SUICIDE PACT: NEW READINGS OF THE SECOND AMENDMENT

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> "The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."
>
> Justice Robert H. Jackson[1]

There are many ways of reading the past. The most common and popular is a focus on the subject itself, a narrative of the events with a little analysis mixed in. A second is the scholarly discourse, the author entering into a conversation with his or her predecessors in the profession. And then there is the personal search by the individual author for meaning in the past, a format favored by those interested in identity history and politics, and, all too often, by legal scholars. This third tack is using history in the service of some current position; what Bernard Bailyn called "the twin sins of anachronism and presentism."[2] The first two approaches pursue "history" as a professional responsibility, the third as a policy struggle with only one possibly correct position.

Laura Kalman's recent book, *The Strange Career of Legal Liberalism*,[3] offers an outstanding dissection of this division in scholarly approaches. Legal scholars, she quotes Frank Michelman as stating, "min[e]" the past and "make a case" for a specific, pre-exiting perspective.[4] Such writers ransack the past,

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1. *Terminiello v. Chicago*, 337 US 1, 37 (1949) (Jackson, J., dissenting).

2. Quoted in Nomi Maya Stolzenberg, *A Book of Laughter and Forgetting: Kalman's "Strange Career" and the Marketing of Civic Republicanism*, 111 Harv. L Rev. 1025, 1027 (1998).

3. Laura Kalman, *The Strange Career of Legal Liberalism* (Yale U. Press, 1996).

4. Id. at 175.

seeking supportive arguments and quotations to promote and enhance their case for the present. Like big game hunters they return from their safari with their prized quotes, having paid no attention to the wider environment or social context of their trophies. They rarely descend into a period to get a sense of the nuances and complexities; and they certainly never bother to count, to arrive at the aggregate rather than the exceptional. As Morton Horwitz put it, this "lawyer's history . . . involves roaming through history looking for one's friends."[5]

Good historians do not attempt to use the past to craft a correct formula for current conduct (a classic misreading of George Santayana). They do not seek a pedigree, as Kalman put it. [6] Lawyers, who "appropriated historians for advocacy purposes,"[7] have not hesitated to seize upon republicanism, the supposed ideology of the nation's founding, as a useful paradigm with an imagined applicability to present circumstances. But the present does not exist to provide precedent for some future society. It seems so obvious, yet somehow still needs stating whenever lawyers write legal history.

There are of course many notable exceptions. Andrew Kull's *Color Blind Constitution*[8] leaps to mind as a work of solid historical scholarship which follows the evidence wherever it may lead, and which is authentically concerned to get the context of legal developments just right. Nonetheless, far too many legal scholars, most especially on issues revolving around the Second Amendment, seem not to understand why one would bother but to argue some imagined client's cause; nor can they conceive what possible use history is if it does not provide usable authority. A historian like William Leuchtenburg who finds and uses evidence contrary to an initially held position may be incomprehensible to many legal scholars.[9] "Leuchtenburg's compliment is the lawyer's insult," Kalman writes. "It is [the] lawyers' business to build paradigms. Too much orderliness, however, makes historians suspicious."[10] As Edmund Morgan wrote Felix Frankfurter, the historian rejects "the demand for

5. Id. at 179 (quoting Morton Horwitz, *Republican Origins of Constitutionalism*, in Paul Finkleman and Stephen Gottlieb, eds., *Toward a Usable Past: Liberty Under State Constitutions* 148 (U. of Georgia Press, 1991)).

6. Kalman, *Strange Career* at 180 (cited in note 3).

7. Id. at 185.

8. Andrew Kull, *The Color Blind Constitution* (Harvard U. Press, 1992).

9. William E. Leuchtenburg, *The Historian in the Public Realm*, 97 Am. Hist. Rev. 11 (1992)

10. Kalman, *Strange Career* at 186 (cited in note 3).

symmetry," avoiding sharp dichotomies which misrepresent the past.[11] Put another way, professional historians immediately doubt any case for which all the evidence falls consistently on one side.

Historians know that history is full of ambiguities and paradoxes, and expect to find them. That explains why most historians of early America shrugged their shoulders in bemusement over the Second Amendment debates and said little, until recently. Only when one side in that polemic proclaimed itself the winner, and even went so far as to declare itself "the new consensus" and "the standard model,"[12] did many historians come forth to question this monopoly on truth.[13]

Kalman notes that lawyers turned to republicanism as a total and all-inclusive explanation of early American history at precisely the moment that American historians were abandoning the concept.[14] Similarly, as Saul Cornell points out with great acuity, proponents of an insurrectionist reading of the Second Amendment have insisted that they have a "standard model" for reading the Constitution and early American intellectual and cultural life at the same time that the vast majority of historians have rejected the idea that any aspect of American history can be understood "in terms of a single ideological paradigm."[15]

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11. Id.

12. Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461 (1995). This issue of the Tennessee Law Review offers a complete, unqualified, and uncritical overview of the "standard model," or "individualist" reading of the Second Amendment. For claims that there is a "new consensus" and "virtual unanimity, that there is no tenable textual or historical argument against a broad individual right view of the Second Amendment," see Randy E. Barnett and Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 Emory L.J. 1139, 1141 (1996).

13. Recent works examining the historical context include Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. of Am. Hist. 22 (1984) (examines the intellectual context of the Second Amendment); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 311 (1998) (looks at fears of slave insurrection among the Southern elite); Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 Wm. & Mary Q. 39 (1998) (studies the first federal efforts to establish a "well regulated militia"); as well as two articles I have written looking at patterns of gun ownership and the nature of gun laws in early America: *The Origins of American Gun Culture in the United States, 1760-1865*, 83 J. of Am. Hist. 425 (1996); *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 L. & Hist. Rev. 567 (1998). The two leading historical works for the Standard Modelers are Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Harvard U. Press, 1994) and Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. of Am. Hist. 599 (1982).

14. Kalman, *Strange Career* at 176-80 (cited in note 3).

15. 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).

Almost no historian speaks any more of a uniform, cohesive American culture; there are too many strands to the fabric of early American society to maintain that just one speaks for all. But then that was exactly the point of federalism, and precisely the perspective offered by James Madison in the Federalist Papers.[16] So we now have the delicious irony of conservative legal scholars rejecting the vision of James Madison as inaccurate, and embracing the classic liberal ideal of a unifying American consensus.[17]

Adherents of the Standard Model find in the Second Amendment a right to insurrection. The people retain the individual right to bear arms as an implicit threat to revolution. In good times, that threat keeps the government in line; in bad, when the government oversteps its bounds, the people may rise up and overthrow that government. The position was most clearly stated in the context of the recent bombing of the Murrah Federal Building in Oklahoma, when Linda Thompson, declaring herself the Adjutant General of the Unorganized Militia of the United States, explained that the Second Amendment "isn't about hunting ducks; it's about hunting politicians."[18] The most obvious question which adherents of the Standard Model must answer is: who gets to decide? Who chooses when it is time for "the people" to use their arms against the government? Does Linda Thompson get to choose? Timothy McVeigh?

The very questions point up the weakness of the position; the Standard Model is an abstraction divorced from a specific historical context. At times it borders on an intellectual game played by law professors swapping quotations and citing one another. As one reads yet again Justice Story's description of the militia as the "palladium of liberty," one realizes that the Standard Modellers are just shuffling the same deck and dealing it out in a different order.

Let us stop for a moment and examine that now famous quotation of Justice Story's, the only ante-bellum evidence for

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16. To state the obvious, Federalist 10 (Madison) in Clinton Rossiter, ed., *The Federalist Papers* 77 (Mentor, 1961); but see Federalist 6 (Hamilton), id. at 53; Federalist 9 (Hamilton), id. at 71; Federalist 15 (Hamilton), id. at 105; Federalist 70 (Hamilton), id. at 423; Federalist 39 (Madison), id. at 240; Federalist 51 (Madison), id. at 320. See also Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 161-202 (Alfred A. Knopf, 1996).

17. Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (Harcourt, Brace and Co., 1955).

18. David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 Cornell L. Rev. 879, 894 (1996).

the supposed right to insurrection imbedded in the Second Amendment offered by Sanford Levinson in his landmark article, *The Embarrassing Second Amendment.*[19] For those of you who have somehow managed to miss it, Joseph Story wrote in his *Commentaries*:

> The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.[20]

No one claims that this single quotation proves an individual right to bear arms, most particularly because Justice Story was not present at the creation and also frames his discussion of the Second Amendment in terms of the militia, and because the next two sentences, rarely quoted, seemingly deny such an individual right.[21] Yet it is a foundational citation for the Standard Modelers, standing in for the absence of any direct evidence from the framers themselves. For an historian the core question is how reflective this single sentence is of the thought of Joseph Story. The militia appears a minor issue in Story's life; in fact there is no reference to it in the collection of his work he prepared,[22] nor in that prepared by his son,[23] nor in his collected letters,[24] nor in any of the standard biographies of Story.[25]

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19. Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 649-50 (1989). Levinson also cited Thomas Cooley, *The General Principles of Constitutional Law in the United States of America* 298 (Little, Brown, 3d ed. 1898), and the early twentieth century lawyer, Theodore Schroeder, *Free Speech for Radicals* 104 (Burt Franklin, 1969).

20. Joseph Story, 2 *Commentaries on the Constitution of the United States: With a Preliminary Review of the Constitutional History of the Colonies and States Before the Adoption of the Constitution* 620 (Little, Brown, and Co., 1873).

21. "And yet, though this truth would seem so clear, and the importance of a well-regulated militia would seem so undeniable, it cannot be disguised that, among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization it is difficult to see." Id. at 620-21.

22. Joseph Story, *The Miscellaneous Writings, Literary, Critical, Juridical, and Political* (James Munroe and Co., 1835).

23. William W. Story, ed., *The Miscellaneous Writings of Joseph Story* (Charles C. Little and James Brown, 1852).

24. William W. Story, ed., *Life and Letters of Joseph Story* (Charles C. Little and James Brown, 1851).

25. R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (U. of North Carolina Press, 1985); Gerald T. Dunne, *Justice Joseph Story and the Rise of the Supreme Court* (Simon and Schuster, 1970); James McClellan, *Joseph Story and the American Constitution: A Study in Political and Legal Thought* (U. of

Story, who never served in the militia, did, however, have an opinion about the right to insurrection: he denied it, actively opposing any which occurred in his lifetime. Justice Story is seen by most commentators as a conservative figure.[26] He considered himself a disciple of Burke and held up Metternich as a role model to his students.[27] He warned these same Harvard students against the abolitionists—anarchists bent on overturning the constitutional order—and viewed with horror the contemporary "restless spirit of innovation and change—a fretful desire to provoke discussions of all sorts, under the pretext of free inquiry, or of comprehensive liberalism."[28] Story proclaimed Dorr's nonviolent rebellion to establish universal manhood suffrage "without law and against law,"[29] maintained that "the Legislature have a right to call upon the President to protect the government against 'domestic violence,' under the Constitution of the United States,"[30] and requested President Tyler to warn "all persons not to attempt to carry any measures into effect by military power, or by insurrectionary movements."[31] Story proclaimed insurrection treason, clarifying that treason included any action "to prevent the execution of any one or more general and public laws of the government, or to resist the exercise of any legitimate authority."[32]

In short, Story held the opposite of what the Standard Modelers read into a single quotation. Faced with insurrection, Story wrote "I know no duty more sacred in every citizen than upon such an emergency to come forth and resist by all the just and moral means in his power, such proceedings."[33] For Story the American Revolution put an end to the need for any more re-

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Oklahoma Press, 1971).

26. The entire thrust of McClellan, *Joseph Story* (cited in note 25). See also Newmyer, *Supreme Court Justice Joseph Story* at 84-88, 94-97, 155-81, 269-70, 313, 390-91 (cited in note 25).

27. Story, ed., *Miscellaneous Writings* at 761, 777 (cited in note 23); Newmyer, *Supreme Court Justice Joseph Story* at 356 (cited in note 25); Dunne, *Justice Joseph Story* at 338 (cited in note 25); McClellan, *Joseph Story* at 79-81 (cited in note 25).

28. Story, ed., *Miscellaneous Writings* at 747 (cited in note 23); Newmyer, *Supreme Court Justice Joseph Story* at 357 (cited in note 25).

29. Newmyer, *Supreme Court Justice Joseph Story* at 360 (cited in note 25) (quoting Letter from Story to Webster, April 26, 1842, *Webster Papers* (New Hampshire Historical Society)).

30. Letter from Story to Judge Pitman (April 1, 1842), in Story, ed., 2 *Life and Letters* at 419 (cited in note 24).

31. Newmyer, *Supreme Court Justice Joseph Story* at 361 (cited in note 25) (quoting Letter from Story to Daniel Webster).

32. Id. at 362; Story, ed., 2 *Life and Letters* at 516 (cited in note 24).

33. Letter from Story to Judge Pitman (Feb. 10, 1842), in Story, ed., 2 *Life and Letters* at 416 (cited in note 24).

bellions or uprisings; the country was now stable and secure, and the people should remain orderly. To read the sources otherwise is to practice a twisted form of post-modernism. Or as Justice Story also wrote, "It is astonishing how easily men satisfy themselves that the Constitution is exactly what they wish it to be."[34]

But there is more to history than parsing the language of the Second Amendment and a few shared quotations. As I hope I demonstrated above, and as Saul Cornell compellingly insists, for historians of any subject it is vital that "the behavior of the historical actors who wrote these texts must be read alongside their published statements."[35] It matters at least as much what those who framed and endorsed the Second Amendment actually did; to examine what legislation preceded and followed the Bill of Rights in order to understand how the framers intended to use it; to trace their patterns of enforcement once in office. It matters that every state in the union had gun regulations in place at the time of the Second Amendment's passage, and that more followed afterward.[36] It matters that those who passed federal militia regulation over the next several decades saw themselves responding to constitutional mandate.[37] It also mattered, as I think Cornell's article makes clear, that those who supported the Second Amendment had no problem disarming rebels and using the power of the state and federal governments to put down any and all insurrections.

Cornell correctly draws our attention to the example of Pennsylvania. The Pennsylvania Constitution of 1776 provides another key quotation for the Standard Modelers, as Cornell notes: "The people have a right to bear arms for the defense [of] themselves and the State."[38] Yet that provision apparently granting an individual right to bear arms did not preclude the same legislature from passing the Test Act, which included the disarming of those who would not take the oath of allegiance.

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34. Letter from Story to Simon Greenleaf (Feb. 16, 1845), in Story, ed., 2 *Life and Letters* at 514 (cited in note 24).

35. Cornell, *Commonplace or Anachronism* at 225 (cited in note 15).

36. Bellesiles, *Gun Laws in Early America* at 587 (cited in note 13).

37. Higginbotham, *The Federalized Militia Debate* (cited in note 13); Lyle D. Brundage, *The Organization, Administration, and Training of the United States Ordinary and Volunteer Militia, 1792-1861* (Ph.D. dissertation, University of Michigan, 1958); Martin K. Gordon, *The Militia of the District of Columbia, 1790-1815* (Ph.D. dissertation, George Washington University, 1975); Mark Pitcavage, *An Equitable Burden: The Decline of the State Militias* (Ph.D. dissertation, Ohio State University, 1995).

38. Cornell, *Commonplace or Anachronism* at 228 (cited in note 15) (quoting Pennsylvania Convention, Declaration of Rights, August 21, 1776).

That would seem evidence enough that this right was not truly individual but carefully constrained by legal category. There was nothing unusual in this formulation by Pennsylvania; the right to possess firearms had always been subject to government regulation under British common law and colonial practice. Pennsylvania retained a long tradition of controlling dangerous populations, rejecting, as Cornell writes, "the very right to armed resistance posited by the Standard Model."[39] The framers of the United States Constitution drew upon the same legal heritage.

Of course it is a very strange conception of America's founding document to believe that it included a right of armed rejection by any group of individuals. The Framers knew what horrors faced them if they could not establish social and political order. Shays' Rebellion was an obvious indicator to them of the direction of the country if they did not act quickly. George Washington wrote to Madison that "We are fast verging to anarchy and confusion," finding the crisis in Massachusetts but a local variant of a national problem requiring a federal solution.[40] Most of the new nation's would-be leaders found the Shaysites dangerous levelers who could easily link up with other supporters of excessive democracy, unless, as Secretary of War Henry Knox recommended, federal troops were sent against them. Washington displayed more skepticism, attempting to learn if the rebels had "real grievances" and why the government of Massachusetts did not address these problems. But if the Shaysites lacked some substantive complaint against their government, then Washington agreed with Knox that the states must move to defend their interests or witness the dissolution of government in the United States.[41]

Framed in the aftermath of Shays' Rebellion, the Constitution appears to many scholars as an essentially conservative reaction to the spread of democracy.[42] Such a reading seems to me

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39. Id. at 229.

40. Letter from Washington to Madison (Nov. 5, 1786), in John C. Fitzpatrick, ed., 29 *The Writings of George Washington* 29, 51 (Government Printing Office, 1939).

41. Id. at 26-28 (Letter from Washington to David Humphreys, Oct. 22, 1786); id. at 33-35 (Letter from Washington to Henry Lee, Oct. 31, 1786); Letter from Knox to Congress, (Oct. 18, 1786), in John Fitzpatrick, ed., 31 *Journals of the Continental Congress* 887 (Government Printing Office, 1934); Letter from Knox to Washington (Oct. 23, 1786), Henry Knox Papers, Massachusetts Historical Society (Boston).

42. David P. Szatmary, *Shays' Rebellion: The Making of an Agrarian Insurrection* 127-34 (U. of Massachusetts Press, 1980); Stephen E. Patterson, *The Federal Reaction to Shays's Rebellion,* in Robert A. Gross, ed., *In Debt to Shays: The Bicentennial of an Agrarian Rebellion* 101-18 (U. Press of Virginia, 1993); Michael Lienesch, *Reinterpreting Rebellion: The Influence of Shays's Rebellion on American Political Thought,* in Gross,

anachronistic. The Framers' first concern was to create a country which would survive; that goal, in their eyes, required certain limitations on personal liberty.[43] Guns were to be used by those serving in the militia, as state laws made evident, and the militia's duty was to maintain order.[44] Unlike during the American Revolution, when the crowd was the militia, in the early national period the crowd was repeatedly confronted by the militia.[45] Even Samuel Adams, one of America's leading democrats, rejected pardons for the Shaysites: "the man who dares to rebel against the laws of a republic ought to die."[46] Not a lot of support for the right of insurrection there.

But what if the government acted in a tyrannical fashion? Surely the people should rise up in rebellion then? Yet that was the purpose of the Constitution, to prevent despotism. Similarly, the central government, Madison hoped, would act as a check on the excess power of the state governments, which he feared more than a federal tyranny.[47] Revolution, as Cornell reminds us,

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ed., *In Debt to Shays* at 161-82; Richard D. Brown, *Shays's Rebellion and the Ratification of the Federal Constitution in Massachusetts,* in Richard Beeman, et al., eds., *Beyond Confederation: Origins of the Constitution and American National Identity* 113 (U. of North Carolina Press, 1987).

43. Federalist 6 (Hamilton) at 53 (cited in note 16); Federalist 15 (Hamilton) at 105 (cited in note 16); Federalist 70 (Hamilton) at 423 (cited in note 16); Federalist 10 (Madison) at 77 (cited in note 16); Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in Robert A. Rutland, et al., eds., 10 *The Papers of James Madison* 212-14 (U. of Chicago Press, 1977); Letter from Madison to Jefferson (Oct. 17, 1788), in Robert A. Rutland, et al., eds., 11 *The Papers of James Madison* 297-300 (U. Press of Virginia, 1977).

44. Clarence C. Ferguson, *The Inherent Justiciability of the Constitutional Guaranty Against Domestic Violence*, 13 Rutgers L. Rev. 407 (1959).

45. On Colonial and revolutionary traditions of crowd action see Pauline Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1756-1776* (Alfred A. Knopf, 1972); Dirk Hoerder, *Crowd Action in Revolutionary Massachusetts, 1765-1780* (Academic Press, 1977); Edward Countryman, *A People in Revolution: The American Revolution and Political Society in New York, 1760-1790* (Johns Hopkins U. Press, 1981); Michael A. Bellesiles, *Revolutionary Outlaws: Ethan Allen and the Struggle for Independence on the Early American Frontier* (U. Press of Virginia, 1993). On crowds in the constitutional period opposed by militia, see William Slade, ed., *Vermont State Papers* 475-82 (J.W. Copeland, 1823); *Pennsylvania Packet, and Daily Advertiser*, Dec. 27, 1786; *Vermont Journal, and the Universal Advertiser*, Dec., 1783; Alan Taylor, *Liberty Men and Great Proprietors: The Revolutionary Settlement on the Maine Frontier, 1760-1820* (U. of North Carolina Press, 1990). On the crowd in the early national period facing militia, see Paul A. Gilje, *The Road to Mobocracy: Popular Disorder in New York City, 1763-1834* (U. of North Carolina Press, 1987), and David Grimsted, *American Mobbing, 1828-1861: Toward Civil War* (Oxford U. Press, 1998).

46. John H. Lockwood, et al., eds., 1 *Western Massachusetts: A History, 1636-1925* at 183 (Lewis Historical Publishing Co., 1926). George Washington wrote Benjamin Lincoln, Jr., that the insurgents "had by their repeated outrages forfeited all right to Citizenship." Fitzpatrick, ed., 29 *Writings of Washington* at 168 (cited in note 40).

47. Madison, *Vices of the Political System of the U. States*, in Marvin Meyers, ed.,

is a natural right, a last resort when the Constitution itself has been contravened; it is not itself a part of the Constitution.[48] Such an extension of violent opposition to authority as a regular component of government would have destabilized the nation from the beginning and guaranteed its failure. Fortunately the framers were smarter than that.

It is very possible that we now live in a nation of individualists intent on personal self-fulfillment unwilling to suffer any inconvenience, such as any sort of limitation on our right to purchase and possess firearms. But that does not mean it was always this way. One of the few ideas which one can locate percolating among both the Federalists and Antifederalists is the notion that liberty requires sacrifice, that the individual must be willing to give up some convenience in the name of the common good.[49]

In terms of gun ownership, sacrificing a little liberty for the public good meant allowing the government to conduct gun censuses (a continuation of the traditional assize of arms), a willingness to serve in the militia when called, placing one's own gun at the service of the state in times of emergency, and, for some, the denial of the right to bear arms.[50] It certainly did not mean that the individual could get together with some other aggrieved neighbors and defy the law. Though the federal and state governments rarely responded to such threats to social order with violence during the first fifty years of the republic, they did call out troops on a number of occasions when threatened with insurrection. And the insurgents rarely found friendly support elsewhere in the country. Even the most sympathetic study of the Whiskey Rebellion, that of Thomas Slaughter, cannot find much support for their goals outside of western Pennsylvania.[51] Even the most assiduous quotation hunter has yet to find a single line insisting that the rebels are just exercising their Second Amendment rights.

The Mind of the Founder: Sources of the Political Thought of James Madison 59 (U. Press of New England, 1981); Letter from Madison to Washington (April 16, 1787), id. at 66-69; Federalist 8 (Hamilton), at 66 (cited in note 16); Federalist 32 (Hamilton), at 197 (cited in note 16); Federalist 43 (Madison), at 271 (cited in note 16); Federalist 45 (Madison), at 288 (cited in note 16); Federalist 46 (Madison), at 294 (cited in note 16); Rakove, *Original Meanings*, at 34, 48-56, 334-36 (cited in note 16).

48. Cornell, *Commonplace or Anachronism* at 237-38 (cited in note 15).

49. Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 19, 396-429 (U. of North Carolina Press, 1969).

50. Bellesiles, *Origins of American Gun Culture* at 428-35 (cited in note 13).

51. Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* 190-204 (Oxford U. Press, 1986).

In the long and meticulous debates over the Militia Act in the first Congress, which considered even the exact bore of the muskets to be required of the militia, the speakers return repeatedly to just how much authority the federal government should have in exercising its constitutional obligation of regulating the militia. Several representatives noted that every increase in federal power came at the expense of the states. Thomas Fitzsimmons rejected the need for militia training as "a great tax on the community, productive of little instruction or edification, either in regard to military tactics, or the morals of a civilized nation."[52] Most members, however, agreed with Roger Sherman of Connecticut that "the different states had certainly an inherent right to arm and protect the lives and property of the citizens." But that to "[m]ore effectively . . . exercise this right" the states needed "to give up to the general government the power of fixing what arms the militia should use, by what discipline they should be regulated," and various other forms of precisely ordering the nature of the militia. The only power left to the states in this formulation was "the right to say what descriptions of persons should compose the militia, and to appoint the officers that were to command it."[53] Joshua Seney of Maryland thought even this latter qualification was granting the states too much power, which they could easily abuse.[54]

Perhaps the only way around these problems for the Standard Modelers, aside from conducting research, is to argue that an individual right must be understood to apply solely to those who enjoy all other rights. Thus the right to bear arms is individual in that the militia consists of all adult male citizens (by definition white in most states), and so for them the right is individual. But what happens when those citizens are divided? That was bound to happen often, as Madison perceived. The Constitution, as we all know, was an effort to form a stable government between the dangers posed by the tyranny of the majority and excess factionalism. There was no consensus, no unity of vision. The Federalists were not in complete agreement; neither were the Antifederalists—nothing like it. If each collection of citizens was allowed to respond with arms in defense of their understanding of liberty, there would be no social peace.

Not that social peace was always a good thing. It is worth

52. William C. diGiacomantonio, et al., eds., 14 *Documentary History of the First Federal Congress 1789-1791* at 56 (Johns Hopkins U. Press, 1996).
53. Id. at 84.
54. Id. at 93-94.

remembering that several state governments were despotic in this period. Southern states viciously enforced a system of slavery, denying the most basic rights to millions of Americans. They also trampled on the individual rights of whites, giving postmasters the right to open mail searching for anti-slavery sentiment, forbidding the circulation of literature questioning slavery, outlawing public meetings of abolitionists, enforcing the most unrelenting intellectual conformity ever experienced in American history in gross violation of the Constitution. Did the Southern militia rise up to battle this tyranny? Of course not; they enforced it.[55] When the state of Georgia violated the rights of the Cherokee people and forced them off their lands in direct violation of the Supreme Court, did the militia of Georgia rush out, muskets in hand, to protect the rights of their fellow Americans? Obviously not; they joined with the Army in expelling the Cherokee from their property. When workers had their right of assembly taken from them, where was the militia? When women were jailed for attempting to exercise the right to vote, where was the militia? One could go on and on. The reality of American history is clear: the militia and its National Guard successor upholds the power of the state. The Standard Model operated only once in American history: in 1861.

Perhaps the most peculiar aspect of the whole gun control debate is the way in which people who call themselves conservatives support a right to armed insurrection.[56] Logically, those who uphold this insurrectionist reading of the Second Amendment should be endorsing armed uprisings by workers, racial minorities, Indians, the Klan, anarchists, and the whole goulash of American political dissidents who believe in armed response to political disagreement.[57] They certainly should be condemn-

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55. On the government protecting itself against such threats, see Federalist 21 (Hamilton), at 138 (cited in note 16); Federalist 28 (Hamilton), at 178 (cited in note 16); Federalist 74 (Hamilton), at 447 (cited in note 16); St. George Tucker, 1 *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States* 366-67 (W.Y. Birch and A. Small, 1803); Story, 2 *Commentaries* at 546-47, 559 (cited in note 20). That Madison in fact saw a threat from an excess of democratic action is evidenced in a letter he wrote his father, in which he stated that the Shaysites sought "an abolition of debts, public and private, and a new division of property." Isaac Kramnick, ed., *The Federalist Papers* 28 (P. Smith, 1995).

56. See for instance, L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 Wm. & Mary L. Rev. 1311 (1997); and the exchange between Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 Val. U. L. Rev. 107 (1991), and Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 Val. U. L. Rev. 131 (1991).

57. David Williams evades this problem by declaring that the Second Amendment did indeed originally grant an insurrectionary right; but not now! Williams, *The Militia*

ing the police powers of the state which have crushed every armed insurrection from the Whiskey Rebellion through the Civil War to the Rodney King riots. But honestly, that is not what the "Standard Modelers" are arguing for. They are not radicals taking to the streets and endorsing the people's right to armed rebellion, whoever those people happen to be. They tend to be political conservatives seeking to negate the government's authority to regulate firearms. But these are conservatives who offer a libertarian reading of society; rather than relying on the state for personal protection, the individual must protect himself. It is a view which accepts and fosters the atomistic nature of society and can conceive of no communal strategy for collective security. It is a view which would have baffled Madison, who sought social cohesion in a society which all too easily could fragment and collapse into chaos. And it is a perspective which carries a heavy and violent price tag.

Recently, one of the leading voices in favor of the Standard Model, Sanford Levinson, joined J. M. Balkin in calling for legal scholars to get beyond "The Canons of Constitutional Law."[58] They argue that a reliance on the same materials generation after generation has stultified legal education and negatively influences the character of scholarly arguments through what they call "deep canonicity."[59] This deep canonicity determines the nature of "law-talk," the rhetoric of the law, as well as the issues which are appropriate for examination and the way in which they are studied; "those ideas so basic that they do not even appear on the 'radar screen' of the imagination."[60]

But most intriguing is Levinson and Balkin's notion of "Canonical Narratives." These narratives are "a set of stock stories about [the law], which are constantly retold and eventually take on a mythic status."[61] It is hard to imagine a better description of the Standard Model's self-generation, especially the "canonical examples," the evidence offered time and again in support of the same positions.[62] "These stories," Levinson and Balkin continue, "explain to the members of that society who they are and what values they hold most dear. These stock stories are both descrip-

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Movement and the Second Amendment Revolution at 948-52 (cited in note 18).

58. J.M. Balkin and Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963 (1998).

59. Id. at 985.

60. Id. at 985. See also Pierre Schlag, *Normativity and the Politics of Form*, 139 U. Pa. L. Rev. 801 (1991).

61. Levinson and Balkin, *Canons of Constitutional Law* at 987 (cited in note 58).

62. Id. at 992.

tive and prescriptive"—for example, the mythology of "courageous pioneers who won the West."[63]

This call for the expansion of the canon is essentially a demand for historical context.[64] It is interesting therefore to note that Levinson offers a personal footnote that "there can be little doubt that many members of the founding generation viewed popular possession of arms as the ultimate 'check' on corrupt governments."[65] That sounds like deep canonicity to me, particularly as he supports this assertion by citing his own article, *The Embarrassing Second Amendment*, which offers only three quotations supportive of this right, none by a contemporary of the first Congress.[66] No doubt Levinson will enthusiastically welcome Saul Cornell's efforts in forging beyond the canon of the Standard Model to construct the historical context of the Second Amendment.

Sometimes one gets the impression that some of the participants in this polemic do not even bother to read beyond the quotations into the original sources. For instance, Standard Modelers trace the individual right to bear arms to Machiavelli's republicanism.[67] Yet reading Machiavelli makes fairly clear that, to quote Wendy Brown, "Machiavelli's republican citizenry is not armed against the state but *as* the state—an armed citizenry is the state's heart, not its opposition or counterweight."[68]

Even more telling is the comment of Stephen Holbrook that the framers of the Second Amendment intended "to guarantee the right of the people to have 'their private arms' to prevent

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63. Id. at 987.

64. See particularly id. at 1021-24.

65. Id. at 1013 n.157.

66. Id. Levinson specifically cites pages 648-50 of *The Embarrassing Second Amendment*, where Story, Cooley, and Schroeder are cited in support of this right to insurrection.

67. See, for instance, Malcolm, *To Keep and Bear Arms* at 8, 125 (cited in note 13). Malcolm does not actually quote or cite Machiavelli when discussing his ideas and influence. She does however quote J.G.A. Pocock's judgment that "[t]he rigorous equation of arms-bearing with civic capacity is one of Machiavelli's most enduring legacies to later political thinkers." Id. at 8 (quoting J.G.A. Pocock, *The Political Works of James Harrington* 18-19 (Cambridge U. Press, 1977)). Curiously, she does not quote or comment upon the immediately preceding sentences in which Pocock writes that Machiavelli insisted that "an armed people" acted to "extend[ ] her [the city-state's] power abroad" and were "subject to none but the public power." Id. at 18.

68. Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's* The Embarrassing Second Amendment, 99 Yale L.J. 661, 662-63 (1989). Among Niccolo Machiavelli's many writings on this point, see for instance *The Prince* 231 (Bobbs-Merrill, 1976); *History of Florence and of the Affairs of Italy: From the Earliest Times to the Death of Lorenzo the Magnificent* 180 (M.W. Dunne, 1901); *Discourses on the First Decade of Titus Livius* 410 (1965).

tyranny and to overpower an abusive standing army or select militia."[69] Yet consider the speech James Madison delivered when he introduced that same Second Amendment to the House of Representatives:

> In our government it is, perhaps, less necessary to guard against the abuse in the executive department than any other; because it is not the stronger branch of the system, but the weaker.... But I confess that I do conceive, that in a government modified like this of the United States, the great danger lies rather in the abuse of the community than in the legislative body. The prescriptions in favor of liberty, ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power: But this [is] not found in either the executive or legislative departments of government, but in the body of the people, operating by the majority against the minority.[70]

Madison hardly issued a clarion call for the people's right to insurrection. Perhaps we no longer agree with Madison's formulation. Perhaps we find it elitist or poor prophesy. The point is: our opinion does not matter. This is still what Madison said. That is history; the rest is editorial.

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69. Stephen P. Halbrook, *That Every Man be Armed: The Evolution of a Constitutional Right* 77 (U. of New Mexico Press, 1984).

70. Jack N. Rakove, ed., *Declaring Rights: A Brief History with Documents* 176-77 (Bedford Books, 1998).