



Putting the Second Amendment to Sleep

H. RICHARD UVILLER & WILLIAM G. MERKEL
*THE MILITIA AND THE RIGHT TO ARMS, OR, HOW
THE SECOND AMENDMENT FELL SILENT*
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*THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING
POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC*
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SUPPOSE THAT THE FEDERAL government, having decided that its criminal justice system was inefficient, replaced all the criminal penalties in the U.S. Code with provisions for what it called civil fines and civil commitment to state reeducation institutions. Would the Sixth Amendment rights to jury trials, assistance of counsel, and so forth, then disappear? Can one use the Preamble's reference to "a more perfect Union" to qualify Article I's requirement that the House of Representatives be chosen "every second Year by the People," and thus conclude that congressional elections need not be held when divisive political campaigns are likely to contribute to national disunity? Or, if free speech rights were thought to be-

long only to natural persons at the time of the founding, should the courts therefore deny First Amendment protection to corporations like the New York Times and CBS? If you are attracted by such interpretations of the Constitution, you should find a lot to like in these two recent books about the Second Amendment.

The Second Amendment provides: "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." For almost a century and a half after its adoption, this provision of the Constitution generated very little controversy. Those who discussed it almost all assumed that it protects a right of individual American citizens not to

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be disarmed by the federal government.

After Congress first adopted a major gun control statute in 1934, courts and legal commentators arrived at a very different consensus. According to this “collective right” view, the Second Amendment protects a right of states to maintain a military counterweight to the federal armed forces or, perhaps, a right of citizens to have the weapons that state governments require them to possess while serving in formal military organizations. In the early 1980’s, a revolt against this consensus began to take place. There is now a substantial literature, and the recent *Emerson* decision,¹ defending the older, individual-right interpretation.

The straightforward version of the collective-right interpretation, according to which the Second Amendment protects a right belonging to state governments rather than to individual citizens, is easily demolished. The Constitution never uses the term “the people” to refer to any government; the Bill of Rights elsewhere uses “the right of the people” to refer to what are indubitably individual rights; and the states’ right interpretation implies that the Second Amendment silently repealed or amended two separate provisions of Article I,² an effect that is mentioned nowhere in the legislative history. These and other arguments against the states’ right theory have been forcefully and repeatedly made, and never refuted. The books reviewed here espouse a variant version of the collective-right interpretation: Second Amendment rights, while belonging in some sense to individuals rather than to states, can be exercised only by people serving in a specific type of government-organized militia that no longer exists, if it ever did. If this theory is correct, the constitutional right to keep and bear

arms itself no longer exists, and may never have existed.

I. The Silenced Second Amendment

In *The Militia and the Right to Arms*, Uviller and Merkel are at pains to emphasize that their methodology is not at all like the result-oriented “noninterpretivism” that academics have invented to justify some of the Supreme Court’s most cherished exercises in creative writing (p. 147). “Our historical approach is simply this: we take seriously the words chosen by the drafters, and seek their meaning to the ratifying generation” (p. 37). Purportedly applying this method, Uviller and Merkel conclude that the Second Amendment means:

Inasmuch as a well-regulated Militia shall be necessary to the security of a free state and so long as privately held arms shall be essential to the maintenance thereof, the right of the people to keep and bear such arms shall not be infringed (p. 24).

Uviller and Merkel are vague about whether they think these very stringent conditions were ever met, but they are sure that the conditions are not met today, and they conclude “that the ‘right of the people’ has become a vacant and meaningless sequence of words” (p. 2).

Uviller and Merkel advance two main arguments in support of this radical conclusion, both of which are demonstrably fallacious. First, and most important, they claim that the Second Amendment’s grammatical structure implies that the right of the people to keep and bear arms exists only to the extent that the introductory phrase about

1 *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

2 See Art. I, § 8, cl. 16 (granting Congress virtually unfettered authority to regulate the militia); *id.* § 10, cl. 3 (forbidding the states to keep troops without congressional consent).

a well regulated militia is or remains true. After noting, correctly, that the introductory portion of the Second Amendment is an ablative absolute, they incorrectly claim that “[t]his construction characterizes a phrase modifying the substance of the main clause as an adjective would modify a noun As a simple matter of grammar, the participial modifier is essential for the declarative clause to occur” (p. 150). Uviller and Merkel should know that their description of an ablative absolute is wrong because they have an endnote quoting two grammarians (p. 297 n.10), neither of whom says any such thing.

Even without the help of a grammar book, anyone can easily see Uviller and Merkel’s mistake by considering the following example. Imagine that a dean comes into a classroom at the beginning of the hour and announces, “The teacher being ill, this class is cancelled.” The ablative absolute is emphatically not “essential for the declarative clause to occur.” The class will be cancelled even if the teacher is perfectly healthy but called in sick so he could watch a ballgame on TV, or if the teacher is actually busy doing some administrative task that the dean thinks more important than teaching the class, or if the teacher’s car broke down and somebody inadvertently misinformed the dean about the reason for the teacher’s absence. Similarly, at least “as a simple matter of grammar,” the right of the people to keep and bear arms is not dependent on the truth of the proposition that a well regulated militia is necessary to the security of a free state, let alone of the proposition that “privately held arms shall be essential to the maintenance thereof.” Uviller and Merkel’s grammatical argument is a canard, and anyone familiar with the Second Amendment literature should know that it is a canard.

The second principal element in Uviller and Merkel’s argument is equally untenable.

They claim, on the basis of what they say is overwhelming historical evidence, that the right of the people to keep and bear arms was meant to be exercised only in a certain ideal kind of militia, namely “a people’s army, well-trained, commanded by local authority, self-armed, and responsive to the call of duty as necessary to protect common security” (p. 109). In support of this assertion, Uviller and Merkel summarize at considerable length a lot of well-known evidence that supports three noncontroversial propositions. First, the founding generation feared professional standing armies, and saw the nonprofessional militia as a peacetime alternative that would present a far smaller threat to political liberty. Second, the principal motivation for adopting the Second Amendment was to respond to fears that the new federal government might seek to subvert the traditional militia in order to facilitate political oppression. Third, nothing like the sort of ideal militia that might render standing armies unnecessary has existed in America for a long time, if it ever did.

These propositions, and the evidence that supports them, do not imply that the Second Amendment permits the federal government to disarm those American citizens who have not been given the opportunity by the government to serve in what the founding generation would have seen as an ideal type of militia. Nor is there any evidence that anyone alive at the time of its framing said or implied that the Second Amendment would stop protecting the right to keep and bear arms if the government failed to maintain theoretically ideal militia organizations. Uviller and Merkel’s entire legislative history argument hinges on a non sequitur, namely that if a right protected by the Constitution does not fully accomplish what was foremost among the hopes of those who adopted it, the right must not exist. The illogic of

Uviller and Merkel's argument is particularly striking when one stops to consider that it is the federal government itself that has failed to preserve the institution that Uviller and Merkel claim is the essential precondition for the exercise of the right that the Constitution sought to secure against infringement by the federal government.³

Although Uviller and Merkel are generally careful to present themselves as legal traditionalists committed to a methodology that emphasizes textual analysis supplemented with legislative history, a different approach occasionally peeks through, as in this passage:

Because it is meaningless to enable a defunct institution, the right decays with the decay of the institution it serves. If someday the judicial structure on the civil side is dismantled as an inefficient way to resolve private disputes (replaced with some form of mandatory arbitration, let us imagine), the Seventh Amendment right to jury trial in civil actions would disappear (p. 161).

This is a striking claim, to say the least. Is it possible, let alone self-evident, that Congress is free to enact a statute requiring all cases and controversies now covered by the Seventh Amendment to be decided by Article I tribunals, without juries?⁴ This passage suggests that Uviller and Merkel's view of the Second Amendment is not really driven by their mistaken grammatical analysis of the provision's ablative absolute, or by their illogical infer-

ences from its legislative history, but rather by an intuition that constitutional rights originally associated with a particular institution (such as the militia or the judiciary) cannot be allowed to survive if the government decides that the institution is inefficient or otherwise undesirable. If one took this intuition seriously, it would have radical consequences for a variety of constitutional rights, and it might have been the organizing principle for an interesting book. But there is no indication that Uviller and Merkel have given any thought to the consequences of their principle for any rights other than those protected by the Second and Seventh Amendments.

Uviller and Merkel's efforts to refute the individual-right interpretation of the Second Amendment are as weak as their efforts to establish their version of the collective-right interpretation. Their main technique is to ignore the strongest arguments in what is now a large academic literature. Most proponents of the individual-right interpretation, including me, are ignored or subjected to casual and unsubstantiated accusations of misreading history (e.g. p. 38). Uviller and Merkel attempt a detailed refutation of only two, carefully selected law review articles that take the individual-right position.

One is a short comment from fifteen years ago offering a self-consciously provocative suggestion that the Second Amendment deserves more serious consideration than it had previously received from the legal establishment.⁵ The author relied on the scanty sec-

3 Congress has almost plenary power to provide "for organizing, arming, and disciplining" the militia, the states having reserved only the power to appoint militia officers and to train the militia in accordance with federal dictates. See U.S. Const. art. I, § 8, cl. 16.

4 Cf. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51–52 (1989) (footnote and citations omitted):

[Congress] lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury. ... [T]o hold otherwise would be to permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears. The Constitution nowhere grants Congress such puissant authority.

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

ondary literature that existed in 1989; he apparently did no significant primary research of his own; and he declined to endorse the major conclusions advanced in the literature he was summarizing. The other target chosen by Uviller and Merkel is William Van Alstyne's very short 1994 essay.⁶ This essay is written in an idiosyncratic style that some readers may find thought provoking and even charming, as I do. But it is easy to show that some of Van Alstyne's formulations are ambiguous, and that many of his suggestions are not fully fleshed out or thoroughly defended. In any event, any knowledgeable student of the subject will easily recognize that Van Alstyne was not trying to elaborate all the arguments that were beginning to appear in the literature by 1994, or to respond to all the counterarguments. Uviller and Merkel slide over significant scholarly contributions from the 1980's, and give almost no attention to the substantial individual-right literature published in the decade after Van Alstyne's piece appeared.

Uviller and Merkel's treatment of historians resembles their treatment of legal analysts. Several historians are cited frequently

and respectfully, especially Michael Bellesiles, Garry Wills, and Saul Cornell. These are all vigorous opponents of the individual-right interpretation, and all of them have taken untenable positions on important issues.⁷ Although Uviller and Merkel do not accept uncritically everything these historians have to say, they do claim that a consensus exists on the central point: "The 'standard model' [i.e. the individual-right interpretation] appears to have the endorsement of only one practicing academic historian, Joyce Lee Malcolm of Bentley College, an undergraduate business school in Massachusetts" (p. 246 n.9). Leaving aside the scarcely veiled disdain for Professor Malcolm's position in the academic pecking order, one has to note that Uviller and Merkel have overlooked such major figures as Leonard Levy and Robert Cottrol,⁸ as well as ten other historians who signed an *amicus* brief in the *Emerson* litigation.

In any event, the significant historical facts about the Second Amendment are not in dispute. The real issue is the meaning of a legal text, and the relevance of those facts to the meaning of that text. There is no reason to defer to the expertise of "practicing aca-

6 William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L.J. 1236 (1994).

7 Bellesiles resigned his tenured position at Emory University after an investigation into charges of academic misconduct arising from his published claims about the prevalence of private gun ownership among the founding generation. See Robert Stacy McCain, *Discredited Volume on U.S. Gun Culture Going Out of Print; Author Lost Prize, University Position*, Washington Times, Jan. 10, 2003, at A7.

To take one example of a dubious claim propounded by Wills, he has written that "to-keep-and-bear is a description of one connected process" which referred to the militia's "permanent readiness." Unfortunately, he did not support this very striking assertion with a single quotation in which the phrase "to keep and bear arms" had ever been used in this way. Garry Wills, *To Keep and Bear Arms*, N.Y. Review of Books, Sept. 21, 1995, at 62, 67-68.

Cornell has published at least one critique of the individual-right interpretation based largely on the patently fallacious assumption that people who supported certain forms of gun control by their own state governments could not possibly have wanted to disable the federal government from enacting similar laws. Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 Const. Comm. 221 (1999).

8 There are clear endorsements of the individual-right interpretation in Leonard W. Levy, *Origins of the Bill of Rights* 133-49 (1999), and Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 Yale L.J. 995 (1995). Those who assume that academic credentials correlate well with cogent arguments, or who simply mistrust historians who teach at "undergraduate business schools," will find that the credentials of Professors Levy and Cottrol compare quite favorably with those of the historians favored by Uviller and Merkel, and indeed with those of Uviller and Merkel themselves.

demic historians” in assessing the relevance of undisputed facts to the meaning of this legal text. Hence the importance of Uviller and Merkel’s mistaken grammatical analysis and illogical inferences from the undisputed historical record.

Uviller and Merkel largely ignore a mass of powerful arguments and evidence in favor of the individual-right interpretation. This is a disquieting feature in a scholarly book whose authors could hardly be unaware of what they are ignoring. And it is made more disquieting by the disparaging language Uviller and Merkel use to describe those with whom they disagree.⁹ Space constraints in this review preclude even a brief summary of the detailed case that has been made in favor of the individual-right interpretation. One example, however, may serve to illustrate Uviller and Merkel’s evasive approach to inconvenient facts and to logical arguments based on those facts.

Uviller and Merkel stress that the Second Amendment is the only provision in the Bill of Rights that contains an explanatory introduction. Although they mention that Eugene Volokh has shown that numerous state constitutions had provisions with similar introductions, they dismiss the significance of Volokh’s research on the ground that the Second Amendment remains unique among the provisions of the federal Bill of Rights (p. 24). But this in no way refutes Volokh’s point: these introductions in the

various state constitutional provisions had never been interpreted to limit the scope of the rights protected in the accompanying operative clauses, and there is therefore no reason to assume that those who enacted the Second Amendment would have expected its ablative absolute to modify or limit its operative clause.¹⁰ Furthermore, Uviller and Merkel also choose to ignore the federal Constitution’s Patent and Copyright Clause. Unlike the Second Amendment, the language of that clause actually does have a grammatical structure that seems to limit the scope of the clause to the achievement of certain limited purposes.¹¹ Notwithstanding that there is much *more* grammatical justification for limiting the scope of the Patent and Copyright Clause than there is for limiting the Second Amendment, courts have never confined congressional power under the former provision to achieving its stated purpose.¹²

Contrary to the claim they make about their methodology (p. 37), Uviller and Merkel have not taken seriously the words chosen by those who drafted the Second Amendment, nor have they shown that their interpretation of those words was shared by the ratifying generation. Far from showing that this right of the people is “a vacant and meaningless sequence of words” (p. 2), Uviller and Merkel have really only shown how much violence to logic and evidence is required in order to create the impression that the Constitution does not mean what it says.

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- 9 E.g., p. 23 (referring to “the notorious *Emerson case*”); p. 30 (referring to two authors as “the confident tandem”); p. 38 (referring to a “dedicated band of individual rights advocates”); p. 263 n.6 (describing Professor Malcolm’s book, which was published by the Harvard University Press, as “the insurrectionist favorite”).
- 10 See Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793 (1998).
- 11 U.S. Const. art. I, § 8, cl. 8: “The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”
- 12 See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (congressional extension of existing copyrights upheld without a showing that such retroactive extensions could be expected to have positive incentive effects on authors).

II. The Forlorn Second Amendment

Unlike Uviller and Merkel, David Williams does not present himself as a methodologically conventional legal analyst. *Mythic Meanings* is somewhat difficult even to describe because it combines, or alternates between, passages that relate primarily to Williams' vision of civic republican political theory and passages in which he tries to show that the Second Amendment constitutionalized that vision.

If this book has a unifying theme, it probably lies in its exploration of the knotty problem of reconciling liberal constitutionalism with the liberal belief that every people has a natural right of revolution. How does one distinguish between a legitimate revolution and an illegitimate insurrection? To the extent that our liberal tradition can tell us which governments and which rebellions are legitimate, it must be through reference to "the people," a collective entity different from the government and not quite reducible to the individuals who make up the population. But if it is only "the people" that can give legitimacy to governments and rebellions alike, one needs a way to identify this entity and to distinguish it from various factions led by imposters who may claim to be its representatives.

Williams concludes that the founding generation – despite disagreements over many other issues – agreed that legitimate revolutions, directed against corrupt governments and carried out for the common good, can only be effected by "the Body of the People [defined as] the people as a whole, assembled in a universal militia and united by a common culture concerning the proper use

of political violence" (p. 2). Just as the original Constitution authorized the federal government to organize this universal militia to suppress factious insurrections, we're told, so the Second Amendment was designed with the correlative purpose of protecting the universal militia's ability to overthrow corrupt governments. But Williams believes that the population of the United States is now so divided and lacking in a common political culture that the Body of the People does not exist. What the Second Amendment tells us, therefore, is that we must work hard to reconstitute the American people as a genuinely unified political community held together by "trust and love" (p. 320–24). The book concludes:

As hope grows on hope, trust grows on trust, and love grows on love, and they all grow on the resources that our myths offer us. If we live out our stories, then, we need to be sure we tell the right ones, as they set the limits of our future. And to heal the violence that scars us, even as we recognize the fears and threats on every side, we must incorrigibly insist on believing in stories of endless possibility (p. 326).¹³

Assuming for the sake of discussion that this is the right way to foster an appropriate level of social unity, just how will we know when Williams' hopes for the resurrection of "the Body of the People" or "universal militia" have been fulfilled? One might expect him to take American society at the time of the Founding as the model. He does not do so, and for a good reason:

[B]y the 1780's the concept of the old universal militia rarely came to realization in the world; it may have existed primarily as a paper concept, a legal ideal

13 For an alternative effort to create "stories of endless possibility," see *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

... [and those] who defined the militia as the Body of the People may have been aware that *the militia had long ceased to satisfy that definition*" (p. 49 (emphasis added)).¹⁴

That means that the institution on whose members the Second Amendment was supposedly designed to confer a constitutional right did not exist even at the time the Second Amendment was adopted. And it means that the Second Amendment in fact never protected any right to keep and bear arms, by anybody.

This last conclusion might have forced a more conventional thinker to reconsider his theory. But Williams deals with the point very briefly and almost in passing, thus providing one example of his unlegalistic approach to law. Indeed, much of the book does not treat the Second Amendment as a law at all, but rather as part of a myth or vision that reflects and affects the way Americans think about the organization of political violence. Thus, although he criticizes several commentators who interpret the Second Amendment differently than he does, including me, Williams expressly declines to resolve what most of us think is the central issue in contemporary debates about the Second Amendment: whether it should be interpreted to protect the right of individuals to have arms for lawful purposes such as self-defense (p. 89).

What really interests Williams is his belief that America no longer has effective myths with which to domesticate political violence, and that this constitutes a "quiet crisis" that is preparing the way for bloody social upheavals (e.g., pp. 12, 263–64). Williams

is especially worried by the so-called militia movement of the 1990's (ch. 6), and he passionately argues that we need to "redeem the people" by creating new myths that will foster a united community devoted to the common good (ch. 9).

Although the fringe groups that preoccupy Williams enjoyed a brief moment of media hype, I think he vastly overestimates their significance. Timothy McVeigh is mentioned on page 1 and repeatedly thereafter, and a long chapter is devoted to groups with names like the Militia of Montana, the Aryan Nations, and the Order. But are such people really a greater threat to national unity than the Unabomber, Earth First!, and the Earth Liberation Front? These and other such extremists of the left get no attention from Williams.¹⁵ In any event, those who worry about potential social upheavals today might sensibly start by focusing on the pietists who like to cut off people's heads on television and immolate tall buildings full of infidels.

Whichever bunch of political extremists one thinks is the greatest danger to our political stability, one has to wonder what any of them has to do with interpreting the Second Amendment. It appears that Williams wants to find a linkage primarily in order to lend support to his civic republican visions by rooting them in the Constitution and the wisdom of the framing generation. That appears to provide the best explanation for the book's extended effort to show that its framers shared Williams' understanding of the Second Amendment.

That effort, however, is unsuccessful. Williams contends that the original proponents

14 See also p. 77, where Williams says that supporters of a universal militia, who he believes were the proponents of the Second Amendment, "must have existed in a state of anxiety, insisting the militia must be the whole people, *but knowing in fact it was not*" (emphasis added).

15 Whatever special fascination some militia-movement publicists have had with the Second Amendment, such fascination hardly seems more significant than the well-known similarity between the Unabomber's manifestoes and some passages in Al Gore's book about the environment. See, e.g., www.strangecosmos.com/content/item/21207.html.

of the Second Amendment (not its opponents) should be taken as the exponents of its true meaning, and that these proponents were fervent believers in Williams' theory about the Body of the People and the universal militia. Even accepting Williams' somewhat oversimplified approach to legislative history, his argument depends on the mistaken claim that the proponents of the Second Amendment were the Anti-Federalists (p. 52). Although the Bill of Rights was no doubt drafted and proposed to the states by the First Congress because of Anti-Federalist complaints during the ratification debates, it is not true that the Anti-Federalists were the proponents of the Second Amendment.

Indeed, as Williams almost admits at one point (p. 52), the Anti-Federalists had every reason to consider the Second Amendment a sop that failed to give them what they wanted most, namely restrictions on the new federal government's authority to raise armies and to control the militia. That is why those who expressed dissatisfaction with the proposed Second Amendment seem to have been primarily or exclusively Anti-Federalists. The proponents of the Second Amendment were actually the Federalists who dominated the First Congress, and Williams provides no evidence that these politicians were captivated by the kind of romantic enthusiasm for the traditional militia ideal expressed by some writers who opposed the original Constitution. Furthermore, as briefly discussed above, the text that the First Congress adopted does not say or imply that the right to keep and bear arms is one that can belong only to members of an ideal type of "universal militia."

Conclusion

Both of these books treat the Second Amendment as a relic whose meaning is inseparable from a type of militia that the

government no longer maintains. Neither of them establishes any such thing, and neither refutes the traditional view that the Second Amendment protects individual American citizens from being disarmed by the federal government. But that does not imply that the nature of the Second Amendment's applicability to today's world is in all important respects self-evident. Much has changed since the Bill of Rights was adopted, and some of those changes were undoubtedly unforeseen by those who wrote it.

At the time of the framing, for example, the weapons typically used for self-defense and other lawful civilian pursuits were not materially different from those that soldiers carried into battle. Nothing in the historical record can tell us directly how the Second Amendment should apply to portable anti-aircraft missiles or suitcase nuclear bombs, or even to standard-issue military rifles like the M-16. The Second Amendment, moreover, was adopted at a time when reasonable people feared that the potentially powerful new central government might have more obviously tyrannical tendencies than it has exhibited in the succeeding centuries. At the same time, the founding generation had little reason to suspect that this new government would begin to supplant the states' regulatory role by enacting laws to deal with such minutia as waiting periods for gun purchases and permissible configurations of features like folding stocks and pistol grips. The government actions that raise Second Amendment issues today were not discussed by its framers, and the scope of the people's right to be free from restrictions on the right to arms is not directly answered by the Constitution's text or history. Above all, future interpretations of the Second Amendment by the Supreme Court will have to take account of a complex background of case law dealing with other constitutional rights, perhaps

most importantly the due process “incorporation” doctrine that has made most of the other substantive provisions of the Bill of Rights applicable to the states.¹⁶

How should such changes affect the way courts apply the Second Amendment to the

various gun control laws of our time? That is an important and complex question that deserves serious scrutiny. Unfortunately, the books reviewed here serve primarily to distract attention away from such questions. And away from the Constitution as well. *GB*

16 The Court has not yet decided whether to “incorporate” the Second Amendment. Williams briefly touches on Akhil Amar’s claim that the Privileges or Immunities Clause incorporated the Second Amendment, but only in order “to explain why it does not concern this book’s thesis” (p. 84). Uviller and Merkel also briefly consider Amar, but hardly mention the Supreme Court’s due process approach (pp. 202–09).