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SECOND AMENDMENT REALISM

David Wolitz

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I. CARDS ON THE TABLE

Let me put my cards right on the table: I am not a gun person. I do not own a gun, and the last time I ever touched one was in summer camp in 1983. I also do not believe that the establishment or defense of a Constitutional right to bear arms is particularly important in a decent liberal democratic society. I can imagine—we all know of—decent democratic societies that *do not* recognize such a right.[1] More specifically, I am not persuaded that this country or its citizens would be worse off if we failed to recognize a Constitutional right to keep and bear arms.[2] On the other hand, I hold no brief against a constitutionally enshrined right to bear arms as long as such a right is, as ours seems to be, reasonably interpreted so as to allow for some public-safety limits on firearm possession.[3]

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1. *See* ROSER MARTÍNEZ QUIRANTE, ¿ARMAS: LIBERTAD AMERICANA O PREVENCIÓN EUROPEA? 190 (Ariel Derecho, Barcelona, 2002) (discussing the strictness of gun regulations in Spain); David B. Kopel, *Japanese Gun Control*, 2 *ASIA PAC. L. REV.* 26 (1993) (describing Japanese gun control regulations and comparing those regulations to the American system); James Grubel, *Australia's Gun Controls a Political Template for the U.S.*, REUTERS (Apr. 3, 2013, 7:04 PM) http://www.reuters.com/article/2013/04/03/us-usa-guns-australia-idUSBRE9320C720130403; Rebecca Peters, *When Will the US Learn from Australia? Stricter Gun Control Laws Save Lives*, GUARDIAN (Dec. 14, 2013, 8:00 AM), http://www.theguardian.com/commentisfree/2013/dec/14/america-mass-murder-australia-gun-control-saves-lives. *See generally*, Library of Congress, *Firearms-Control Legislation and Policy*, LAW.GOV, http://www.loc.gov/law/help/firearms-control/index.php_(last updated Feb. 28, 2014) (providing a detailed summary of the gun laws of various foreign nations including Australia, Japan, and Spain).

2. The United States Supreme Court found that an individual right to keep and bear arms for defensive purposes was guaranteed by the Second Amendment of the Constitution. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

3. *Id.* at 626–29.

As a matter of policy, I suspect that American gun laws today are generally too permissive, rather than too restrictive. I am skeptical that gun control legislation can substantially reduce the amount of gun violence in our country.[4] But I am even more skeptical that increasing ordinary citizens' access to guns would substantially reduce gun violence in our country.[5] Sadly, I am afraid we do not know how to reduce the appalling level of fatal gun violence we suffer in this country, levels that are off the charts for a country of our affluence.[6]

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4. *See, e.g.*, Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide?*, 30 HARV. J.L. & PUB. POL'Y 649, 693 (2007) (finding no observed correlation between gun control and reduction in violence based on a study of various countries); Gary Kleck & E. Britt Patterson, *The Impact of Gun Control and Gun Ownership Levels on Violence Rates*, 9 J. QUANTITATIVE CRIMINOLOGY 249, 283 (1993) (finding generally negative results for the "violence control effectiveness of gun control"); *see also* Task Force on Cmty. Preventative Servs., Ctrs. for Disease Control, *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws*, 52 MORTALITY & MORBIDITY WKLY. REP. (RR 14 RECOMMENDATIONS & REP.) 11, 16 (2003), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5214a2.htm (finding no control regulations that significantly reduced violent crime, suicide, or gun accidents).

5. ARKADI GERNEY, CHELSEA PARSONS & CHARLES POSNER, AMERICA UNDER THE GUN: A 50-STATE ANALYSIS OF GUN VIOLENCE AND ITS LINK TO WEAK STATE GUN LAWS 35 (2013); ("[T]he 10 states with the weakest gun laws collectively have a level of gun violence that is more than twice as high—104 percent higher—than the 10 states with the strongest gun laws."); Linda L. Dahlberg, Robin M. Ikeda & Marcie-Jo Kresnow, *Guns in the Home and Risk of a Violent Death in the Home: Findings from a National Study*, 160 AM. J. EPIDEMIOLOGY 929, 929 (2004) (finding that "[t]hose persons with guns in the home were at significantly greater risk than those without guns in the home of dying from a suicide in the home relative to other causes of death"); David Hemenway, *Risks and Benefits of a Gun in the Home*, 5 AM. J. LIFESTYLE MED. 502, 508 ("[F]or most contemporary Americans, the scientific studies suggest that the health risk of a gun in the home is greater than the benefit.").

6. Olga Khazan, *Here's How the U.S. Gun Violence Compares with the Rest of the World*, WASH. POST (Dec. 14, 2012, 4:02 PM), http://www.washingtonpost.com/blogs/worldviews/wp/2012/12/14/schoo-shooting-how-do-u-s-gun-homicides-compare-with-the-rest-of-the-world/ (finding that the United States tends to suffer from more gun related crime than Europe, Canada, India, and Australia); E.G. Krug, K.E. Powell & L.L. Dahlberg, *Firearm-Related Deaths in the United States and 35 Other High-and Upper-Middle-Income Countries*, 27 *INT'L J. EPIDEMIOLOGY* 214, 214 (1998) (finding that in 1998, "[t]he rate of firearm deaths in the United States . . . exceeds that of its economic counterparts . . . eightfold"); ABA Standing Comm. On Gun Violence, *The U.S. Compared to Other Nations*, ABA J., http://www.americanbar.org/groups/committees/gun_violence/resources/the_u_s_compared_to_other_nations.html (last visited May 14, 2014) (providing sources comparing gun violence in

In any event, very restrictive gun control proposals are just not popular enough to be widely enacted throughout the country, so it is ordinary democratic politics—not Constitutional law—that does most of the job of protecting people's access to guns.[7] In fact, before 2008, ordinary democratic politics did all of the work of protecting gun rights at the federal level.[8]

Now, having set out my own general views about gun control and gun rights, I want to make two broad analytical points. The first is about the relationship, or lack thereof, between the Second Amendment itself and the development of Second Amendment doctrine. The second point is about what role we, as law professors, can and ought to play with respect to the development of Second Amendment doctrine.

Glenn Reynolds writes in his Introduction that, post-*Heller* and post-*McDonald*, the "Second Amendment is now ordinary constitutional law."[9] I agree with that statement. And what it means is that the development of Second Amendment jurisprudence and Second Amendment scholarship will now suffer all of the defects that come along with the practice of ordinary constitutional law—including, but not limited to, significant and irreducible doctrinal indeterminacy, results-driven reasoning by judges and academics, judicial self-aggrandizement, centralization of decision-making in Washington, DC, and increasing left–right socio-political

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the United States to other countries).

7. *See, e.g.*, *Gun Control: Key Data Points from Pew Research*, PEW RESEARCH CTR. (July 27, 2013), http://www.pewresearch.org/key-data-points/gun-control-key-data-points-from-pew-research/.

8. It was only in 2008 that the Supreme Court held that the federal Constitution protected and individual right to keep and bear arms. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). Many state constitutions contained individual gun rights provisions long before 2008. *See, e.g.*, Conn. Const. art. I, § 15 ("Every citizen has a right to bear arms in defense of himself and the state."); Ky. Const. § 1 ("Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapon."); Ohio Const. art. I, § 4 ("The people have the right to bear arms for their defense and security . . ."); Miss. Const. art. III, § 12 ("The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question . . . "); Pa. Const. art. I, § 21 ("The right of the citizens to bear arms in defence of themselves and the State shall not be questioned."). *See generally* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POLITICS 191 (2006) (providing a survey of different state's constitutional gun control schemes).

9. Glenn Harlan Reynolds, *Foreword: The Second Amendment as Ordinary Constitutional Law*, 11 TENN. L. REV. 407, 413 (2014).

polarization. All of these factors tend toward a decrease in the legitimacy and prestige of the Supreme Court in its Constitutional decisionmaking capacity[10], and relatedly, a decrease in the legitimacy and prestige of constitutional law as an academic endeavor.[11]

In this Essay, I will focus on the implications of doctrinal indeterminacy because the fact that existing authoritative sources—such as Constitutional text and Supreme Court precedent—cannot dictate the answers to undecided Second Amendment questions should chasten both judges and academics as they set out to develop and critique new Second Amendment doctrine.

II. THE INDETERMINACY OF SECOND AMENDMENT DOCTRINE

Now that the Supreme Court has told us that there is an individual right to bear arms unrelated to service in a militia,[12] there are numerous open questions regarding the precise scope of the right, the appropriate standard of review for rights-infringing government action, and what, if any, auxiliary doctrines and rights might be implied by the core Second Amendment right.[13] Indeed, it is not too much of a stretch to say that what we know with

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10. Andrew Dugan, *Americans' Approval of Supreme Court Near All-Time Low*, GALLUP (July 19, 2013), http://www.gallup.com/poll/163586/americans-approval-supreme-court-near-time-low.aspx; Adam Liptak, *Approval Rating for Justices Hits Just 44% in New Poll*, N.Y. TIMES (June 7, 2012), http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html?pagewanted=all&_r=0.

11. *See, e.g.*, Jason Brennan, *Academic Constitutional Legal Theory Is Intellectually Corrupt*, BLEEDING HEART LIBERTARIANS (June 25, 2012), http://bleedingheartlibertarians.com/2012/06/3368/ (accusing the field of constitutional law of corruption for, among other things, "reverse engineering" the constitution to best fit political and moral beliefs).

12. *Heller*, 554 U.S. at 616 (noting that "[e]very late–19th–century legal scholar that we have read interpreted the Second Amendment to secure an individual right unconnected with militia service); *id.* at 635–36; *id.* at 528 ("The phrase 'keep arms' was not prevalent in the written documents of the founding period that we have found, but there are a few examples, all of which favor viewing the right to 'keep Arms' as an individual right unconnected with militia service.").

13. Some of the other articles in this Symposium discuss precisely these issues related to the scope and content of the Second Amendment right, and what, if any, ancillary doctrines the Court might adopt to protect that right. *See* Josh Blackman, *The 1st Amendment, 2nd Amendment, and 3D Printed Guns*, 81 TENN. L. REV. 479 (2014); David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417, 462–77 (2014); Jordan E. Pratt, *Uncommon Firearms as Obscenity*, 81 TENN. L. REV. 633 (2014).

confidence is only that, under current Supreme Court doctrine, the government may not categorically ban handgun possession in private homes or require that all firearms in a private home be kept in an inoperable state.[14] Almost everything beyond those propositions is, doctrinally speaking, up for grabs.

Reynolds notes that to say that the Second Amendment is now ordinary constitutional law is not to say that "everything is settled or that the courts have gotten, or will get, everything right."[15] His caveat is an understatement. In fact, to call it an understatement might be an understatement. To say that the Second Amendment is now ordinary constitutional law is to say that almost nothing is settled, and it is also to say there is no way the court can "get it right."[16] Almost nothing is settled in a trivial sense because the process of making doctrine out of the Second Amendment is so new; there simply are not many authoritative cases to help us understand how the big questions about the scope of the right will be answered by the courts.[17]

But nothing is settled in the deeper sense that there is no logical inexorability that can take us from the meager doctrine-as-is to some more fully fleshed out regime of Second Amendment law. For each significant open question about the scope of the Second Amendment, there simply is no single correct legal answer just waiting to be discovered or articulated by the Court. I am not arguing that there are an infinity of answers to disputes about what the Second Amendment as law requires or forbids. The text and existing doctrine, thin as they are, do constrain the range of legitimate interpretations; there *are* wrong answers to Second Amendment disputes. I am also not arguing for the trusim that, as a matter of institutional power, the Supreme Court can do what it wants with the Second Amendment. What I *am* arguing for is the standard Legal Realist point that there is a range of correct—that is, legally legitimate—answers to questions about what the Second Amendment requires or forbids.[18] The range of open questions and

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14. Richard Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008), http://www.newrepublic.com/article/books/defense-looseness (noting that after *Heller* "[a]ll that is clear is that an absolute ban on possessing a pistol is unconstitutional. The other restrictions that a government might want to impose are up for grabs.").

15. Reynolds, *supra* note 9, at 414.

16. *See id.*

17. *But see* Kopel, *supra* note 13, 434–38 (discussing lower court cases).

18. *See, e.g.*, Karl Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1239 (1931) ("[I]n any case doubtful enough to make litigation respectable the available authoritative premises... are at least two, and mutually contradictory as applied to the case in hand.").

legally legitimate answers is wide enough that it is still far from clear whether gun rights enthusiasts will be pleased or dismayed by Second Amendment doctrine as it develops over the next few years and decades.

To be sure, there are a variety of conventional techniques that our courts employ in interpreting Constitutional text, and these conventional interpretive techniques do channel and constrain the development of doctrine. Phillip Bobbit's description of six modalities of constitutional argument—textual, historical, structural, doctrinal, prudential, and ethical—is a sufficient list for present purposes.[19] But because there are so many of these legally legitimate techniques for interpreting and applying the Constitution, and because there is no agreement on how to prioritize them, the future development of all Constitutional doctrine, including Second Amendment doctrine, can take widely divergent paths of equivalent legal legitimacy.

The text of the Second Amendment itself will be of little help in the cases to come. Those twenty-seven words—only fourteen if we excise the so-called Prefatory Clause—simply will not, through plain meaning analysis, settle any of the open questions in Second Amendment law. Indeed, those words did not settle even the little that *was* settled in *Heller* and *McDonald*, as the majority opinions in those cases relied just as heavily on history as on plain meaning analysis.[20] The point here is not the radical proposition that the words of the Second Amendment do not mean anything or that they can be made to mean everything; it is simply that the words of the Second Amendment are genuinely open to multiple and contradictory interpretations, even on the basic question of whether there is an individual right to keep and bear arms unconditioned from militia service. How much less is the text capable of resolving disputes about the precise content and scope of such a right, to say nothing of appropriate levels of scrutiny, or Second Amendment "penumbras."[21]

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19. PHILIP BOBBITT, CONSTITUTIONAL INTERPERTATION 12–13 (1991).

20. *See* Stephen Kiehl, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1139–40 (2011) ("The *Heller* majority and *McDonald* plurality suggested that a historical inquiry could help determine the scope of the Second Amendment right."); Rory K. Little, *Heller and Constitutional Interpretation: Originalism's Last Gasp*, 60 HASTINGS L.J. 1415, 1418 (2009) ("Heller's originalism is both 'thick' and 'pure' . . . its laborious historical detail is unprecedented for a constitutional Supreme Court decision, . . . and the decision's constitutional analysis begins and ends solely with that history . . ."); Posner, *supra* note 14 ("The range of historical references in the [*Heller*] majority opinion is breathtaking . . .").

21. *See* Glenn H. Reynolds, *Second Amendment Penumbras: Some Preliminary*

What about the other modalities of constitutional argument? Both majority and dissenting opinions in *Heller* and *McDonald* were notable, of course, for their commitment to the *historical* mode of interpretation, as each side marshalled its own "historical reality" to argue for its preferred outcome.[22] Hence, the Justices on both sides of *Heller* and *McDonald* regaled us with tales of pre-ratifictaion, ratification-era, and then post-ratification history which, each side assured us, would show that its reading of the text was most consonant with the original 1791 meaning *and* with long-standing pre-and-post-ratification practice. I will not regurgitate the dueling histories here. The point is simply that reasonable judges, like reasonable academics, can and do reach different conclusions about what exactly the history tells us about the right way to interpret the Second Amendment.

The Justices in *Heller* and *McDonald* also made use of, and battled over, the other modalities of Constitutional interpretation. Justice Breyer stressed the *prudential* problems of constitutionalizing gun policy and taking otherwise-available crime-control techniques out of the hands of the political branches.[23] Justices Scalia and Stevens battled over the *doctrine* bequeathed by *United States v. Miller*[24] and a few other cases.[25] Both sides discussed the *structural* role of state militias in a federal system and tried to explain why that did or didn't affect our understanding of the Second Amendment.[26] And of course the *McDonald* decision was,

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Observations, 85 S. CAL. L. REV. 247, 248 (2012) (discussing "some possible penumbral aspects of the Second Amendment, as it may be applied in the future").

22. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (criticizing petitioners for "ignoring . . . historical reality").

23. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3120, (2010) (Breyer, J., dissenting) ("I cannot understand how one can take from the elected branches of government the right to decide whether to insist upon a handgun-free urban populace in a city now facing a serious crime problem and which, in the future, could well face . . . other emergencies that threaten the breakdown of law and order.").

24. 307 U.S. 174 (1939).

25. *See McDonald*, 130 S. Ct. at 619–27 (discussing the interpretative difference between the majority and dissent's opinion with respect to Supreme Court precedent); *see, e.g.*, *id.* at 3120 (Scalia, J., concurring) (discussing what Justice Scalia believes to be Justice Steven's misinterpretation of the Supreme Court decision in *Palko v. Connecticut*, 302 U.S. 319 (1937)).

26. Compare *Heller*, 554 U.S. at 627 ("[T]he conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty."), *with id.*at 637 (Stevens, J. dissenting) ("The Second Amendment was... a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a

to a large degree, one long debate about the place of gun rights in the American *ethos*—are they fundamental to our national character, or are they not?[27] So while dueling historical arguments were the stars of *Heller* and *McDonald*, all of the major modalities of Constitutional interpretation were represented in those cases. And there is every reason to expect that all of these modalities of interpretation will be represented—and battled over—in future Second Amendment cases, with similarly fractious results.

III. THE ROLE OF ACADEMICS

If I am correct that the future development of Second Amendment doctrine is underdetermined by the existing Constitutional text and authoritative precedents on point, then what can we in the academy add to the discussion?

First, the Langdellian task of divining the right answers to open Second Amendment questions is not possible, as there are a variety of legally legitimate and contradictory answers to all the important questions. It would be pointless to try to doctrinally determine where Second Amendment jurisprudence is going because its future path is doctrinally wide open. Its actual development, therefore, will be a function *primarily* of non-doctrinal forces—broad political, cultural, and social developments, plus a variety of contingent factors about the Justices who make the decisions and the facts of the cases before them.[28]

We might say then, that we should be Realists and simply try to *predict* which among the many plausible paths the Supreme Court will in fact choose to go.[29] In a sense, this means we should become expert Court-watchers, something like latter-day Kremlinologists, trying to figure out what the Justices will do based on informed

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national standing army posed an intolerable threat to the sovereignty of the several States.").

27. *McDonald*, 130 S. Ct. at 3036 (noting that the fundamental question to be decided was "whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process, [and thus] . . . whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty").

28. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 820 (1935) (calling for more rigorous study of "the social forces which mold the course of judicial decision," including economic, political, institutional, psychological, professional, and cultural factors).

29. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) ("a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; —and so of a legal right.").

guesses. As spectators of the Court, of course, we cannot help but partake in this kind of speculation from time to time. And there may be some real value in trying to parse the trends that make one path of doctrinal development more likely than another. But, surely, informed prediction is not what we need law professors for.[30] Such speculation becomes moot the day after the Supreme Court in fact issues an opinion, and such predictive work is surely not a lasting contribution. In any event, it turns out that we law professors are not very good at prediction; how many of us, for instance, correctly predicted the manner in which the Justices would resolve the most high-profile Constitutional case of the past decade, *NFIB v. Sebelius*?[31]

What we law professors usually end up doing in fact is developing arguments *within* one of the different modalities of Constitutional interpretation. In the Second Amendment context, the historical mode of argument already looms large in the academic literature as it does in the caselaw.[32] For the two decades leading up

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30. Indeed, as Justice Holmes argued, such informed prediction is what we need practicing lawyers for. *See id.* at 457 (defining the lawyer's professional skill as the "prediction of the incidence of the public force through the instrumentality of the courts").

31. Bob Drummond, *Obama Health Law Seen Valid, Scholars Expect Rejection*, BLOOMBERG (June 22, 2012, 12:15 PM), http://www.bloomberg.com/news/2012-06-22/law-experts-say-health-measure-legal-as-some-doubt-court-agrees.html; Sarah Kliff, *Experts Aren't Very Good at Predicting Supreme Court Cases*, WASH. POST (June 25, 2012, 1:26 PM), http://www.washingtonpost.com/blogs/wonkblog/wp/2012/06/25/experts-arent-very-good-at-predicting-supreme-court-cases/; Dan McLaughlin, *My Predictions on the Health Care Case*, REDSTATE (June 27, 2012, 11:18 AM), http://www.redstate.com/diary/dan_mclaughlin/2012/06/27/my-predictions-on-the-health-care-case/; Avik Roy, *On Thursday, Roberts Is Likley To Write The Supreme Court Opinion That Partially Overturns Obamacare*, FORBES (June 25, 2012, 1:34 PM), http://www.forbes.com/sites/aroy/2012/06/25/on-thursday-roberts-is-likely-to-write-the-supreme-court-opinion-that-partially-overturns-obamacare.

32. *See, e.g.*, Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 321 (1998); Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 6 (2012); Saul Cornell, *"Don't Know Much About History": The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 678–81 (2002); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 488 (2004) (describing a divide in the historical interpretation of the Second Amendment between supporters of "collective rights" and supporters of "individual rights."); David Harmer, *Securing a Free State: Why the Second Amendment Matters*, 1998 B.Y.U. L. REV. 55,79–87 (1998); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 646–51 (1989); Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 907 (2013).

to *Heller*, academics produced lots of articles making historical arguments for why the Second Amendment did or did not enshrine a personal right unconnected to militia service.[33] Now, post-*Heller* and post-*McDonald* we are producing more and more articles in which law professors plumb the history of firearms-related legislation, litigation, and policy to argue about the scope of the right—to try to assess, for instance, which classes of citizen or which classes of firearms might be excluded from the right.[34] Much of this work undoubtedly has practical effect insofar as it winds its way into litigants' briefs and eventually into Supreme Court opinions. And a lot of this work undoubtedly has independent scholarly value by, for instance, informing us of some overlooked aspect of the history of gun rights or gun control in America, or calling our attention to ethical stakes in the gun rights debate that had previously gone unexamined.

My worry about this kind of work is that it casts law professors as essentially adjuncts to the activist movements which seek to either expand gun rights or expand gun control. The legal academy producing this type of scholarship effectively serves as a farm team for the movement lawyers and strategists on both sides to help develop and test out new lines of argument. We produce, in a sense, mock briefs, in favor of our visions of the Second Amendment, and we produce these arguments without the benefit of an actual case or controversy, without a real client—with no stakes at all actually. It is what Pierre Schlag calls "air law" or "spam jurisprudence."[35] It is

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33. JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 162–63 (Harvard University Press, 1994); Bogus, *supra* note 30, at 405–08; Harmer, *supra* note 30, at 63–72; Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 474–81 (1995); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1241–44 (1994).

34. *See, e.g.*, Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 142–43 (2013); Nicholas Johnson, *Administering the Second Amendment: Law, Politics, and Taxonomy*, 50 SANTA CLARA L. REV. 1263, 1263, 1265–72 (2010); David Kopel, Clayton E. Cramer & Joseph Edward Olson, *Knives and the Second Amendment*, 47 MICH. J. L. REFORM 167, 168 (2013); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009); Mark Tushnet, *Permissible Gun Regulations After* Heller*: Speculations About Method and Outcomes*, 56 UCLA L. REV. 1425, 1440 (2009); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1479 (2009).

35. *See* Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L.J. 803, 813, 832 (2009). As Schlag explains:

as if we are lawyers who just happen to have a little more time on our hands—and no pesky clients—so we can think up our own cases, imagine an ideal client, and then make intricate, long, footnote-laden arguments to . . . well, let's face it, primarily to one another.

Now, some law professors embrace this role and see themselves as activist lawyers who happen to be operating from an academic perch rather than from a law firm or an agenda-driven legal fund. Needless to say, this is a pose that left-wing law professors embrace as much as, or even more than, those on the right.[36] The legal academy undoubtedly benefits from the passion these activist scholars bring to their subjects. And law professors do genuinely have the time and inclination to advance arguments in textual, historical, structural, and doctrinal modalities—arguments that working lawyers may not have the time or inclination to make. But let us at least admit that these types of arguments are largely motivated by our commitments to substantive ethical or policy positions and that, because there are so many legally legitimate methods of making constitutional arguments, there are in fact a wide range of legally legitimate answers to interpretive questions about the Second Amendment.

In the end, the Second Amendment is now ordinary Constitutional law, which is to say that the scope and reach of the Second Amendment is still largely indeterminate, its destiny as law is now firmly in the hands of the Justices of the Supreme Court, and legal academics are still by and large playing our parts as designated apologists or designated critics of what the Court has done or will do. Ordinary constitutional law is, in practice, not so edifying after all.

> During the rock n' roll era (circa 1955–1980), young males developed a habit of imitating their favorite rock stars by pretending to play a non-existent guitar. This behavior became known as "air guitar." It was a practice of dubious value: On the one hand, air guitar produced no real sound. On the other hand, no one playing air guitar ever struck a false note. . . . The relation of air guitar to contemporary legal scholarship is relatively straightforward. As for Spam Jurisprudence, it pretty much speaks for itself.

Id. at 803 n.*.

36. Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1516 (2001) (arguing that the Critical Legal Studies movement is best understood as "a political location for a group of people on the Left who share the project of supporting and extending the domain of the Left in the legal academy").