: the Framers rejected it. James Madison declined to include it in his draft bill of rights, and when a motion was made in the First Senate to insert it, it was voted down.¹⁰¹ The *Heller* dissent thus mistook the purpose of a provision the Framers rejected, for the purpose of a provision they accepted. The error is all the more startling because the rejection of Virginia’s item 11, and the First Senate’s vote against re-inserting it, were discussed in the briefs of Petitioner,¹⁰² Respondent,¹⁰³ and an amicus.¹⁰⁴

⁹⁹ *An Amendment to the Constitution is Needed to Prevent the Danger of a Standing Army*, in 3 GEORGE MASON PAPERS, *supra* note 96, at 1073, 1075.

¹⁰⁰ 3 ELLIOT’S DEBATES, *supra* note 95, at 660. I am indebted to Jim Schaller, who first noted this sequence of events.

¹⁰¹ The records of the First Senate for September 8, 1789 state:

On motion to add the following clause to the articles of amendment to the constitution of the United States, proposed by the House of Representatives, to wit: ‘That each State, respectively, shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same; that the militia shall not be subject to martial law, except when in actual service, in time of war, invasion, or rebellion, and when not in the actual service of the United States, shall be subject only to such fines, penalties, and punishments, as shall be directed or inflicted by the laws of its own state.’

It passed in the Negative.

JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA 75 (Washington, Gales & Seaton 1820).

The motion was probably made by a Virginia Senator. One, John Randolph, angrily described the vote as “not allowing the militia arms.” CREATING THE BILL OF RIGHTS 293 (Helen E. Viet et al. eds., 1991).

¹⁰² Brief for Petitioners at 29 n.6, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 102223.

¹⁰³ Respondent’s Brief at 35–36, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 336304.

There are other indicia of legislative or Framers' intent, and all are consistent with an individual right for individual purposes.

First, there is Madison's planned location of the right to arms. Madison's original plan (changed by the House) was to lay out each amendment as a change or insertion to specific locations in the original Constitution, rather than as a separate list following that document. If he had seen the future Second Amendment as affecting Congressional militia powers, he would have made it modify those powers in Article I, Section 8. Instead he placed it, together with freedom of religious and expression as to be inserted in "article 1st, section 9, between clauses 3 and 4,"¹⁰⁵ following the few guarantees of individual rights (habeas corpus, bills of attainder, ex post facto laws) in the original Constitution.

Second, there are the writings of a rather powerful member of the House, Speaker Frederick Muhlenburg of Pennsylvania. In Pennsylvania's ratifying convention, a substantial minority had called for a bill of rights guarantee that

the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals.¹⁰⁶

The *Heller* dissent deals with this background by noting that Madison did not duplicate this language. "Faced with all of these options, it is telling that James Madison chose to craft the Second Amendment as he did."¹⁰⁷

Rep. Muhlenburg saw things differently. Toward the end of the House debates he wrote to his friend Benjamin Rush:

[A]s it now is done I hope it will be satisfactory to our State, and as it takes in the principal Amendments which our [Pennsylvania] Minority had so much at Heart, I hope it may restore Harmony & unanimity amongst our fellow Citizens.¹⁰⁸

¹⁰⁴ Brief of *Amicus Curiae* Academics for the Second Amendment in Support of the Respondent at 6–9, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 405564.

¹⁰⁵ 1 ANNALS OF CONGRESS 434 (Joseph Gales ed., 1834).

¹⁰⁶ 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 597-95 (Merrill Jensen ed., 1976).

¹⁰⁷ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2833 (2008).

¹⁰⁸ CREATING THE BILL OF RIGHTS, *supra* note 101, at 280.

Finally, there is the attestation of Madison himself. As noted above, the English 1689 Declaration guarantees a clearly individual right, albeit with limitations. In Madison's notes for his floor speech, he discussed why the 1689 Declaration was an inadequate substitute for an American Bill of Rights:

[F]allacy on both sides—espcy as to English Decln of Rts—
 1. Mere act of parl.
 2. no freedom of press—Conscience
 Gl. Warrants—Habs corpus
 Jury in Civil Cause—criml.
 Attainders—arms to Protestts.¹⁰⁹

The first can only be read as “inadequate because it is a mere act of Parliament, which can override it at will.” The last can only be read as “inadequate because the right to arms is guaranteed to Protestants only.”¹¹⁰

V. THE DISSENT'S TREATMENT OF POST-RATIFICATION LEGAL COMMENTARY

The *Heller* majority cites four great and early commentators on the Constitution and Bill of Rights: St. George Tucker (1803), William Rawle (1824), Joseph Story (1833), and Thomas Cooley (1898).¹¹¹ Of these, Tucker, Rawle, and Cooley clearly favor an individual right for individual purposes, and Story is ambivalent.

The Stevens dissent seeks to neutralize Tucker, emphasize Story, and ignore Rawle and Cooley. It also introduces a little-known nineteenth century author, Benjamin Oliver.¹¹²

The Neutralization of Tucker. The dissent argues that “St. George

¹⁰⁹ James Madison, *Notes for Speech on Constitutional Amendments, June 8, 1789*, in 12 MADISON PAPERS 193–94 (C. Hobson & R. Rutland eds., 1979). The outline appears to be one for his June 8, 1789 introduction of the bill of rights, which argues the British Declaration has “gone no farther than to raise a barrier against the power of the Crown; the power of the Legislature is left altogether indeterminate,” with no protection of right of jury trial, freedom of the press, or liberty of conscience. In the recorded version, Madison does not deal with bills of attainders or the right to arms, but it must be remembered that the Annals of Congress were not a transcript, but were assembled years later from newspaper reports of the debates.

¹¹⁰ Why would a 1689 act of the British Parliament be seen as having any effect in the United States of 1789? We must remember that Madison was not a modern positivist, nor speaking to the same. In his and their mindframes, the argument that a century-old British declaration would bind the new government, because “rights are rights,” required refutation.

¹¹¹ *Heller*, 128 S. Ct. at 2805–07.

¹¹² *Id.* at 2839–41.

Tucker, on whom the Court relies heavily, did not consistently adhere to the position that the Amendment was designed to protect the ‘Blackstonian’ self defense right.”¹¹³ It argues that, while Tucker’s oft-quoted 1803 edition of Blackstone refers to the arms right as individual, his law lecture notes, circa 1789, saw it as tightly linked to the militia.¹¹⁴ It quotes from his unpublished lecture notes to prove that he saw the Amendment “in the context of the compromise over military power represented by the original Constitution and the Second and Tenth Amendments.”¹¹⁵

The problem is that the quotation invoked by the dissent is *not* taken from Tucker’s discussion of the Second Amendment. It instead comes from his discussion of Congress’s Article I powers over the militia, where Tucker describes the militia. When, a few pages farther on, Tucker does get to the Second Amendment, he uses individual rights terminology tracking—often down to the word—his 1803 Blackstone, describing the right as derived from “the right of self-defense,” which is the “first law of nature.”¹¹⁶

How could the dissent make an error of this magnitude? The answer is that the dissent appropriated the argument, and the quotations it employs, from a 2006 law review article,¹¹⁷ which misleadingly quoted Tucker’s discussion of the militia clauses as if they were his discussion of the Second Amendment, and omitted Tucker’s real discussion of the subject matter.¹¹⁸

The dissent had, at the very least, reason to approach the article with caution; it had already been subjected to serious criticism.¹¹⁹ Verification would have been simple. Tucker’s papers are a public record; the originals are housed within three hours’ drive of the Supreme Court, and copies were available on microfilm.¹²⁰ A very

¹¹³ *Id.* at 2839 n.32.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NW. U. L. REV. COLLOQUY 272 (2008).

¹¹⁷ Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123 (2006), cited in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2839 n.32 (2008).

¹¹⁸ See Hardy, *supra* note 116.

¹¹⁹ See Stephen P. Halbrook, *St. George Tucker’s Second Amendment: Deconstructing “The True Palladium of Liberty,”* 3 TENN. J.L. & POL’Y 120 (2007); see also David T. Hardy, *A Well-Regulated Militia: The Founding Fathers and the Origin of Gun Control in America*, 15 WM. & MARY BILL RTS. J. 1237, 1264–66 (2007) [hereinafter Hardy, *A Well-Regulated Militia*].

¹²⁰ The dissent acknowledges that the papers are at the College of William and Mary, about

modest labor would have spared the minority this error.

The Elevation of Story. The dissent stresses the views of Justice Story, who portrayed the Second Amendment as militia-related.¹²¹ It is fair to say that Story's discussion of the Second Amendment involved primarily its militia aspect, with some references to arms possession preventing tyranny, which could relate either to the militia or to widespread civilian armament.¹²² Story also laments the decline of the militia in his time, as citizen grew indifferent to their service, and feared it would prove difficult to "keep the people duly armed without some organization."¹²³

It is noteworthy that Story, while emphasizing the militia, nowhere espouses the dissent's view of the Second Amendment. He did not argue that arms rights would vanish if the militia did: if anything, he thought that loss of the militia system would lead to declines in arms ownership, which he feared. Story's views are more consistent with the majority's interpretation—the right to arms is individual, while the well-regulated militia clause explains what motivated the Framers to include this guarantee in the Bill of Rights.¹²⁴

Benjamin Oliver's Commentary. The *Heller* majority cites commentaries by major early legal scholars—Tucker, William Rawle, Thomas Cooley. The dissent invokes an 1832 book by Benjamin Oliver, and cites him as seeing the right to arms as conditioned upon militia service.

One might observe that Oliver was not exactly in the same league as Tucker, Rawle, and Cooley. Tucker, for example, taught law at William and Mary, wrote the first American version of Blackstone, and remained the most frequently cited American legal scholar until 1827.¹²⁵ Rawle had been offered the post of Attorney General by George Washington, and sat in the Pennsylvania legislature when it ratified the Bill of Rights.¹²⁶ Cooley sat on the Michigan Supreme Court, founded what became the University of Michigan Law School, and was in his day considered "the greatest authority on constitutional law in the

three hours' drive southeast of Washington D.C. Professor Cornell's article notes they are housed at the Swem Library there. When the author arrived at the Swem Library and asked to examine the notes, library staff produced both the original and a microfilm within ten minutes.

¹²¹ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2839–41 (2008).

¹²² See Kopel, *supra* note 65, at 1391–95.

¹²³ *Id.* at 1394.

¹²⁴ *Heller*, 128 S. Ct. at 2801.

¹²⁵ Kopel, *supra* note 65, at 1371–73.

¹²⁶ Hardy, *Armed Citizens*, *supra* note 12, at 613.

world.”¹²⁷

In contrast, all that is known of Benjamin Oliver is that he authored some texts on business law, and some legal form books.¹²⁸ To compensate, the dissent asserts that “Oliver is the *only* commentator in the Court’s exhaustive survey who appears to have inquired into the intent of the drafters of the Amendment.”¹²⁹

We are left to wonder if the dissent actually read the text it cited. Oliver’s “inquiry” into original intent actually consists of a brief *guess*:

The provision of the constitution, declaring the right of the people to keep and bear arms, &c. was probably intended to apply to the right of the people to bear arms for such purposes only.¹³⁰

“Probably intended,” with no citation of evidence, is a far cry from “inquired into the intent of the drafters.”

In short, the dissent’s treatment of early constitutional commentators displays a results-oriented approach. The dissent ignores the commentators whose views conflict with the desired result, and elevates relative “unknowns” to expert status when their opinions are in accord with that result. It falls for a misleading article, when verification would have been simple.

VI. THE DISSENT’S TREATMENT OF POST-CIVIL WAR LEGISLATION

The *Heller* majority points out that the postwar Southern States enacted laws forbidding firearm ownership by blacks, that Congressmen expressed outrage, and that Congress passed a protective statute referring to “the constitutional right to bear arms.”¹³¹ These references, it submits, could hardly relate to militia service.

The dissent considers this a “hasty” conclusion, noting that in some States the Reconstruction governments did create integrated or “negro militias,” which led to conflict, particularly in South Carolina.¹³² The dissent, in a rather tentative manner, argues that it is “quite

¹²⁷ Kopel, *supra* note 65, at 1461.

¹²⁸ Hardy, *A Well-Regulated Militia*, *supra* note 119, at 1269.

¹²⁹ *Heller*, 128 S. Ct. at 2839 n.33 (emphasis in original).

¹³⁰ BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN: WITH A COMMENTARY ON STATE RIGHTS, AND ON THE CONSTITUTION AND POLICY OF THE UNITED STATES* 177 (Books for Libraries Press 1970) (1832).

¹³¹ *Heller*, 128 S. Ct. at 2809–11.

¹³² *Id.* at 2841.

possible” that the Congressional statements actually did refer to “disarmament of black militia members.”¹³³

The problem with this theory is that the Congressional references came in 1866, at a time when the southern militias were virtually all-white, many wearing Confederate uniforms, and their principal function was to disarm and subjugate blacks and Unionists.

Their activities were frankly terroristic and were aimed directly to negroes who displayed a tendency to assert their newly granted independence. Disarming the freedmen was apparently considered a primary duty and once that was fulfilled with relish, according to his except from a letter: “The militia of this county have seized every gun and pistol found in the hands of the (so-called) freedmen of this section of the county. They claim that the Statute Laws of Mississippi do not recognize the Negro as having any right to carry arms.”¹³⁴

Thus in early 1866 a legislator complained that rather than restore order, the southern militias preferred to “hang some freedman or search negro houses for arms.”¹³⁵ This state of affair continued until Congress, in March 1867, passed legislation (repealed in 1869-1870) to disband the militias of most former Confederate States.¹³⁶ The conflict in South Carolina, which the dissent cites, occurred in and after 1870, four years after the Congressional complaints regarding arms seizures.¹³⁷

The dissent’s explanation of the Congressional references thus cannot pass muster. The Congressional action is illustrative on another level. The original legislative proposal would have commanded that the militias of the named States “be forthwith disarmed and disbanded.”¹³⁸ Several other legislators objected on Second Amendment grounds, and its sponsor volunteered “to modify the amendment by striking out the

¹³³ *Id.* at 2842.

¹³⁴ OTIS A. SINGLETARY, *NEGRO MILITIA AND RECONSTRUCTION* 5 (1963).

¹³⁵ CONG. GLOBE, 39th Cong., 1st Sess. 941 (1866).

¹³⁶ In relevant part, the Act stated:

And be it further enacted, That all the militia units now organized or in service in either of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Louisiana, Mississippi, and Texas, be forthwith disbanded, and that the further organization, arming, or calling into service of the said militia forces, or any part thereof, is hereby prohibited under any circumstances whatever, until the same shall be authorized by Congress.

Act of Mar. 2, 1867, §6, 14 Stat. 485, 487. Tennessee was not named; it had already been readmitted to the Union. This measure was repealed as to five named States by the Act of Jan. 14, 1869, 15 Stat. 266, and as to the remaining four by the Act of July 15, 1870, §2, 16 Stat. 363, 364.

¹³⁷ OTIS A. SINGLETARY, *supra* note 134, at 15.

¹³⁸ Congressional Globe, 39th Cong., 2d Sess. 1848 (1867).

word ‘disarmed.’ Then it will provide simply for disbanding these organizations.”¹³⁹ The lead critic responded that this “is much more acceptable;” he had worried that “disarming the whole people of the South seemed to me to be so directly in the face of the Constitution itself, as to strike me as somewhat strange.”¹⁴⁰ Congress did not seem to think that disbanding State militias posed a Second Amendment problem, whereas disarming individuals would do so.¹⁴¹

CONCLUSION

The Stevens dissent in *Heller*, had it become law, would have become a juridical disaster zone. The Court would have run afoul of the beliefs of a clear majority of Americans. It would have denied that Americans had a right that they believed they held—which is likely more damaging than upholding a right with which they disagreed. Most importantly, it would have done so on grounds that were demonstrably, clearly, and repeatedly wrong, with errors that could best be attributed to carelessness approaching arrogance and at worse to indifference because the conclusion was predetermined.

¹³⁹ *Id.* at 1848–49.

¹⁴⁰ *Id.* at 1849.

¹⁴¹ This highlights another problem of the *Heller* dissent. The majority cites Justice Cooley’s argument that if the right were limited to militiamen, it would be a check on government that could be negated by government, which defines militia membership. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2811 (2008). The dissent responds that Congress has no power to exclude persons from State militias: “The States’ power to create their own militias provides an easy answer to the Court’s complaint.” *Id.* at 2832 n.20. But the early Courts established that, once Congress acted, the field of militia regulation was pre-empted. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 24 (1820); Heath, *supra* note 66. When in 1859 Massachusetts proposed to allow blacks to serve in its militia, its Supreme Court advised the measure would be unconstitutional: the Federal 1792 Militia Act did not include them, and the Federal power to “organize” the militia clearly included defining its membership. Judgement of Dec. 23, 1859, 80 Mass. (14 Gray) 614. The actions of Congress in simply abolishing nine State militias—with not a single member objecting that such abolition ran afoul of any portion of the Constitution—further supports this understanding.