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## Article

### Uncoupling the Constitutional Right to Self-Defense from the Second Amendment: Insights from the Law of War

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*This Article contextualizes Professor Nicholas Johnson's argument that a robust right to arms is essential to the security of Black communities in the United States. While accepting Johnson's premise that private self-defense is necessary where government is hostile towards or unable to defend a community against violence, this Article maintains that the Second Amendment as understood at the time of its ratification did not extend to private self-defense. Rather than force-fitting a private right to self-defense into the syntactically and contextually unrelated Second Amendment as one-Justice majorities have done in *District of Columbia v. Heller* and *McDonald v. City of Chicago*, the Author suggests that honest intellectual engagement with moral and philosophical claims in favor of a private right to self-defense could profit enormously from careful consideration of the *jus ad bellum*, the branch of public international law concerning the right of states to defend themselves against armed attack. The lack of an absolute textual command in the Constitution, federalism, and deference to democratically legitimate legislative policy making favor judicial accommodation of public safety and arms control concerns alongside private claims of self-defense. Comparing the right to self-defense in domestic law (as illustrated by the Trayvon Martin case) to the right to self-defense in public international law (as illustrated by the arguments advanced by the Bush and Obama Administrations to justify the use of unmanned drones to target Al Qaeda operatives) suggests that claims to use force in self-defense must be limited to situations in which an actual attack is underway or imminent. The Author concludes by suggesting that these limits are inherent in general principles of law basic to the very nature of self-defense, and that constitutional jurisprudence in the United States would benefit greatly from attending to these general principles of law and abandoning historically implausible and disingenuous originalism when assessing claims premised on the right to self-defense.*

**ARTICLE CONTENTS**

I. INTRODUCTION ..... 1811

II. QUESTIONS LEFT OPEN BY *HELLER* AND *MCDONALD*..... 1818

    A. THE LIMITS OF ORIGINALISM ..... 1820

    B. THE LIMITS OF ANCESTOR WORSHIP..... 1822

III. FEDERALISM AND DEMOCRATIC EXPERIMENTALISM..... 1824

IV. INSIGHTS FROM THE LAW OF WAR ..... 1827

V. REFLECTIONS ON DRONES AND THE COMMENTS  
    OF ATTORNEY GENERAL ERIC HOLDER AND  
    PRESIDENT CARTER..... 1831

VI. REFLECTIONS ON THE TRAYVON MARTIN CASE AND  
    THE BARBARISM OF SEA SLUGS ..... 1835

VII. THE WAY FORWARD ..... 1838

VIII. CONCLUSION ..... 1840



# Uncoupling the Constitutional Right to Self-Defense from the Second Amendment: Insights from the Law of War

WILLIAM G. MERKEL\*

## I. INTRODUCTION

It is a long-established axiom among political theorists that when people leave the state of nature and enter into civil society, they accept the enforcement of limitations against some of their rights so as to protect and indeed maximize other personal and collective rights—including the right to security—to the greatest extent possible.<sup>1</sup> In modern constitutional

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<sup>1</sup> This proposition was central to the political philosophy of Thomas Hobbes, John Locke, and William Blackstone, three of the English-speaking world's foundational thinkers on governmental legitimacy. Thus, in endeavoring to convince his readers to accept the authority of the English Commonwealth after the execution of Charles I, Hobbes wrote:

From this fundamental law of nature, by which men are commanded to endeavour peace, is derived this second law; that a man be willing, when others are so too, as far-forth, as for peace, and defence of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself. For as long as every man holdeth this right, of doing any thing he liketh; so long are all men in the condition of war. But if other men will not lay down their right, as well as he; then there is no reason for any one, to divest himself of his: for that were to expose himself to prey, (which no man is bound to) rather than to dispose himself to peace.

THOMAS HOBBS, *LEVIATHAN* 87 (J.C.A. Gaskin ed., Oxford Univ. Press 1998) (1651).

According to John Locke's *Two Treatises of Civil Government*, written either to encourage overthrow of the government of James II in the early 1680s or to justify the newly established constitutional settlement after the Glorious Revolution in 1689,

[w]herever, therefore, any number of men are so united into one society as to quit every one his executive power of the law of nature and to resign it to the public, there and there only is a political or civil society. And this is done wherever any number of men, in the state of nature, enter into society to make one people, one

democracies, it is generally accepted also that legislatures may legitimately

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body politic, under one supreme government, or else when any one joins himself to, and incorporates with, any government already made; for hereby he authorizes the society or, which is all one, the legislative thereof, to make laws for him as the public good of the society shall require, to the execution whereof his own assistance, as to his own degrees, is due. And this puts men out of a state of nature into that of a commonwealth by setting up a judge on earth, with authority to determine all the controversies and redress the injuries that may happen to any member of the commonwealth; which judge is the legislative, or magistrates appointed by it. And wherever there are any number of men, however associated, that have no such decisive power to appeal to, there they are still in the state of nature.

*Id.* at 164. In a later passage in the Second Treatise, Locke elaborates:

If man in the state of nature be so free, as has been said, if he be absolute lord of his own person and possessions, equal to the greatest, and subject to nobody, why will he part with his freedom, why will he give up his empire and subject himself to the dominion and control of any other power? To which it is obvious to answer that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain and constantly exposed to the invasion of others; for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure. This makes him willing to quit a condition which, however free, is full of fears and continual dangers; and it is not without reason that he seeks out and is willing to join in society with others who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties, and estates, which I call by the general name "property."

*Id.* at 184. Blackstone, writing to celebrate the firmly established constitutional order of the 1760s some seven decades after its foundations in the Glorious Revolution, observed:

[E]very man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. . . . For no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life.

1 WILLIAM BLACKSTONE, COMMENTARIES \*125.

The contextual background to *Leviathan* is explored by Quentin Skinner in his book *Hobbes and Republican Liberty*. QUENTIN SKINNER, HOBBS AND REPUBLICAN LIBERTY 178–82, 198–208 (2008). Richard Ashcraft follows Peter Laslett in arguing (entirely persuasively in my view) that John Locke's *Two Treatises on Government* were written as a radical revolutionary and regicidal manifesto during the early 1680s rather than as an after-the-fact justification for the Glorious Revolution as earlier generations of scholars had assumed. Laslett dates the writing to the final stages of the Exclusion Crisis (ca. 1680–81), while Ashcraft situates the drafting nearer in time to the Rye House Plot of 1683. RICHARD ASHCRAFT, REVOLUTIONARY POLITICS AND LOCKE'S TWO TREATISES OF GOVERNMENT (1986). Stanley Katz's insightful introductory essay to the Chicago editions of Blackstone's *Commentaries* explains that Blackstone's sections on constitutional law and governmental legitimacy delicately balanced his perceived need to immunize the existing constitutional arrangement against any potential revolutionary challenge, notwithstanding that order's own revolutionary origins in 1688–1689. Stanley N. Katz, *Introduction* to 1 WILLIAM BLACKSTONE, COMMENTARIES, at x–xii (Univ. Chi. Press 1979) (1765).

adjust the balance among these rights to enforce popular preferences about the rights packages deemed most desirable by the citizenry.<sup>2</sup> In a society in which courts enforce certain rights against legislative judgments, legislatures are of course limited in their capacity to adjust rights and balance them against other rights.<sup>3</sup> Some rights, like the right against arbitrary deprivation of life by the state, are almost entirely beyond legislative discretion. The legislature may infringe upon them only in very limited circumstances, in the case of the right to life, probably only for the purposes of facilitating self-defense and defense of the society, and, in societies with legal orders that tolerate execution under the law, carrying out capital punishment pursuant to a lawful death sentence.<sup>4</sup> Other less

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<sup>2</sup> See Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 39, 41 (Michel Rosenfeld ed., 1994); IAN LOVELAND, CONSTITUTIONAL LAW: A CRITICAL INTRODUCTION 8–11 (2d ed. 2000); Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1309 (2001).

<sup>3</sup> See generally LOUIS HENKIN, THE AGE OF RIGHTS 118–22 (1990) (describing the rise during the twentieth century of judicial enforcement of individual rights expressed or rooted in the Constitution and concomitant tensions between enforcement of legislative preferences and judicial enforcement of constitutional values). Compare *Marbury v. Madison*, 5 U.S. 137, 178 (1803) and CA 6821/93 *Bank Mizrahi v. Migdal Cooperative Village* 49(4) PD 222, 224 [1995] (Isr.), two foundational cases justifying judicial review of legislative acts for conformity with the United States Constitution and the Israeli Basic Laws, respectively. Chief Justice Marshall relied essentially on compact theory to hold that the sovereign will of the people in ratifying the Constitution trumps the will of the People's elected agents reduced to statutory law, while Chief Justice Barak held that Basic Laws passed by the Knesset in its constitutive as distinct from legislative capacity have constitutional status that renders the Basic Laws superior to ordinary statutory law. On the tension between popular democracy and judicial policing of constitutional sovereignty, see generally ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); JOHN HART ELY, DEMOCRACY AND DISTRUST, at vii (1980); RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 1 (2004); HANS KELSEN, GENERAL THEORY OF LAW AND STATE 155–58 (Anders Wedberg trans., 1949); ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 32–38 (2000); MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW, at ix, 3–43 (2008).

<sup>4</sup> See, e.g., U.S. CONST. amend. V, VI, VIII, XIV (Sixth Amendment Right to Counsel, the Cruel and Unusual Punishment Clause of the Eighth Amendment, the Due Process Clauses of the Fifth and Fourteenth Amendments). These amendments have spawned an enormous body of constitutional jurisprudence on the death penalty. See, e.g., *Ring v. Arizona*, 536 U.S. 584, 609 (2002); *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972). In the European context, Article 2 and Protocols Six and Thirteen to the European Convention on Human Rights first limited, and then eliminated, the authority of governmental actors to impose capital sentences or otherwise deprive persons of life except when acting in necessary self-defense, defense of others, or to suppress a riot or insurrection. European Convention on Human Rights art. 2, protocols 6, 13, June 1, 2010, available at [http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention\\_ENG.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf). The substance of the right is defined in Article 2 of the Convention as follows:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

fundamental rights (consider, for example, the right to operate a motor vehicle) are clearly subject to legislative discretion and their restraint is frequently permissible, perhaps for purposes such as criminal punishment, traffic safety, environmental protection, to preserve public order, to protect third parties and allow their indemnification, or to maximize social utility pursuant to the legislature's policy preferences.<sup>5</sup> Even staunch libertarians generally concede that governmental restraint of liberties that are otherwise immune from interference may be permissible to protect third persons from harm.<sup>6</sup>

In the United States, the question is hotly debated whether gun possession and the right to use firearms in self-defense fall closer to the fundamental, inalienable end of the spectrum (like the right against arbitrary deprivation of life), or nearer to the relativistic, conditional,

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2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
- a. in defence of any person from unlawful violence;
  - b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - c. in action lawfully taken for the purpose of quelling a riot or insurrection.

*Id.* art. 2.

<sup>5</sup> See generally IAN LOVELAND, CONSTITUTIONAL LAW: A CRITICAL INTRODUCTION 20–21, 595–611 (2d ed. 2000) (introducing the study of British Constitutional Law from a comparative perspective, contrasting the time-honored Diceyan understanding of unbridled legislative discretion with American style judicial review and discussing how the Human Rights Act of 1998 affected the British system by subjecting Parliamentary statute-making to fundamental European human rights norms).

<sup>6</sup> John Stuart Mill's famous harm principle holds that personal liberty may not be legitimately curtailed by government authority except in situations where an actor's conduct harms or threatens harm to other persons. In Mill's original formulation,

the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

JOHN STUART MILL, ON LIBERTY 8 (Curran V. Shields ed., Macmillan Publ'g Co. 1956) (1859). By referencing preventative self-defense, Mill appears to concede that government may intervene to prevent incipient harm, not just to punish wrongdoers after the fact. *Id.*

legislatively adjustable end of the spectrum (like the right to drive a car).<sup>7</sup> A five-Justice majority on the Supreme Court favors a position nearer to the fundamental side.<sup>8</sup> Professor Nicholas J. Johnson appears to agree.<sup>9</sup> Or at least, Professor Johnson takes for granted that the Supreme Court's recent decisions that the Second and Fourteenth Amendments protect a robust personal right to armed self-defense outside the context of service in the lawfully established militia represent salubrious developments, in that they rule out policy options such as total gun bans that he finds ill-advised.<sup>10</sup>

Johnson's thoughtful *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy* marshals an impressive and ultimately irrefutable array of evidence to demonstrate that from the end of Reconstruction until the later phases of the Civil Rights Movement, government in the United States, on the local, state, and national levels, consistently failed the Black community by turning a blind eye to, abetting, and at times orchestrating racist violence against African Americans, thereby supporting or at least tolerating white supremacist cultures committed to legal, social, and economic subordination of African Americans in both North and South.<sup>11</sup> With government having failed the Black community in this regard, Johnson proceeds to observe in quintessentially Hobbesian fashion that the right of private self-defense endures wherever government remains unable or unwilling to protect citizens or subjects against private or official violence.<sup>12</sup> While this insight was freighted with political hazards for Black leaders for much of modern American history,<sup>13</sup> as a matter of natural law and justice it remains unassailable, for to deny otherwise unprotected persons the right to self-defense in the face of armed attack is to deny their core rights to life and dignity. More unusually and controversially, Johnson suggests that things have not necessarily changed materially for the Black community with the

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<sup>7</sup> On the heated debate and cultural conflict over the twinned questions of gun rights and gun control, see generally SAUL CORNELL, *A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 73–106, 137–208 (2006); DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* 97–220 (2003).

<sup>8</sup> See *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). *Heller* recognized a Second Amendment right to keep commonly held weapons for purposes of self-defense in the home, and marked the first time the Supreme Court had clearly acknowledged a Second Amendment right not connected to service in the lawfully established militia. *McDonald* applied the substantive right described in *Heller* against state and municipal governments.

<sup>9</sup> See Nicholas J. Johnson, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*, 45 CONN. L. REV. 1491 (2013).

<sup>10</sup> See *id.* at Part V.B.2.

<sup>11</sup> See *id.* at Part I.

<sup>12</sup> See *id.* at Part III.B.

<sup>13</sup> See *id.* at Part II.B.

disappearance of Jim Crow, the end of state sponsorship and enablement of white supremacists, and the coming of Black political empowerment.<sup>14</sup> Today, many urban Black communities confront constant peril at the hands of a criminal subclass of gangsters, drug lords, and violence-prone thugs.<sup>15</sup> The most salient contemporary architects of violence against peaceable African Americans then are no longer state actors or state-aided white supremacists, but rather urban Black criminals who local, state, and federal law enforcement agencies cannot effectively combat, owing not to lack of will, but lack of resources and complex social and economic factors that so far have eluded governmental control.<sup>16</sup> For Johnson, the source of government's failure to protect African Americans is not outcome-determinative; when government is unable to protect, the right to private self-defense endures, and this holds as true today as it did during the era of lynching a century ago.<sup>17</sup>

At its heart, Johnson's article is not about constitutional doctrine or constitutional theory. His is a policy paper. Johnson's argument is that Black political leaders who have endorsed strict gun control policies since the late-1960s should rethink their position and consider embracing John Lott's "more guns, less crime" hypothesis.<sup>18</sup> I am much more of a

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<sup>14</sup> *Id.* at Part III.B.

<sup>15</sup> *Id.* at Part V.B.1.

<sup>16</sup> *Id.*

<sup>17</sup> *See id.* at Part III.B.

<sup>18</sup> JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS 19 (1998). John Lott is a Fox News personality, famous for his "more guns, less crime" hypothesis. *See John Lott Archive*, FOX NEWS, <http://www.foxnews.com/archive/author/john-lott/index.html> (last visited Mar. 29, 2013). This is an academically dubious claim, however, that has been debunked and discredited by leading authorities in social science and public health. *See, e.g.*, Ian Ayres & John J. Donohue III, *Yet Another Refutation of the More Guns, Less Crime Hypothesis—With Some Help from Moody and Marvell*, 6 ECON. J. WATCH 35, 56 (2009); Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193, 1296 (2003); Mark Duggan, *More Guns, More Crime*, 109 J. POL. ECON. 1086, 1112 (2001); *see also* DENNIS A. HENIGAN, *LETHAL LOGIC: EXPLODING THE MYTHS THAT PARALYZE AMERICAN GUN POLICY* 131 (2009); Tim Lambert, *Did Lott Cook His "More Guns, Less Crime" Data?*, SCIENCEBLOGS (Apr. 25, 2003), <http://scienceblogs.com/deltoid/2003/04/25/0426/>. Lott used dishonest practices to help make *More Guns, Less Crime* a *cause célèbre*. He worked hard to generate positive publicity for the book by publishing his own overblown favorable reviews under the assumed name of Mary Rosh. *See* Julian Sanchez, *The Mystery of Mary Rosh: How a New Form of Journalism Investigated a Gun Research Riddle*, REASON, May 1, 2003, at 16, 18; *see also* Tim Lambert, *Mary Rosh's Blog*, SCIENCEBLOGS, (Jan. 21, 2003), <http://scienceblogs.com/deltoid/2003/01/21/maryrosh/>. On the most basic level, Lott's central claim that guns reduce the rate of crime defies reality. Japan and England, with very low rates of gun ownership and strict gun control laws, have minuscule murder rates compared to the U.S. with its notoriously high rate of gun ownership. *See* FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS (2011), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/violent-crime/murder>; *Publication Hub: Gateway to UK National Statistics*, U.K. OFF. OF NAT'L STATISTICS, <http://www.statistics.gov.uk/hub/crime-justice/crime/crime-trends> (last visited May 21, 2013); *Intentional Homicide, Number and Rate per 100,000 Population*, UNITED NATIONS, <http://data.un.org/Data.aspx?d=UNODC&f=tableCode%3A1> (last visited May 21, 2013). New York

constitutional historian than a policy wonk, so I will say relatively little about the merits *vel non* of gun control and the Lottian alternative of unrestricted access to guns. For the record, I will disclose that I think Lott's vision is fanciful and absurd, and that I object to it for a variety of fundamental reasons.<sup>19</sup> I will concede however, as any honest observer must, that it resonates with a substantial segment of the American population, and that its implementation is eminently permissible as a constitutional matter. There is nothing in the text, structure, or case law of the United States Constitution that in any way inhibits local, state, or national government from leaving gun possession entirely unregulated. But in contrast to Lott, Professor Johnson, and five current Supreme Court Justices, I take the position that there is likewise nothing in the text or pre-2008 case law of the Second Amendment to prohibit local, state, or national government from heavily regulating and severely restricting access to firearms.<sup>20</sup> Whether government should allow access to guns is, as I explain below, a matter that the Second Amendment, properly construed, leaves entirely to legislative discretion. That said, I have enormous sympathy for Professor Johnson's core claims regarding the fundamental right to self-defense, and the particular importance of that

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City, with what, by U.S. standards, amounts to restrictive firearms regulation, has a significantly lower murder rate than South Carolina, a state with lax gun laws and a population wedded to the gun culture. See Harry Bradford, *10 Most Violent States in the U.S.: The Institute for Economics and Peace*, HUFFINGTON POST (June 13, 2011, 6:12 AM), [http://www.huffingtonpost.com/2011/04/13/10-most-violent-states\\_n\\_848317.html#s263573&title=9\\_South\\_Carolina](http://www.huffingtonpost.com/2011/04/13/10-most-violent-states_n_848317.html#s263573&title=9_South_Carolina). This comprehensive data can be found in the Institute for Economics & Peace's 2011 Peace Index study. INST. FOR ECON. & PEACE, UNITED STATES PEACE INDEX 4 (2011), available at <http://www.visionofhumanity.org/wp-content/uploads/2011/04/U.S.-Peace-Index-2011-3.pdf>. Lott and Professor Johnson both repeatedly claim that gun control has failed in the District of Columbia, but the murder rate in D.C. has actually been falling substantially over the past fifteen years, reaching its lowest level since the early 1960s just last year. See *Record-Low Homicides for District*, WASH. INFORMER (Jan. 4, 2013, 6:01 PM), <http://washingtoninformer.com/index.php/local/item/12769-record-low-homicides-for-district> (noting that Washington, D.C. recorded eighty-eight homicides in 2012, the lowest number of homicides since 1961, and that this number is significantly lower than the crack-cocaine era when D.C.'s homicide reports exceeded 400). In sum, Lott is a highly dubious authority to depend on when formulating public policy on such important concerns as guns and crime.

<sup>19</sup> See *supra* note 18.

<sup>20</sup> See, e.g., William G. Merkel, *Heller as Hubris, and How McDonald v. City of Chicago May Well Change the Constitutional World as We Know It*, 50 SANTA CLARA L. REV. 1221, 1239–42 (2010) [hereinafter Merkel, *Heller as Hubris*] (arguing that there is insufficient evidence to support the claim that the original understanding of the Fourteenth Amendment contemplated incorporation of a private right to arms against the states, that Justice Alito's opinion places far too much stock in the dubious historical claims relied on by Justice Scalia in *Heller*, and that state and municipal gun control provisions that do not offend equal protection principles were not considered to violate the Fourteenth Amendment when it was ratified); William G. Merkel, *The District of Columbia v. Heller and Antonin Scalia's Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349, 360–63, 377–78 (2009) [hereinafter Merkel, *Antonin Scalia's Perverse Sense of Originalism*] (arguing that Justice Scalia's allegedly originalist opinion in *Heller* is historically unsupportable, and that the Second Amendment was not originally understood to stand in the way of legislative restrictions on gun use and possession).

right to members of vulnerable communities who have long been disserved by government. Honest engagement with constitutional text and constitutional jurisprudence, I explain below, suggests strongly that the right to self-defense that Professor Johnson favors cannot be rooted in the original understanding of the Second Amendment, but that it could plausibly and cogently be based on substantive due process, natural law, the Ninth Amendment, and fundamental principles of law that emerge from comparative inquiry into foreign and international law.

This Article briefly summarizes the reasons why the Supreme Court's recent Second Amendment jurisprudence is wrong-headed, and then outlines several alternative perspectives that may afford greater insight into the nature and limits of the right to self-defense than does the originalist course embraced by the Supreme Court in *District of Columbia v. Heller*<sup>21</sup> and *McDonald v. City of Chicago*.<sup>22</sup> But before turning my attention to what I see as obvious errors in the two just-mentioned cases, it will be useful to point out how many policy-related questions those decisions have left open. This, in turn, suggests that it remains pivotally important both for gun enthusiasts like Professor Johnson and for gun skeptics like me to develop a more cogent theoretical understanding of the constitutional parameters surrounding armed self-defense than that offered by the Court in either *Heller* or *McDonald*.

## II. QUESTIONS LEFT OPEN BY *HELLER* AND *MCDONALD*

The Supreme Court's recent foray into the arena of armed self-defense has, as the well-worn cliché would have it, raised more questions than it has answered. Indeed, while they sound a self-defense-friendly tone, *Heller* and *McDonald* actually answer very few questions concerning the scope of policy options permissible to national, state, and local legislatures and administrative bureaus.<sup>23</sup> The holding in the two cases is that the Constitution protects "the individual right to possess and carry weapons in case of confrontation,"<sup>24</sup> but that this right is subject to "reasonable . . . regulations."<sup>25</sup> The Court's binding legal instructions, then, are cast in very general terms. We know after *Heller* and *McDonald* that neither national nor state government may render it all but impossible for an individual to keep in the home and have access there to an operational handgun of a sort commonly owned by the general public for purposes of

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<sup>21</sup> 554 U.S. 570 (2008).

<sup>22</sup> 130 S. Ct. 3020 (2010).

<sup>23</sup> Cf. Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 705, 709–16 (2012).

<sup>24</sup> *McDonald*, 130 S. Ct. at 3050; *Heller*, 554 U.S. at 592.

<sup>25</sup> *McDonald*, 130 S. Ct. at 3046.

self-defense.<sup>26</sup> We know the same restrictions that apply against national legislative authority also apply against the states and municipalities.<sup>27</sup> And we know that, according to dicta uttered by Justice Scalia in *Heller* and echoed by Justice Alito in *McDonald*, laws relating to control and prohibition of unusual or particularly dangerous weapons, possession of weapons by convicted felons or the insane, and access to weapons in certain sensitive places such as schools and government buildings are presumptively unaffected by the constitutional right to arms.<sup>28</sup> But that is probably the full extent of our knowledge. Neither legislators, administrators, nor the general public have yet been instructed by the Supreme Court as to how the newly-recognized constitutional right to armed self-defense impacts laws concerning:

1. Carrying weapons outside the home;
2. Carrying weapons inside a vehicle;
3. Self-defense outside the home or in vehicles;
4. Limitations on the number of weapons individuals may own;
5. Waiting periods;
6. Conditioning gun ownership on psychological evaluation;
7. Inspections of weapons;
8. Taxation;
9. Sport shooting;
10. Hunting;
11. Gun collecting;
12. Licensure;
13. Registration;
14. Mandatory safety training;
15. Restrictions on gun ownership arguably analogous to, but not directly within, the categories of presumptively permissible regulations listed by Justices Scalia and Alito; or
16. Weapons related to service in the lawfully-established militia (there is some irony on this last point, all the more so in light of the once respected rule of *United States v. Miller*<sup>29</sup>).

In the nearly five years since the *Heller* decision, over one hundred

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<sup>26</sup> *Id.* at 3050; *Heller*, 554 U.S. at 627, 635.

<sup>27</sup> *McDonald*, 130 S. Ct. at 3050.

<sup>28</sup> *Id.* 3047; *Heller*, 554 U.S. at 626–27.

<sup>29</sup> 307 U.S. 174 (1939). *Miller* was the most important Supreme Court decision on the Second Amendment prior to *Heller*. *Miller* was distinguished and not overturned in *Heller*, but for decades constitutionalists and Courts of Appeals had agreed nearly unanimously that *Miller* restricted the Second Amendment right to weapons linked to service in the lawfully established militia. In *Miller*, Justice McReynolds wrote, “In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.” *Id.* at 178.

gun-rights-related cases have been docketed or decided in United States Courts of Appeals.<sup>30</sup> All of the questions listed above and others linking Second Amendment-related claims to other constitutional values such as freedom of expression<sup>31</sup> or freedom from unreasonable search and seizure<sup>32</sup> are now being litigated, and in the absence of particular instructions from the Supreme Court, federal and state courts have applied varying standards of review ranging from permissive<sup>33</sup> to differing iterations of intermediate scrutiny.<sup>34</sup> So far, however, only one post-*Heller* federal Court of Appeals case has upheld a right to arms-based challenge to government action. The Seventh Circuit has issued a preliminary injunction against the City of Chicago, lifting a ban on firing ranges in the City that rendered compliance with a hand gun licensing scheme requiring one hour of annual training burdensome, thereby vitiating the right to have a handgun to defend the home.<sup>35</sup> In reaching its decision to enjoin the firing range ban, the Court noted that Second Amendment standards are still emerging, making it difficult for trial courts to apply the still largely undefined right with precision.<sup>36</sup> In this light, understanding the theoretical underpinnings of the new right acquires considerable practical import. I would like to suggest that, going forward, there must be better alternatives to originalism, and especially to theories of originalism premised on patently false history.

#### A. *The Limits of Originalism*

The original public meaning methodology expounded by the Court in

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<sup>30</sup> List on file with Author. As of August 2012, U.S. Courts of Appeals have decided 101 cases involving post-*Heller* Second Amendment claims. See Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1565 (2009) ("By January 15, 2009, lower federal courts had decided over seventy-five different cases challenging gun control laws under the Second Amendment.").

<sup>31</sup> See *Nordyke v. King*, 644 F.3d 776, 793–94 (9th Cir. 2011) (rejecting gun rights claim premised on expressive conduct doctrine under First Amendment); cf. Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1297, 1299–1301 (2009) (exploring analogies between the Second Amendment right described in *Heller* and the First Amendment protected right to possess obscene materials in the home).

<sup>32</sup> See *United States v. Garvin*, 2012 U.S. Dist. LEXIS 76540, at \*9–10, \*12–13 (E.D. Pa. May 31, 2012).

<sup>33</sup> See, e.g., *United States v. Carter*, 669 F.3d 411, 416–17, 421 (4th Cir. 2012) (upholding 18 U.S.C. § 922(g) as reasonably related to substantial government interest); *United States v. Decastro*, 682 F.3d 160, 164, 166 (2d Cir. 2012) (holding that heightened scrutiny is triggered only where a regulation substantially burdens the Second Amendment right); *United States v. Vongxay*, 594 F.3d 1111, 1118–19 (9th Cir. 2010) (applying rational basis review to the Second Amendment rights of felons).

<sup>34</sup> See, e.g., *United States v. Williams*, 616 F.3d 685, 692–93 (7th Cir. 2010) (upholding prohibition on convicted felon possession of firearms in 18 U.S.C. § 922(g) as substantially related to an important government interest);

<sup>35</sup> *Ezell v. City of Chicago*, 651 F.3d 684, 690–91, 710–11 (2012).

<sup>36</sup> *Id.* at 690.

*Heller* and *McDonald* does not correlate well with the non-militia-linked right to armed private self-defense voted into life by a one justice majority in each case.<sup>37</sup> The substantive right with which the Court was ultimately concerned—i.e., the right of individual persons to be armed in anticipation of the need to defend themselves against private aggression—was simply not discussed, or was discussed only marginally, when the young Republic took up the question of ratifying the Amendment.<sup>38</sup> Indeed, it is not far off the mark to reflect on two unrelated conversations that have little if any intersection. One conversation, spanning the years 1788–1791, concerned principally the virtues of the universal militia and the dangers of standing armies,<sup>39</sup> while a separate conversation, playing itself out in our own time, concerns the liberty of individuals to guard against the criminal element.<sup>40</sup> It is more than passing strange that disputants in the second conversation should look to the long-gone participants in the first for validation and approval. Perhaps there is even a hint of the tragic-comedic when present political actors appeal to past authority, claiming involvement in a conversation that logically cannot become real.<sup>41</sup> And yet, as Professor Jamal Greene trenchantly argues, originalism is all too real to ignore, because it has political currency and appeal, and this insures it will to some measure shape law in a more or less democratic polity—or at least that it will do so as long as its political appeal endures.<sup>42</sup>

Originalism may be a false philosophy,<sup>43</sup> yet it is anything but

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<sup>37</sup> Cf. Winkler, *supra* note 30, at 1557–58, 1564 (noting that, even though it has been hailed by some as a triumph of originalism, the *Heller* decision actually rests on current popular understanding of the right to arms, and suggesting that this logical inconsistency actually strengthens the opinion by making it more relevant and more likely to endure).

<sup>38</sup> I discuss this in my two previously cited articles. See Merkel, *Heller as Hubris*, *supra* note 20, at 1226; Merkel, *Antonin Scalia's Perverse Sense of Originalism*, *supra* note 20, at 352–53; see also Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms*, 29 J. EARLY REPUBLIC 585, 586–87 (2009) (detailing the results of systematic reviews of digitized records of pamphlets, journals, books, and legislative records of the late colonial and founding eras indicating that 95% or more of preserved uses of “bear arms” and its cognates refer unambiguously to militia or army service and not carrying weapons for private purposes).

<sup>39</sup> See H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* 93 (2002).

<sup>40</sup> See SAUL CORNELL, *A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 116 (2006).

<sup>41</sup> For a series of essays on originalism as comedy and farce, see generally DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002).

<sup>42</sup> See Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659–60 (2009).

<sup>43</sup> There has been extensive academic writing regarding the dubious historical pretensions of the original public meaning school of originalism. See, e.g., Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295, 295 (2011); Martin Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 590 (1995); Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 934–35 (1996). Another litany

impotent. The tragedy of originalism, then, is of a different nature than Belshazzar's appeal to gods of wood and iron or Canute's imploring Wotan to command the North Sea to stand still. For a false god, originalism has a lot of clout. That power, though, has its limits. As deployed in contemporary constitutional politics, originalist methodology is more concerned about dressing up and justifying intuitions than offering enlightenment or informing normative vision.<sup>44</sup> Not that "conversation" with the past need be a corrupt enterprise. Efforts to "read," "discover," "dis-cover," "uncover," "deconstruct," "reconstruct," or "enter" the founding era past have yielded rich enlightenment in the textual explorations of many non-originalist historians of the constitutional era.<sup>45</sup> To be meaningful and transformative, however, excursions into bygone worlds require modesty, effort, study, and perspective if they are not to end up bogged down in the banal and narcissistic projections of presentist voyeurs. There is a world of difference between the careful reconstructive architectonics of, say, Eric Slauter's *The State as a Work of Art*,<sup>46</sup> in which now dead metaphors reanimate as powerful leitmotifs, and *Heller*, in which cultural raiders swiftly pillage the past for usable artifacts whose significance they cannot accurately explain.<sup>47</sup>

#### B. *The Limits of Ancestor Worship*

Apart from the problem of indeterminacy that bedevils original public meaning and original intent-based originalism alike, and the susceptibility of historical evidence to manipulation by advocates and results-oriented judges, and apart from normative questions associated with the dead hand of the democratically deficient past,<sup>48</sup> there remain telling prudential reasons not to adhere slavishly to policy preferences of bygone days, even when clever jurists manage to articulate avowedly "neutral reasons" for

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of scholarly writings addresses the shortcomings of original intent-based model of originalism that has largely been supplanted by the original public meaning school. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205 (1980); Lawrence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1107 (1990); Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 824 (1983).

<sup>44</sup> See Merkel, *Antonin Scalia's Perverse Sense of Originalism*, *supra* note 20, at 352.

<sup>45</sup> See, e.g., ROBERT A. FERGUSON, *READING THE EARLY REPUBLIC* (2004); JAY FLIEGELMAN, *DECLARING INDEPENDENCE: JEFFERSON, NATURAL LANGUAGE, AND THE CULTURE OF PERFORMANCE* (1993); PETER S. ONUF, *JEFFERSON'S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD* (2000).

<sup>46</sup> ERIC SLAUTER, *THE STATE AS A WORK OF ART: THE CULTURAL ORIGINS OF THE CONSTITUTION* (2009).

<sup>47</sup> See Merkel, *Antonin Scalia's Perverse Sense of Originalism*, *supra* note 20, at 352. The image of "standard model" Second Amendment enthusiasts as historical raiders is developed with telling acumen in Jack N. Rakove, *The Second Amendment: The Highest State of Originalism*, 76 CHI.-KENT L. REV. 103 (2000).

<sup>48</sup> For more on these ills, see generally FARBER & SHERRY, *supra* note 41.

doing just that. At the risk of indelicacy, salient prudence-based reasons for shunning past practice focus on the problem that, for those who accept the existence or even the possibility of human progress, the United States in which the Constitution was framed was infinitely more barbarous than the United States of today.<sup>49</sup> As Jefferson reflected nearly two hundred years ago,

I am certainly not an advocate for frequent and untried changes in laws and constitutions. . . . But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.<sup>50</sup>

Jefferson appears to have contemplated less rigid adherence to the frozen norms of yesteryear than Justice Scalia had in mind in *Heller*. Of course, Justice Scalia's adherence to ancient values allegedly written into constitutional text is—at least nominally—conditional. As he wrote in his *United States v. Virginia*<sup>51</sup> dissent, “to counterbalance the Court’s criticism of our ancestors, let me say a word in their praise: They left us free to change.”<sup>52</sup> But the claim that norms discovered in two hundred year-old constitutional text are immune to charges associated with the dead hand of

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<sup>49</sup> To contextualize the founding generation’s fascination with barbarism, modernity, and human progress, consider J.G.A. Pocock’s analysis and situation of Edward Gibbon’s 1776 work, *Decline and Fall of the Roman Empire*. J.G.A. POCOCC, 5 BARBARISM AND RELIGION 386 (2010).

<sup>50</sup> Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 15 THE WRITINGS OF THOMAS JEFFERSON 32, 40–41 (Albert Ellery Berch ed., 1905). This quotation is displayed on the Southeast Portico at the Jefferson Memorial in Washington D.C. *About the Thomas Jefferson Memorial*, NAT’L PARK SERV., [www.nps.gov/thje/historyculture/about-the-memorial.htm+&cd=1&hl=en&ct=clnk&gl=us](http://www.nps.gov/thje/historyculture/about-the-memorial.htm+&cd=1&hl=en&ct=clnk&gl=us) (last visited Mar. 24, 2013, 8:30 PM). As the letter to Kercheval suggests, Jefferson’s characteristically enlightened faith in human progress endured well into the Age of Romanticism. Consider also the following admonition against unthinking devotion to the ways of the past:

When I contemplate the immense advances in science and discoveries in the arts which have been made within the period of my life, I look forward with confidence to equal advances by the present generation, and have no doubt they will consequently be as much wiser than we have been as we than our fathers were, and they than the burners of witches.

Letter from Thomas Jefferson to Benjamin Waterhouse (Mar. 3, 1818), in 15 THE WRITINGS OF THOMAS JEFFERSON 162, 164–65 (Albert Ellery Berch ed., 1905).

<sup>51</sup> 518 U.S. 515 (1996).

<sup>52</sup> *Id.* at 567 (1996) (Scalia, J., dissenting).

the past because they are subject to alteration by the amendment process is quite problematic. Writing that our fictive ancestors left “us” free to change presupposes that they had a capacity to bind “us” in the first place, and that they might legitimately bind us not only to norms but also to onerous procedures required to surmount those norms’ deep entrenchment. Jefferson’s remarks on the dubiousness of authority from barbarous times thus adumbrate a larger problem about originalism: The founders’ intent about intent is anything but clear.<sup>53</sup> An original public meaning-oriented originalist might glibly retort that intent is irrelevant (because the public meaning originalist says only original public meaning matters). Whatever the relevance of intent to modern constitutional understanding, it is not clear that the ratifying generation was any less skeptical about the normative capacity of their language to bind a future body politic in perpetuity than Jefferson was about the desirability of his generation imposing its political preferences on those not yet born.

### III. FEDERALISM AND DEMOCRATIC EXPERIMENTALISM

Considerations of federalism and democratic experimentalism also caution against mapping out a future dependent on alleged original public understanding of a private right to arms.<sup>54</sup> In a federal system like that of the United States, with numerous jurisdictions with substantial legislative authority, the best way to maximize the happiness of the largest number of persons may well be to allow local legislatures to experiment in the fashion suggested by Louis Brandeis<sup>55</sup> and offer residents different packages of immunities, obligations, government services, and taxes. Those who cherish guns will naturally gravitate towards gun friendly jurisdictions, while those who believe public safety is better served by gun control will gravitate towards jurisdictions with substantial restrictions on gun ownership.<sup>56</sup>

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<sup>53</sup> See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985).

<sup>54</sup> On democratic experimentalism, see generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 269 (1998).

<sup>55</sup> “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>56</sup> Pat Hubbard, my colleague at the University of South Carolina School of Law, has suggested a potentially serious reservation against the democratic experimentalism based argument that freedom of movement allows those who object to majority preferences to “vote with their feet” and move to another jurisdiction where majority preferences mirror their own. For Professor Hubbard, this argument is uncomfortably similar to the intolerant refrain of patriots during the era of the Vietnam War, who embraced the mantra “America: love it or leave it,” and urged those who objected to the war to forsake their citizenship on grounds of ideological impurity. As Hubbard explains, leaving one’s home is entirely too high a price to pay for the privilege of favoring policies not endorsed by the

My preferred option rests on two premises. First, the Supreme Court's view that the Constitution's text mandates a strong right to guns even outside the context of service in the lawfully established militia is not (as Justices Scalia, Alito, and Thomas insist it is) dictated by the original public meaning of the constitutional text when it was ratified. In fact, as I have argued previously,<sup>57</sup> the original public meaning of the Second Amendment did not extend to arms possession outside the context of militia service at all, and according to the careful quantitative research of historian Nathan Kozuskanich, well over 95% of uses of the phrase "bear arms" and its cognates surviving in pamphlets, journals, books, and recorded legislative debates in late colonial British North America and the early Republic unambiguously refer to militia service or military duty.<sup>58</sup> Second, *contra* to many strong libertarians, I do not assume that Pareto optimality is the touchstone of all legitimate government action. According to Pareto, no government action is justified that leaves any single person worse off than he or she was before the government intervention.<sup>59</sup> Thus, redistributive taxes would be illegitimate because many wealthy persons object to paying higher taxes than poor persons. Pareto optimality is, however, too harsh of a standard. In fact, it is an injunction against virtually all governmental action. To take an extreme example, the Thirteenth Amendment is not Pareto optimal because some

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majority of voters in the jurisdiction. I counter that minority or officious individual veto of majority-favored policies is not without enormous social and utilitarian costs in its own right. When Officer Heller won his case, the results were hardly Pareto neutral, or even Kaldor-Hicks efficient. The majority of District of Columbia residents was not rendered more happy and content by the decision, and arguably public safety (or at least the majority-favored policy respecting public safety) was adversely impacted, as well.

Perhaps the most extreme variant of the "voting with your feet" modality of democratic experimentalism is that espoused by the radical U.S. expatriate academic Jonathon Moses, who argues that freedom of migration across international borders will maximize civic contentment allowing all of humanity to participate in a global market for packages of government policies, services, and protections. JONATHAN W. MOSES, *INTERNATIONAL MIGRATION: GLOBALISM'S LAST FRONTIER* (2006). I applaud Moses for being willing to pursue the principles to which he adheres to their ultimate limits. But when I heard him make the case for open borders at a plenary session of the European Association of American Studies Conference at the University of Oslo in 2008, the overwhelming sense among Northern hemisphere academics and policy makers attending seemed to be that the severe free rider problems associated with immigrants seeking out advantageous benefit plans that they had not helped finance through a lifetime of taxation would doom a worldwide open borders strategy to the same sort of "race to the bottom" difficulties that vexed the United States in the early twentieth century, prior to the establishment of the modern American regulatory state during the New Deal. My more modest argument respecting the Second Amendment does not concern social and economic rights that require financing by means of onerous taxes. Unlike Moses's scheme, offering U.S. citizens different packages of gun rights and restrictions in different jurisdictions is unlikely to lead to chaos and free-riding.

<sup>57</sup> See Merkel, *Antonin Scalia's Perverse Sense of Originalism*, *supra* note 20; Merkel, *Heller as Hubris*, *supra* note 20.

<sup>58</sup> Kozuskanich, *supra* note 38, at 585–87.

<sup>59</sup> See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 17 (8th ed. 2011).

plantation owners were unhappy after abolition of slavery. Unlike strict disciples of Pareto, my general sense is that majority preferences can, in many instances, be legitimately enforced against a dissenting minority. Federalism and Brandeisian experimentalism provide one safeguard against majority abuses. After all, when it comes to guns, we can be fairly confident that a great many states will opt for permissive rules in the foreseeable future. Many people (including, of course, Justices Scalia, Alito, and Thomas) believe that judicial enforcement of the Second Amendment provides another essential security. I read the text of the Constitution differently and I am convinced that most individuals would have shared my view when the text was enacted and ratified.

The alleged plain meaning and original public understanding of constitutional text are not the only plausible claims in favor of allowing what Alexander Bickel called counter-majoritarian intervention by the judiciary.<sup>60</sup> Before the rise of originalism, public choice theory as reflected in the work of John Hart Ely<sup>61</sup> and still more famously in *Carolene Products* Footnote Four<sup>62</sup> set out three criteria under which the normal default rule protecting legislative preferences against judicial intervention might yield. The first paragraph of then Justice Stone's famous footnote invoked express prohibitions in constitutional text; the second paragraph spoke of unworkable impasses in the political process created by the corrupting influence of entrenched and unyielding power; and the third paragraph, most famous of all, described the special case of "discreet and insular minorities" who might be targets of deliberate majority abuse.<sup>63</sup> If I am right about the text of the Second Amendment, the judicially created right to arms clearly falls outside paragraph one of *Carolene Products* Footnote Four, because the text concerns only arms bearing in the militia. I am very much inclined to think that paragraph two of Footnote Four is likewise inadmissible as a special claim for judicial intervention on behalf of gun rights because, if anything, gun advocates have succeeded in rigging the local, state, and national political processes against gun control legislation.<sup>64</sup> Paragraph three may have some purchase on the local level in cosmopolitan urban settings, but it is by no means clear to me that officious intermeddlers from Montana or Alabama should enjoy veto power by judicial proxy over the decisions of elected legislatures in New

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<sup>60</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–19 (1962).

<sup>61</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135–36, 181 (1980).

<sup>62</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938).

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

<sup>64</sup> See, e.g., James V. Grimadli, *Focused NRA a Force in U.S. Politics*, WASH. POST, Dec. 15, 2010, at A10 (one installment in a long series of pieces by Grimadli exploring the profound influence of the NRA in Washington).

York City or Chicago.<sup>65</sup> When it comes to gun rights on the national plane, the third paragraph seems wholly inapplicable; seeing as gun enthusiasts are probably not a minority at all, they are certainly not discreet and insular, and thanks to Brandeisian experimentalism, they are always free to leave San Francisco or D.C. for more congenial climes.

Another migration-related consideration (this one invoking Jonathan Moses's global variation of Brandeisian experimentalism<sup>66</sup>) gives me pause respecting the Supreme Court's recent fabrication of a private right to weapons possession and its incorporation against the states. As far as I know, a right to weapons possession is not considered fundamental in any legal system outside the United States. I do not know of any international human rights instrument or any constitution in another society with a well-developed system of justice that protects a right to guns. This causes me to wonder whether the right in question is really fundamental in character. Perhaps it is merely an American idiosyncrasy. That said, the right to self-defense, particularly the right to self-defense in contexts where government cannot or does not protect individuals claiming the right, is acknowledged around the world.<sup>67</sup> This realization likewise causes me to think that it might be more sensible to discuss self-defense on its own merits even in our own country, rather than treat it as a legacy of constitutional language addressed to a militia system the nation abandoned long ago.<sup>68</sup>

#### IV. INSIGHTS FROM THE LAW OF WAR

I have argued that originalism offers inadequate normative guidance respecting the meaning of the right to self-defense in contemporary

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<sup>65</sup> The problematic character of single person veto over policies favored by the majority is illustrated most poignantly in the case of eighteenth century Poland, where every aristocrat in the numerous hereditary upper house enjoyed the "liberum veto" (i.e., the capacity to block policy favored by the majority in both houses and the executive). See Paul Krugman, *The Senate Becomes a Polish Joke*, N.Y. TIMES BLOG (Feb. 5, 2010, 10:44 AM), <http://krugman.blogs.nytimes.com/2010/02/05/the-senate-becomes-a-polish-joke/>. This rendered Poland incapable of responding to foreign aggression, leading ultimately to the state's partition, annexation, and disappearance. *Id.*; see also, NORMAN DAVIES, *1 GOD'S PLAYGROUND: A HISTORY OF POLAND 11* (1982) (leading English language study of eighteenth century Polish political history).

<sup>66</sup> See MOSES, *supra* note 56, at 200.

<sup>67</sup> In public international law, serious comparative reflection on the nature of self-defense in different municipal legal systems goes back at least to the time of the Suez Crisis, when D.W. Bowett developed the claim that an international legal right to (collective) self-defense (including anticipatory self-defense) was inherent in the general principles of international law because a municipal analogue existed in legal systems around the world. See D. W. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 3–4 (1958) (expanding arguments first set out in the British Year Book of International Law in 1955–1956).

<sup>68</sup> See UVILLER & MERKEL, *supra* note 39, at 109–10, 166–67 (tracing the disappearance, over the course of the nineteenth century, of the universal compulsory militia envisioned at the time the Constitution was ratified and outlining the argument that the Second Amendment right to arms cannot coherently be applied given the collapse of the predicate by which that right was textually conditioned).

American law in large part because there is little substantive overlap between the founding era conversation respecting the meaning of the Second Amendment and current debates concerning the right to self-defense. There is, however, a very substantial body of contemporary legal discourse that yields rich insights, attracts powerful contributions from around the world, and overlaps in substance to a very large degree with contemporary American concerns regarding self-defense as a fundamental right under municipal law. This body of law is *jus ad bellum*, the international law governing the initial application of force that may or may not engender armed conflict.<sup>69</sup>

As long ago as the Caroline Dispute of 1837–1842, which involved British use of force against a ship used by American soldiers of fortune to assist insurgents in Canada, U.S. Secretary of State Daniel Webster and British Minister to the United States Lord Ashburton were able to agree on the basic analytic outlines of justified self-defense in international law.<sup>70</sup> The jurisprudence of the International Court of Justice (“ICJ”) has added precision and gloss (and at times, some confusion) to the legal regime explaining when defensive force is justified. A state’s lawful resort to defensive force must target an actual armed attack, and that attack must rise to the level of being “significant.”<sup>71</sup> Whether the use of defensive force against an imminent but not yet executed attack is legal is hotly debated;<sup>72</sup> the Bush Doctrine purporting to justify the use of force against mere potential (but not imminent) threats has been almost universally

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<sup>69</sup> The municipal analogy, exploring self-defense under the law of armed conflict and self-defense in municipal law under to the same principles of analytic jurisprudence has been powerfully developed. See, e.g., GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* 216–17 (2008); GEORGE P. FLETCHER, *1 THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL* 161, 333 (2007).

<sup>70</sup> John E. Noyes, *The Caroline: International Law Limits on Resort to Force*, in JOHN E. NOYES ET AL., *INTERNATIONAL LAW STORIES* 263, 263 (2007).

<sup>71</sup> *But cf.* *Corfu Channel* (U.K. v. Alb.) 1949 I.C.J. 4, 5 (Dec. 15) (holding the U.K.’s use of naval force to clear mines unlawful since the deployment did not serve the purpose of defending against an armed attack); *Military and Paramilitary Activities in and Against Nicaragua* (Nic. v. U.S.) 1986 I.C.J. 4, 124–25 (June 27) (holding that Nicaragua’s sending of assistance to Salvadoran rebels in the form of weapons and logistical support was not a significant armed attack justifying the use of defense force by the intervening United States).

<sup>72</sup> See ANTONIO CASSESE, *INTERNATIONAL LAW* 357–61 (2d ed. 2005). The International Court of Justice has never expressly endorsed anticipatory self-defense, but state practice and publicists go both ways. I find a terminological distinction between anticipatory self-defense against an imminent attack (consider Lord Ashburton’s formulation of instant and overwhelming necessity or the situation of Israel in 1967 when combined Egyptian/Syrian armies massed on the borders and President Nasser announced his intention to destroy Israel) and preemptive self-defense (consider the Bush Doctrine purporting to justify strikes against potential threats) cogent and useful. State practice suggests that at least some acts of anticipatory self-defense are not viewed as illegal; in contrast, no authorities outside the United States have endorsed Bush Doctrine-style preemptive self-defense. See W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT’L L. 525 (2006).

repudiated.<sup>73</sup> The ICJ itself has never embraced the right to defend against anything other than an actual attack. To act lawfully, the defending state must use force against the party responsible for the attack.<sup>74</sup> Finally and crucially, the defending state's use of force must be necessary to repulse an actual attack, and it must be proportional in the sense of not exceeding the level of force required to effectively defend against that attack.<sup>75</sup>

The ICJ is the principal judicial organ of the U.N., and its opinions on the use of force draw heavily on two specific provisions of the U.N. Charter, Article 2(4) prohibiting "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" and Article 51 preserving "the inherent right of individual or collective self-defense if an armed attack occurs."<sup>76</sup> However, there is nothing in the ICJ's jurisprudence to suggest that the normative content of the law of self-defense depends primarily on the Charter text. In fact, the Nicaragua Case, perhaps the ICJ's most important decision on the use of force and the scope of lawful (collective) self-defense, relied on customary international law, not the U.N. Charter.<sup>77</sup> It is fair to say then that the ICJ's

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<sup>73</sup> Reisman & Armstrong, *supra* note 72, at 530–32, 547–48.

<sup>74</sup> See, e.g., *Oil Platforms (Iran v. U.S.)* 2003 I.C.J. 161, 190–92 (Nov. 6) (holding U.S. strikes on Iranian oil platforms unlawful where it was unclear whether prior attacks were carried out by Iranian or Iraqi forces); *Legal Consequences of Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 4, 6 (July 9). The controversial advisory opinion on the Wall has been read by some commentators including Professors George Fletcher and Jens Ohlin to permit the use of defensive force only against attacks by states, but if this is what the International Court of Justice intended, the opinion in the Wall case is inconsistent with prior opinions (*Case Concerning Military and Paramilitary Activities*) and reason. FLETCHER & OHLIN, *supra* note 69, at 5–6, 146. Professor Mary Ellen O'Connell argues that the advisory opinion only speaks to the legitimate use of defensive force under the U.N. Charter, holding out the possibility that Israel might legally defend against non-state actors as long as the legal basis for that action is something other than the U.N. Charter—perhaps *jus cogens*, customary international law, natural law, or general principles of law. But since Article 51 speaks to the inherent right of self-defense, a more natural assumption is that the Charter provision on the use of defensive force merely incorporates existing international law, in which case O'Connell's position becomes incoherent and the advisory opinion indefensible.

<sup>75</sup> See *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 160, 199 (Nov. 6) (holding U.S. destruction of Iranian platforms neither necessary to defend against any attack or proportionate to the threat of imminent attack in the form of further missile launches); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 263 (July 8) (finding the use or threat of nuclear weapons exceedingly unlikely to satisfy necessity and proportionality requirements except in extreme case where survival of a state or people threatened).

<sup>76</sup> U.N. Charter art 2, para. 4.

<sup>77</sup> The Vandenberg Amendment, attached by the United States Senate as a reservation to the Declaration acknowledging the compulsory ipso facto jurisdiction of the I.C.J., precluded the Court from taking cases involving the U.S. where legal issues to be decided depended on construction of a multi-lateral treaty (including the U.N. Charter) unless all states party to the treaty and affected by the case were joined as parties. Grant Gilmore, *The International Court of Justice*, 55 YALE L.J. 1049, 1053 n.13 (1946). The U.S. argued that its use of force against Nicaragua was justifiable as an exercise of collective self-defense on behalf of El Salvador, Honduras, and Costa Rica. Memorial of U.S., *Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.)*, 1986 I.C.J. Pleadings 182

jurisprudence of self-defense does far more than parse the text of the Charter; it draws also on customary international law and general principles of law to flush out the elements and contours of the international right to legitimate self defense.

It is precisely these insights from general principles of law and customary international law that offer a principled alternative to originalism for those seeking to develop the newly acknowledged constitutional right to self defense and apply it to pressing contemporary problems under municipal law.<sup>78</sup> In this light, it is particularly worth noting that the legal principle that states have a right to self-defense implies that states have a right to be armed. Indeed Alfred von Verdross, the earliest expositor of the foundational principle of modern international law that *jus cogens* rules may not yield to competing rules of lesser normative value, used treaties rendering a state unable to defend itself as a principal illustrative example of a rule-making forbidden by *jus cogens*.<sup>79</sup> But to say states may be armed is hardly to say that they have an unlimited and immutable right to weaponry. As the ICJ's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons reminds us, it has been a fundamental principle of Hague law for a century that the capacity to inflict suffering on an attacker or the enemy is not unlimited.<sup>80</sup> In the Hague Conventions of 1899 and 1907, states consented to the first modern arms control limitations, and the global arms control regime now extends beyond bans on poison gases and exploding bullets to prohibitions and limitations respecting nuclear weapons, biological weapons, chemical weapons, landmines, and cluster munitions.<sup>81</sup> To pursue the municipal

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(Nov. 26). Since the latter three states were not parties to the case, issues under the Charter were not opposable against the U.S. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nic. V. U.S.), 1984 I.C.J. 392, 430 (Nov. 26). The Court decided the merits based on customary international law regarding the use of force, citing the U.N. Charter provisions on the use of force as evidence of customary international law. *Id.* The U.S. withdrew its Declaration recognizing the compulsory ipso facto jurisdiction of the I.C.J. to highlight its objections to the Court's decision in the jurisdictional phase of the case prior to the decision on the merits. *See id.* at 441.

<sup>78</sup> Resort to foreign and international materials in the context of deciding U.S. cases is itself the subject of famous controversy among the justices of the Supreme Court. It is perhaps not surprising that those committed to originalism are most hostile to consideration of non-U.S. sources, even for purposes of developing general principles of law already inherent in American jurisprudence. *See, e.g.,* Antonin Scalia & Stephen Breyer, *A Conversation Between U.S. Supreme Court Justices*, 3 INT'L J. CONST. L. 519, 521 (2005).

<sup>79</sup> Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571, 577 (1937). Verdross's path-breaking article has an interesting double-edged quality in that it can be easily read to delegitimize both the punitive aspects of the Versailles Treaty and looming Nazi aggression against Austria and Czechoslovakia.

<sup>80</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 256–57 (July 8).

<sup>81</sup> George H. Aldrich & Christina M. Chinkin, *Introduction to the Hague Peace Conferences Symposium*, 94 AM. J. INT'L L. 1, 1 (2000). *See generally* MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE: CASES AND MATERIALS 665–740 (2d ed. 2009).

analogy back to its foundations, consenting to these limitations reflects in real terms the same calculus among states that Hobbes, Locke, and Blackstone attribute to individuals at the formation of the social contract: that is, a decision to accept binding and enforceable limitations on the capacity to use force in order to promote individual and collective security.

#### V. REFLECTIONS ON DRONES AND THE COMMENTS OF ATTORNEY GENERAL ERIC HOLDER AND PRESIDENT CARTER

Reflecting on the legality of drone strikes, the most salient question currently confronting the United States under the international law of self-defense, suggests provisional insights that might help us constructively rethink debates about the limits of self-defense under American municipal law brought to prominence by George Zimmerman's shooting of Trayvon Martin. Let me begin with some observations concerning the use of drones against al-Qaeda operatives.

The deployment of unmanned drones for purposes (depending on one's perspective) of precise military strikes or targeted assassinations<sup>82</sup> has generated enormous worldwide controversy during the Obama presidency.<sup>83</sup> In particular, Attorney General Eric Holder's defense of

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<sup>82</sup> The controversy surrounding targeted assassination in the context of the War on Terror extends well beyond issues directly tied to the use of drones. A new book by a pseudonymous author claiming to be a Navy Seal involved in the U.S. military raid that killed Osama bin Laden in Abbottabad, Pakistan holds out that the object of the mission was assassination, and that there were no plans to attempt to arrest or take Bin Laden prisoner. See MARK OWEN, *NO EASY DAY* (2012).

<sup>83</sup> Commentary and analysis—whether popular, political, or academic—on drone strikes, and more broadly, targeted assassinations, is voluminous. See, e.g., H CJ 769/02 Public Committee Against Torture in Israel v. Gov't of Israel 53(4) PD 817 (2005) (Isr.); Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, U.N. Doc. A/HRC/14/14/Add. 6 (May 28, 2010); Harold Hongju Koh, Legal Adviser to U.S. Dep't of State, the Obama Administration and International Law, Address Before the Annual Meeting of the American Society of International Law (Mar. 25, 2010); Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, in *SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON THE USE OF LETHAL FORCE* (Simon Bronitt, Miriam Gani & Saskia Hufnagel eds., 2012); Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SECURITY J. 145 (2010); Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Legal Force*, 13 Y.B. INT'L HUMANITARIAN L. 3 (2010); John C. Dehn & Kevin Jon Heller, *Targeted Killing: The Case of Anwar al-Aulaqi*, 159 PENNUMBRA 175 (2011); David Kretzmer, *Targeted Killings of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Self-Defence?*, 16 EUR. J. INT'L L. 171 (2005); Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405 (2009); David Cole, *Killing Our Citizens Without Trial*, N.Y. REV. BOOKS (Nov. 24, 2011), <http://www.nybooks.com/articles/archives/2011/nov/24/killing-our-citizens-without-trial/?pagination=false>; Tara McKelvey, *Inside the Killing Machine*, NEWSWEEK, Feb. 13, 2011, at 34; Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, PITT. POST-GAZETTE, Oct. 9, 2011, at A6; Editorial, *Justifying the Killing of an American*, N.Y. TIMES, Oct. 11, 2011, at A22; Editorial, *The Power to Kill*, N.Y. TIMES, Mar. 10, 2012, at SR10; Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is 'A Legal Geography of War'* (Apr. 26, 2011) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1824783](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1824783); David Cole, *Killing Citizens in Secret*,

drone attacks on terrorist targets in his speech on the national security policy of the United States delivered at Northwestern University on March 5, 2012 has provoked heated debate.<sup>84</sup> Those whose sense of nationalism easily flares into febrile patriotic ire have expressed singular outrage at governmental policies targeting U.S. citizens for assassination. In many instances, the underlying intuitive assumption of those offended by the Attorney General's remarks appears to be that good government may do what it wishes to others, but it may not kill citizens except by lawful execution—by which means it may kill them in abundance. But less jingoistic and violence-prone thinkers have also condemned Holder's remarks,<sup>85</sup> and it is likely the national security strategy outlined by the Attorney General as much as the long train of abuses at the Guantanamo Bay detention camp that sparked President Carter's New York Times op-ed condemning the Obama Administration for continuing the dismal system of human rights violations first set in motion by a subcabinet "torture team" during President George W. Bush's first term.<sup>86</sup>

President Carter is, of course, correct that by the standards of international human rights and procedural fairness in criminal prosecution, targeted assassination is barbarous and wholly indefensible. But everything depends on the selection of governing paradigm. Under the law of armed conflict, the claim that necessary and proportionate force (including lethal force) may be used to prevent an imminent armed attack or thwart an ongoing attack by an actor who happens to be a citizen is not terribly shocking.<sup>87</sup> It is, in fact, an entirely orthodox understanding of the *jus ad bellum* as articulated as long ago as the Caroline Affair.<sup>88</sup> Admittedly, contemporary authorities are split on the legality of anticipatory self-defense in the case of an attack that is imminent but not yet actual.<sup>89</sup> But the trend since 1967, at least among publicists and in-

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N.Y. REV. BOOKS BLOG (Oct. 9, 2011, 11:15 PM), <http://www.nybooks.com/blogs/nyrblog/2011/oct/09/killing-citizens-secret/>.

<sup>84</sup> See Eric Holder, U.S. Att'y Gen., Remarks at Northwestern Univ. Sch. of Law, Mar. 5, 2012, available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

<sup>85</sup> See, e.g., Press Release, American Civil Liberties Union, ACLU Comment on Eric Holder Speech on Targeted Killing Program (Mar. 5, 2012), available at <http://www.aclu.org/national-security/aclu-comment-eric-holder-speech-targeted-killing-program>.

<sup>86</sup> Jimmy Carter, Op-Ed., *A Cruel and Unusual Record*, N.Y. TIMES (June 24, 2012), [http://www.nytimes.com/2012/06/25/opinion/americas-shameful-human-rights-record.html?\\_r=4](http://www.nytimes.com/2012/06/25/opinion/americas-shameful-human-rights-record.html?_r=4). On the Bush-era origins of the policies Carter critiques, see generally PHILIPPE SANDS, *LAWLESS WORLD: THE WHISTLE-BLOWING ACCOUNT OF HOW BUSH AND BLAIR ARE TAKING THE LAW INTO THEIR OWN HANDS* (2005) and PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES* (2008).

<sup>87</sup> See, e.g., R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 92 (1938).

<sup>88</sup> See James A. Green, *Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense*, 14 CARDOZO J. INT'L & COMP. L. 429, 433–36 (2006).

<sup>89</sup> Compare Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development*

state practice, has been towards acknowledging the rightfulness of acting once an aggressor is poised to launch an imminent strike.<sup>90</sup> And for present purposes, it is not analytically necessary to premise a coherent argument in favor of the use of defensive force against al-Qaeda on the imminence of any future attacks, for al-Qaeda openly acknowledges that it has attacked the U.S. and that its conflict against the U.S. continues unabated. If a state of armed conflict continues to exist between the U.S. and al-Qaeda, then members of al-Qaeda, U.S. nationals included, are presumably not civilians but legitimate military targets of the U.S. subject to the restrictions imposed by the *jus in bello* as acknowledged by Attorney General Holder. In other words, if armed conflict exists, the U.S. may target al-Qaeda members whether or not they are attacking or about to attack the U.S. or U.S. nationals.<sup>91</sup> The presence of armed conflict shifts the governing paradigm from *jus ad bellum* to *jus in bello* (or international humanitarian law), under which U.S. targeting of Al Qaeda operatives (including U.S. nationals) is permissible provided it satisfies the requirements of (1) military necessity, (2) distinction, (3) proportionality, and (4) humanity.<sup>92</sup>

That said, several things profoundly disturb me about the Attorney General's comments at Northwestern. First, there is the assumption that the Fifth Amendment applies only or principally to U.S. citizens, which makes no sense textually, since the rights it protects are those of "persons."<sup>93</sup> If text does not support limiting the Fifth Amendment to

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of *International Law*, 16 BROOK. J. INT'L L. 493, 505–06 (1990), with Timothy Kearley, *Raising the Caroline*, 17 WIS. INT'L L.J. 325, 344–45 (1999).

<sup>90</sup> See, e.g., Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT'L L. 62, 65–66 (2005).

<sup>91</sup> Thanks to Dino Kritsiotis of the University of Nottingham for vetting these ideas with me over lunch at the University of South Carolina.

<sup>92</sup> See Rebecca Ingber, *Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda*, 47 TEX. INT'L L.J. 75, 83–86 (2001). Military necessity recognizes the legitimacy of using force to achieve submission of the enemy, but not for the purposes of wanton destruction. Distinction requires differentiating between military objects and belligerents who may be targeted, and civilians and civilian objects who may not be targeted. Proportionality prohibits attacks that are likely to cause civilian casualties that are excessive in relation to the anticipated military advantage sought to be achieved. Humanity aims to minimize suffering in armed conflict, and precludes causing suffering unrelated to legitimate military purposes.

<sup>93</sup> U.S. CONST. amend. V. Recall also that Chief Justice Rehnquist reasoned that the Fourth Amendment did not apply to the warrantless seizure of evidence found in the home of a Mexican national in Mexico by U.S. agents, since there is no evidence that the Fourth Amendment was understood by its drafters "to apply to activities of the United States directed against aliens in foreign territory." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 267 (1990). This reasoning was rejected in vigorous dissents by Justice Brennan (joined by Justice Marshall) and Justice Blackmun, who maintained that constitutional restraints on the exercise of governmental enforcement powers apply to all action by U.S. and state officers anywhere in the world. *Id.* at 282. This universal and non-racist approach to judicial enforcement of individual rights echoed Justice Murphy's classic dissent in *In re Yamashita*, 327 U.S. 1, 26 (1946) (Murphy J., dissenting). Chief Justice Rehnquist's reliance on the

citizens, what does? Is it suspicion that “Americans” form a master race, or that “non-Americans,” in words that might come from Chief Justice Taney’s decision in *Dred Scott v. Sandford*,<sup>94</sup> have no rights that the U.S. government is bound to respect? Secondly, I wonder what purpose other than pandering to jingoists is served by extraneous invocations of originalism. What the founding fathers thought about the applicability of the law of armed conflict to U.S. action against U.S. citizens is not obviously relevant, but rather more obviously something about which Holder does not know very much. Finally, there is (especially towards the end of his remarks) a nod to American exceptionalism,<sup>95</sup> which likewise serves no legally analytic purpose, and which I am also inclined to write off as pandering. But I will say this: In accepting the binding and outcome-determinative character of international law, Holder has conceded much more than his predecessors in the Bush administration would have been likely to do and, on that score at least, the speech represents a salubrious development.<sup>96</sup> Still, as George Fletcher pointed out a decade ago in the immediate aftermath of the September 11, 2001 attacks, the U.S. government’s blending of the law enforcement and armed conflict legal regimes not only leads to analytically unclear thinking, but easily promotes miscarriages of justice and warping of norms that may have pernicious consequences in other contexts as well.<sup>97</sup> One could say much the same about the government’s assumption that there is a watered-down version of the Constitution that applies in wartime or with respect to U.S. governmental action against non-citizens. This is not the written Constitution with which I am familiar. It is, to draw on Justice Jackson’s

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Fourth Amendment’s textual linkage to “people” suggests that the Fifth and Fourteenth Amendments rights of persons may apply globally against abuse by U.S. and state governmental actors, while the Second Amendment guarantee, like the Fourth, applies only in favor of “the people” of the United States. *Verdugo-Urquidez*, 494 U.S. at 267. *But see id.* at 264 (distinguishing the Fourth and Fifth Amendments). This line of reasoning leads to incongruous consequences respecting the constitutional right to arms, which under *Verdugo-Urquidez* could protect non-U.S. nationals against abuse by state governmental actors since by the terms of the Due Process Clause of the Fourteenth Amendment it is incorporated in favor of any “person,” but leaves non-U.S. citizens unprotected from abuse by federal actors, since the Second Amendment right applies directly in favor of “the people.”

<sup>94</sup> 60 U.S. 393 (1857).

<sup>95</sup> *See* Holder, *supra* note 84.

<sup>96</sup> Consider by way of contrast the stance of John R. Bolton, United States Ambassador to the United Nations from 2005 to 2006, whose open hostility to international law was so severe that he routinely placed the phrase itself in quotation marks to signify his contempt. *See, e.g.*, John R. Bolton, *Clinton Meets “International Law” in Kosovo*, WALL ST. J., Apr. 5, 1999 at 14. Coincidentally, many internationalists look forward to the day Bolton meets “international criminal law” in the Hague.

<sup>97</sup> *See, e.g.*, Karen Greenberg, *Heightened Insecurity*, 2 N.Y.U. REV. L. & SEC. 1, 1 (2004). In particular, note the ongoing debate between Professor Fletcher and Professor Ruth Wedgwood of Johns Hopkins University on the legality of the U.S. war against Iraq and the importance of clear analytic distinction between the war and criminal justice paradigms in assessing the legality of various measures in the so-called War on Terror. *Id.* at 8–16.

cautionary admonitions in his dissent in *Korematsu*, a shadow constitution that paves the way for executive primacy that, left unchecked, will grow into tyranny.<sup>98</sup> The abusive powers that kindly governmental actors wield against bad people today will form precedents for less kindly governmental actors to employ against less bad (and less foreign) persons tomorrow.<sup>99</sup>

#### VI. REFLECTIONS ON THE TRAYVON MARTIN CASE AND THE BARBARISM OF SEA SLUGS

Populists on the political right bewail the government's targeted assassination of U.S. citizens. It does not seem to matter to them, that under the law of war, the lethal application of government force to an al-Qaeda fighter of U.S. nationality is analytically indistinguishable from Union targeting of Confederate forces during the Civil War. Or, less charitably, it is perhaps the very applicability of that analogy that saps government action of legitimacy in the eyes of some radical antinomian populists. For some, with the possible exception of the New Deal, there is no clearer, more paradigmatic case of the federal government going too far than its forceful suppression of the Southern rebellion during the American Civil War between April 1861 and May 1865.<sup>100</sup> Perhaps I should not use the phrase "going too far." There is an ascendant strain in American libertarian thought that would hold any governmental action illegitimate precisely because it is governmental in character.

But populists lament not only the government's application of force. They seem to resent even more the government's interference with private applications of force. Enter George Zimmerman or, more to the point, many of his defenders and the champions of "Stand Your Ground" laws and citizen arrest statutes. Max Weber's famous aphorism that the government has a monopoly on the legitimate use of force<sup>101</sup> may not command majority assent in contemporary America. Stand Your Ground laws, citizen-arrest statutes, and the evisceration of the common law rule that the exercise of lawful self-defense requires the actor to retreat to a wall or ditch bespeak an antinomian reversion to first principles and a severe

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<sup>98</sup> *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Jackson, J. dissenting).

<sup>99</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 632 (1952) (Douglas, J. concurring).

<sup>100</sup> For more discussion, see TONY HORWITZ, *CONFEDERATES IN THE ATTIC: DISPATCHES FROM THE UNFINISHED CIVIL WAR* (1999), a perhaps far too sympathetic memoir of a well-known journalist's year-long journey among the unreconstructed, and Daniel Feller, *Libertarians in the Attic, or a Tale of Two Narratives*, 32 *REV. AM. HIST.* 184, 184 (2004), reviewing pseudo-historical and propagandistic neo-Confederate writings.

<sup>101</sup> Max Weber, *Politics as Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* (H. H. Gerth & C. Wright Mills eds., Wright Mills trans., Oxford Univ. Press 1946), available at <http://www.sscnet.ucla.edu/polisci/ethos/Weber-vocation.pdf>. In Weber's words: "Today, however, we have to say that a state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory." *Id.*

fraying of the social fabric. It is one thing to acknowledge that the police cannot be everywhere to defend the populace and that it might not be desirable to live in a state where government agents are sufficiently numerous and officious to be just about everywhere to respond in case of emergency, real or contrived. This suggests private self-defense as a fallback option. It is another to prefer the state of nature as a matter of course and private self-defense as the governing paradigm of human relations.<sup>102</sup> To return to the analogy between municipal and international law, the question is whether Article 51 presents an exception to Article 2(4) or whether it swallows Article 2(4) and the international order of which it is a principal bulwark whole.

The vigilante figures prominently in popular fantasy, and, perhaps, though the facts in the public sphere are very murky indeed, in George Zimmerman's fantastical self-image.<sup>103</sup> Deciphering the complex events leading to the death of Trayvon Martin requires hard work and measured judgment. So does sorting through the Florida Stand Your Ground Law and the small number of Florida Supreme Court cases offering guidance as to its meaning, and the perhaps conflicting commands of Florida's generally applicable self-defense statute partially supplanted by the Stand Your Ground Law.<sup>104</sup> Read together, the statutes and the limited body of related Florida Supreme Court case law establish an incompletely theorized set of rules respecting partial and conditional forfeiture of the

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<sup>102</sup> In extremis, this world is quite literally barbarous, or even subhuman. An analogy from discourse concerning the law of nations is instructive. Consider the noted literary critic Edmund Wilson's musings on resort to armed conflict absent a coherent *jus ad bellum*: "In a recent . . . film showing life at the bottom of the sea, a primitive organism called a sea slug is seen gobbling up small organisms through a large orifice at the end of its body; confronted with another sea slug of an only slightly lesser size, it ingurgitates that, too. Now the wars fought by human beings are stimulated as a rule . . . by the same instincts as the voracity of the sea slug." MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 60 (4th ed. 2006).

<sup>103</sup> In a different factual and statutory context, an eerily similar case captured the nation's attention in the 1980s when "subway vigilante" Bernhard Goetz acted in anticipation of an expected attack and shot four youths who he believed appeared menacing. Joseph A. Kirby, *'Subway Vigilante' Case in Final Stage*, CHI. TRIB., Apr. 23, 1996, at 4. Like the shooting of Trayvon Martin, the Bernhard Goetz case was racially inflected on the ground, in the media, and in the popular imagination. See GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* (1988).

<sup>104</sup> The "Stand Your Ground Law," FLA. STAT. 776.013(3), states:

A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself.

*Id.* FLA. STAT. 776.041(2) provides "The justification [of self-defense] is not available to a person who . . . initially provokes the use of force against himself or herself." *Id.*

right to self-defense by initial aggressors.<sup>105</sup> While parts of the Florida Code originate in the Model Penal Code, Florida criminal law in its current state is not theoretically coherent in the continental European sense, with a General Part and a Special Part, few inconsistencies, and overarching conceptual purposes. The Stand Your Ground Law is one of many appendages cobbled onto a doctrinal body that consists to a significant degree of accretions, relics, exceptions, vestiges, and sops to animated constituencies.

I do not mean to disparage lawmaking by democratic means, or even to suggest that law in the United States is deficient in that statutes and codes originate in legislative committees and in the work of lobbyists rather than in the work of academic philosophers appointed by Napoleon or Bismarck. Indeed, I argue that a heightened burden rests on courts to explain with particular cogency the theoretical basis for decisions that unsettle policies codified into law by democratically accountable agents. But in the U.S., high courts and high court judges have never shied away from

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<sup>105</sup> The theoretical importance of distinguishing between claims to exercise defensive force asserted by someone defending the status quo, on the one hand, and an initial aggressor who has unsettled a previously existing state of affairs, on the other, is famously associated with Immanuel Kant's analysis of the case of a shipwrecked sailor attempting to dislodge another sailor from a floating plank that will support only one man. FLETCHER, 1 THE GRAMMAR OF CRIMINAL LAW, *supra* note 69, at 49–55. By contrast to the muddled state of affairs under Florida law, consider the more highly theorized account in the German Federal Court's (BGH) appellate decision of November 22, 2000—3 StR 331/00 reported in *Juristenzeitung* 2001, 664, with accompanying commentary by Professor Claus Roxin [hereinafter Roxin decision] (Author's translation on file and available for consultation). The case involves the question of whether lethal force was justifiable self-defense in the case of a would-be assailant who found the tables turned against him. The initial aggressor, intending revenge for injuries suffered in an earlier incident, arranged an illegal cigarette smuggling deal with the eventual victim as a pretext for luring him into a forest so that he could be shot. When the eventual victim realized that the initial aggressor intended to assault him, the victim struck the aggressor with a club before the aggressor had a chance to pull out his weapon. At this point, the victim formed the resolution to kill the aggressor by means of a further club strike. The aggressor defended himself by discharging a lethal double-barreled shotgun blast into the victim. Thus, the aggressor entered the stage intending criminal assault. He ultimately acted with defensive force. The Appellate Court ruled that on these facts, the aggressor was guilty of criminally negligent homicide, because he could have foreseen that the use of deadly force might become necessary to defend his own life as a result of his contemplated assault. Professor Roxin disagreed, reasoning that

a provocateur surprised by a life-threatening attack should not be left defenseless. In the first place, the interests of the attacked person take precedence, as his life must be valued more highly than the readily understandable desire for retaliation on the part of the attacker. Secondly, if the State did not offer adequate protection against private acts of revenge, it would foster lynch law, which runs counter to the purposes of the criminal law. Admittedly, in cases of severe provocation, every other means to extricate oneself from the attack without injury, including even acceptance of definable risks, must be ruled out [before the resort to deadly force is justified.]

Roxin decision, *supra*. Professor Roxin would have acquitted on homicide and convicted for attempted grievous bodily harm.

jurisprudential reflection. Even Oliver Wendell Holmes's aphorism that the life of the common law is not reason but experience reflects a high level of theoretical abstraction and a detached, studied, systematic, perspective.<sup>106</sup> In that spirit, the Supreme Court of the United States might have done better than recognize a constitutional right to self-defense based on historical fantasy. And the Supreme Court of Florida, when it reviews the Stand Your Ground Law, would be well served to avoid consulting Anglo-Floridian origin myths embodied in the aggressively genocidal ghosts of General Andrew Jackson and Colonel William Worth about the scope of legitimate self-defense.<sup>107</sup> It appears to me far more cogent to reflect, once facts are settled to the degree that the evidence admits, on whether George Zimmerman acted preemptively, in anticipatory self-defense, or in actual self-defense, and whether his conduct and relevant provisions of the Florida Code are consistent with coherent criteria for delimiting the boundary between impermissible preemptive assassination and permissible, necessary, proportionate self-defense against an actual (or imminent?) attack. These inquiries are not the stuff of originalism, but of general principles of law gleaned from comparative study and analytic reflection.

## VII. THE WAY FORWARD

Admittedly, to a hardheaded observer, there may seem little realistic chance that the Supreme Court of the United States or a high court in one of the several states stands poised to cast off parochial reflections on allegedly exceptional American origins in favor of investigations into transnational principles of justice any time soon. In the context of the politically-freighted issues of self-defense, gun control, and individual reliance on a Weberian public order, there is every reason to expect American jurists—who seldom swing too far from popular opinion—will remain beholden to popular beliefs in American exceptionalism and the continuing allure of foundation mythology. After all, when Justices Breyer and Scalia meet on the lecture circuit to rejoin the debate over the legitimacy of judicial consultation of foreign and international sources, even Justice Breyer suggests only occasional and modest borrowings from

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<sup>106</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

<sup>107</sup> Jackson, rightly or wrongly, is widely "credited" with originating the genocidal observation that "the only good Indian is a dead Indian." As a rogue General, he conquered Spanish Florida and offered it to the United States for annexation; as President, his signature helped make the Indian Removal Act of 1830 law. Worth pursued liquidation policies during the Seminole War that "pacified" peninsular Florida and opened it to Anglo-American settlement. See BEN KIERNAN, *BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR* 300–34 (2007); RUSSELL F. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY* 137–38, 162–63 (1984).

persuasive but not binding transnational sources.<sup>108</sup> In the sober words of Jeremy Waldron, “We do not live in an age in which uttering magic words like ‘*ius gentium*’ is sufficient to license the practice of basing American legal conclusions on non-American legal premises.”<sup>109</sup> And yet, on closer reflection, it may be that this most charged of political arenas, pitting the antinomian and anarchic champions of an unbridled right to armed self-defense against the statist rear guard urging measured restrictions on resort to force and access to arms, is the ideal forum in which to push serious judicial forays towards internationally inflected principles-based analysis of conflicts and claims.

I suggest two reasons for this counterintuitive nod in an optimistic direction. First—and this has the principal focus of my previous writing on the Second Amendment—the originalist account of the right to armed self-defense is objectively absurd and facially dishonest. If the Miltonian, Jeffersonian, Madisonian, Holmesian, and Brandeisian faith in the marketplace of ideas has any substance at all, in the long run, the originalist celebration of the cult of guns and violence will collapse under its own weight. Second, there is a highly coherent and jurisprudentially sound theory readily available to take its place. That theory is the analytic jurisprudence of self-defense founded in comparative study, cogently expounded in the works of George Fletcher, for current purposes most saliently in *The Grammar of Criminal Law*, which upon completion will run to three volumes covering American, Comparative, and International Criminal Law.<sup>110</sup>

My Second Amendment work to this point reflects my efforts to contribute to the first phase of a three stage process aimed at dismantling the originalist jurisprudence of the right to self-defense and replacing it with something better. The “something better” is already extant, and might be called the “Fletcher School,” founded on general principles of the law of self-defense. The criminal theorists and comparativists working on elaborating these general principles of criminal law are in the process of completing the second phase of the process I envision. My future work in this field will focus on the third stage in the process, namely attempting to import insights from general principles of law into the American jurisprudence of armed self-defense with a view to supplanting the now-ascendant but untenable originalist approach. In the federal courts, windows into this general principles-based discourse might open via substantive due process, privileges and immunities, the Ninth Amendment, emanations from specific provisions of the Bill of Rights (including the

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<sup>108</sup> See Scalia & Breyer, *supra* note 78, at 524.

<sup>109</sup> Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 143 (2005).

<sup>110</sup> FLETCHER, I THE GRAMMAR OF CRIMINAL LAW, *supra* note 69, at vii–xxi.

Second Amendment itself), or frank invocation of natural law. My task going forward will be to help make the case that these pathways are more legitimate than the originalist course I urge forsaking. An enormous challenge lies ahead for those intending, as I do, to make the affirmative case for opening doors long closed, shuttered, and posted with labels warning that entry leads to values-inflected judging and to substitution of judicial will for legislative preferences. But honest confrontation of the jurisprudential substance underlying the debates on the legitimate use of guns ultimately involves the general principles of law, not historical fantasies about settlers and bears or historical realities about civic republican fondness for the militia and distrust of the Army.

### VIII. CONCLUSION

Professor Johnson's well-reasoned argument that it is both bad policy and gravely unjust to deny law-abiding and civic-minded members of the Black community the right to own weapons for self-defense against violent criminals that the police and courts control only imperfectly, if at all, merits serious consideration. I suspect that the right to which Professor Johnson refers also merits constitutional enforcement. That said, the right to self-defense that Professor Johnson references has very little to do with the original public understanding of the Second Amendment. To me, that should not matter. The five Justices who joined the *Heller* and *McDonald* majorities acted in an unprincipled and results-oriented fashion to model an intellectually untenable right to self-defense that depends far too heavily on made-up history. These five Justices, their colleagues on the bench, and constitutionally engaged citizens might do well to reflect on Professor Johnson's narrative, and attempt to root the unwritten right to self-defense that he adumbrates in the American constitutional fabric by some more honest means than puerile fantasies and fetishes about half-imagined ancestors. Principled engagement with the criminal theory of self-defense and our long jurisprudential history of enforcement of non-enumerated and textually unspecified rights through substantive due process strike me as salubrious starting points on the road to constitutional honesty. Poignant reflection on the Black experience as a painfully real alternative to an imagined glorious founding will play an indispensable part in any serious effort to construct an intellectually honest constitutional right to self-defense.