

Natural Law's Return: Uncovering the Roots of Intractability on Guns as Prelude to New Growth

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GUN VIOLENCE IS A MASSIVE, TRAGIC PROBLEM IN AMERICAN life. Looking only at the worst mass shooting events, those with ten or more fatalities—a threshold higher than that set by many definitions of “mass shooting,” which may include those with as few as three or more casualties or fatalities¹—there have been thirty-three such shootings since 1949: one in the late 1940s, none in the 1950s, one in the 1960s, one in the 1970s, five in the 1980s, three in the 1990s, four in the 2000s, *thirteen* in the 2010s, and five so far in the 2020s.² Total gun deaths, including homicides with fewer than ten victims, accidental killings, and suicides, are trending up in

¹ See Marisa Booty, Jayne O'Dwyer, Daniel Webster, Alex McCourt, and Cassandra Crifasi, “Describing a ‘Mass Shooting’: The Role of Databases in Understanding Burden,” *Injury Epidemiology* 6, art. no. 47 (2019): doi.org/10.1186/s40621-019-0226-7, discussing the consequences of the lack of agreed definition for “mass shooting” and providing an overview of the methods used and results reached by Everytown for Gun Safety, the Gun Violence Archive, the FBI’s Supplementary Homicide Report, and *Mother Jones* in their analyses of shootings for the year 2017.

² All but seven of these are listed in “Mass Shootings in the US Fast Facts,” *CNN*, May 3, 2020, web.archive.org/web/20200504172259/edition.cnn.com/2019/08/19/us/mass-shootings-fast-facts/index.html. For the other seven, see “A Motive Is Sought in Slaying of 11 in a Family in Ohio,” *New York Times*, April 1, 1975, 22; Robert D. McFadden, “10 in Brooklyn are Found Slain inside a House,” *New York Times*, April 16, 1984, A1; Bryan Pietsch, Neil Vigdor, and Will Wright, “Gunman Kills 10 in Grocery Store,” *New York Times*, March 23, 2021, www.nytimes.com/2021/03/23/us/boulder-colorado-shooting.html; Hayley Smith, Richard Winton, Maura Dolan, and Leila Miller, “Ten Dead, Including Gunman, in San Jose Rail Yard Mass Shooting; Victims Identified,” *Los Angeles Times*, May 26, 2021, www.latimes.com/california/story/2021-05-26/police-swarm-active-shooter-incident-in-san-jose; Hurubie Meko and Dan Higgins, “Buffalo Gunman Pleads Guilty in Racist Attack that Left 10 Dead,” *New York Times*, November 28, 2022, www.nytimes.com/2022/11/28/nyregion/buffalo-shooting-guilty-plea.html; María Méndez, “Uvalde School Shooting: What We Know One Year Later,” *Texas Tribune*, May 24, 2023, www.texastribune.org/2023/05/24/uvalde-school-shooting-what-to-know; Summer Lin, “Monterey Park Gunman Sent Manifesto to Law Enforcement, Sheriff Says,” *Los Angeles Times*, July 21, 2023, www.latimes.com/california/story/2023-07-21/monterey-park-gunman-sent-manifesto-before-mass-shooting-sheriff-says.

recent years—48,830 in 2021—though the per capita level is lower than the record level reached in 1974,³ raising the macabre question of what an “acceptable” level of gun deaths might look like.

Yet over the last forty years, legal issues pertaining to gun control and gun rights have become among the most intractable in American society. In 1991, Warren Burger, former chief justice of the United States (1969–1986), famously declared that promoting belief in an individual right to bear arms under the Second Amendment was a “fraud” perpetrated on the American public.⁴ In 2008, a very differently constituted Supreme Court than the one Burger had led established as binding precedent the reading Burger had denounced as fraudulent, in the case *District of Columbia v. Heller*. Relatedly, the politics of guns has been similarly tumultuous, with the National Rifle Association on one side and billionaire and former New York City mayor Michael Bloomberg (whose “super PAC” Everytown for Gun Safety often targets NRA-supported candidates) on the other being particular figures of scorn and opprobrium, depending on one’s respective political sympathies.⁵

Intractability has moreover become a signal characteristic of many issues in American life. Alasdair MacIntyre has argued that intractability in moral discourse is the result of incommensurability between liberalism and communitarian moral traditions. More recently, Cathleen Kaveny has argued instead that intractability in US contexts is a consequence of Americans’ eschewing practical moral deliberation in favor of the more polemical prophetic indictment, the latter being a form of “moral chemotherapy” with the potential to kill the patient if used indiscriminately.⁶

While overarching accounts like these are important, I would suggest that at the same time, each issue is intractable for its own sets of reasons. Intractability is never the result of just one or even two factors but rather accounted for by a set of reasons, a perfect storm of weaknesses and gaps in the ability of a society to conduct moral

³ John Gramlich, “What the Data Says about Gun Deaths in the US,” *Pew Research Center*, April 26, 2023, www.pewresearch.org/short-reads/2023/04/26/what-the-data-says-about-gun-deaths-in-the-u-s/.

⁴ Warren Burger, interview with Charlayne Hunter-Gault, *MacNeil/Lehrer NewsHour*, December 16, 1991, YouTube, youtu.be/Eya_k4P-iEo.

⁵ Chris Cillizza and Aaron Blake, “Michael Bloomberg’s One-Man Crusade for Gun Control,” *Washington Post*, December 18, 2012, www.washingtonpost.com/news/the-fix/wp/2012/12/18/michael-bloomberg-the-public-face-of-gun-control-2/; Reid J. Epstein, “Bloomberg’s Gun Control Group Pours \$15 Million into Races in 8 States,” *New York Times*, July 23, 2020, www.nytimes.com/2020/07/23/us/politics/bloomberg-guns.html.

⁶ See Cathleen Kaveny, *Prophecy without Contempt: Religious Discourse in the Public Square* (Cambridge, MA: Harvard University Press, 2016), 15–45, where Kaveny engages MacIntyre directly.

deliberation. Accordingly, in this essay I will unwind some of the history around guns in the US, with a focus on the legal issues precisely because, as Kaveny argues, the law is one of the most important areas of practical moral deliberation.⁷ In this case especially a focus on legal issues is important, as the breakdown in moral reasoning around gun rights and gun control is the single most visible symptom of a shift in legal discourse away from natural-law and common-law reasoning and towards naked positivism. This has resulted in a parsing of the language of the Second Amendment which places far greater weight on the latter's wording than it can reasonably support.

The right to self-defense was originally supported by natural law, and the Second Amendment "right of the people to keep and bear Arms" was both intrinsically bound up with and logically distinct from this natural-law right. By the early twentieth century, natural law was no longer recognized as a valid source for understanding the law. Legal realism and positivism became the dominant modes of legal theory and interpretation, so there was a need to find the natural right in the written language of the Constitution if it was to be cognizable at all. This was achieved to some degree in the *Heller* decision, which is a poor fit—like having to wear two left, wrong-sized shoes.

The *Heller* Court achieved this "forced fit" by arguing that the popularly understood meaning of the Constitution at the time of its adoption—including associated natural rights—is an important source for understanding what the Constitution should mean today. Essentially, this was a way to bootstrap a natural-law understanding of the individual right to self-defense into the positive right guaranteed by the Second Amendment. The problem is that this approach necessarily is an anachronistic enterprise, since it relates only to a snapshot of natural law from the time of the Constitution's adoption and not a meaningful engagement with the natural-law tradition as such.

Could the intractability around gun issues be remedied by renewed engagement between the legal tradition and contemporary natural-law discourse? The answer is unclear. Any problem, however, is made easier to solve by careful analysis of the specific nature of the impasse and the factors that led to distension of the deliberative process in the first place. I would add that before meaningful engagement can occur, both sides need a better understanding of the issues at play. Such are the goals of this essay.

In the first section, I will discuss the history of natural law in US legal tradition, including a discussion of Andrew Forsyth's recent

⁷ Kaveny, *Prophecy without Contempt*, 422.

book *Common Law and Natural Law in America: From the Puritans to the Legal Realists*. As Forsyth persuasively argues, the relationship between natural and common law is more interwoven than generally recognized. In the second section I will summarize the recent history of gun politics. In the third, I will discuss a few of the most relevant cases pertaining to the Second Amendment, including the *Heller* decision, in the context of recent shifts in constitutional theory. In a brief concluding section, I will offer an overview of the current, recently invigorated state of natural-law discourse and describe what a renewed engagement between that discourse and the legal tradition might look like.

I do *not* describe what some *détente* between the warring parties might look like. It is likely that no side will ever convince the other of its moral rightness. The place of guns in American life has been contested throughout this country's history and will continue to be so, long into the foreseeable future. It need not, however, remain a defining fault line in the political landscape and, more to the point, the grim statistics of gun deaths must not continue unabated.

THE INTERTWINED HISTORIES OF COMMON AND NATURAL LAW

Law in the United States generally follows the forms of reason of the common law, taken to mean that all law is understood according to binding judicial case opinions known as case law. Originally, the term "common law" described the law "common" to all of England, as opposed to local custom. Over time the phrase came to distinguish the "common law" legal systems of England and its colonial progeny (including the US and forty-nine of fifty US states) from the "civil law" system used in those Continental nations such as France and Spain descended from the Roman law tradition and their colonial progeny (including the US state of Louisiana). These civil law systems traditionally have given little weight to interpretative judicial opinions and look to the legal codes anew when applying them. Moreover, the nature of judicial inquiry in civil law jurisdictions is often administrative or investigatory rather than conducted by an impartial arbiter within a co-equal branch of government distinct from the executive and legislative. The phrase "civil law" itself is derived from the Roman *ius civile*, which referred in the Roman legal system to the positive national laws of a state, contrasted to the *ius gentium* (law of all nations) and the *ius naturale* (natural law).⁸

Within the current US legal system, there is a continuum between areas of law mostly dominated by codes, such as criminal law, and areas where the controlling law consists almost entirely of case law,

⁸ Daniel R. Coquillette, *The Anglo-American Legal Heritage: Introductory Materials*, second ed. (Durham, NC: Carolina Academic Press, 2004), 7–8.

such as torts (the area of law that includes private causes of action such as negligence), with contract law somewhere in the middle. Criminal law used to be closer to contract law and torts, but this changed with the promulgation of the Model Penal Code, published in 1962 by the American Law Institute as an advisory document for states.⁹ The MPC served as a template for many states to systematize their criminal codes, an opportunity to reform or reject doctrines which existed in case law alone. The trend towards codification and standardization extended to procedural areas as well. For example, the Federal Rules of Evidence were adopted in 1975, replacing a motley set of common-law rules which had governed the topic. Even after this wave of codification, however, the role of the common-law judge remained unchallenged, with judicial precedent still maintaining an important, often dispositive role.¹⁰ While the role of the judge remained unchallenged, the theoretical basis for the role, as well as the judge's proper function, increasingly came into question.

Under the traditional "declaratory theory" of common law, judges never make law, they merely announce what the law has always been.¹¹ This understanding was originally based (at least in part) in natural law, where common law functioned as human law had for Aquinas—that is, as conclusions from and specifications of natural law.¹² With the rise of codification in the twentieth century, there was the potential for fundamental mismatch between statutes and regulations increasingly understood as positive law and the natural-law-based practices and reasoning of common law. One can shift emphasis to the natural-law basis for the legislature to *make* the law or for the authority of nation-state-based legal systems more broadly (as Jean Porter does in her book *Ministers of the Law: A Natural Law Theory of Legal Authority*), but that is not a small shift.¹³

The potential mismatch never quite came to pass, however, due to the erosion of any role the natural law might play, a shift that occurred

⁹ Paul H. Robinson and Markus D. Dubber, "The American Model Penal Code: A Brief Overview," *New Criminal Law Review* 10, no. 3 (Summer 2007): 324.

¹⁰ Anders Walker, "The New Common Law: Courts, Culture, and the Localization of the Model Penal Code," *Hastings Law Journal* 62, no. 6 (July 2011): 1634–1635. See also Mark D. Rosen, "What Has Happened to the Common Law? Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development," *Wisconsin Law Review* 1994, no. 5 (1994): 1119–1286.

¹¹ Allan Beever, "The Declaratory Theory of Law," *Oxford Journal of Legal Studies* 33, no. 3 (2013): 425–426.

¹² Also operative here were custom and (often legendary) claims about the now-lost written laws of the Anglo-Saxons. See generally Candace Barrington and Sebastian Sobocki, eds., *Cambridge Companion to Medieval English Law and Literature* (Cambridge: Cambridge University Press, 2019), 1–80.

¹³ Jean Porter, *Ministers of the Law: A Natural Law Theory of Legal Authority* (Grand Rapids, MI: Eerdmans, 2010).

during the early decades of the twentieth century.¹⁴ While this decline in a natural-law basis for common law and the rise of codification several decades later were not directly related, it seems fair to say that the former cleared the way for the latter, and conversely that the latter trend solidified the former.

By the postwar period, to some extent it was *all* positive law, at least insofar as all law, whether statutory or case law, had been severed from its natural-law roots. For some commentators, the longstanding, historical role that common-law judges had played as a check on legislative and executive power was now its own argument for the continuation of the practice.¹⁵ In a democracy, however, with its rhetorical commitments to majoritarian rule, that was (and is) a difficult argument to make.

The problem became manifest as a result of a series of progressive decisions by the Warren Court perceived by some as lacking popular assent. In the absence of natural law as a basis for the judge's authority or as a distinct source of law for common-law reasoning, a backlash against these decisions occurred, and a theory of constitutional "originalism," with its focus on the "original intent" of the Constitution, soon came to prominence. The *judges* might no longer have authority as instruments of natural law, but at least the US Constitution, the *writing* they were charged with interpreting (and which in a positivist sense gave them their power under Article III), might. For conservatives, originalism solved the problem of a judge's authority, left murky in the aftermath of natural law's demise, but it did so as a one-way ratchet with regard to outcomes, since it precluded the progressive interpretations of the Constitution that had been a hallmark of the Warren era.

This demise notwithstanding, Andrew Forsyth has recently attempted to restore an understanding of the role of natural law in US legal history with his book *Common Law and Natural Law in America: From the Puritans to the Legal Realists*, which examines selected periods in US history from the colonial era to the early decades of the twentieth century and the subsequent rise of the legal realists. Forsyth describes the role natural law had in the Puritans' approach to the legal system as well as for the early colleges they founded.¹⁶ He states, "Such a [natural-law] vision [of society] simply

¹⁴ See especially Oliver Wendell Holmes, "Natural Law," *Harvard Law Review* 32, no. 1 (November 1918): 40–44.

¹⁵ David A. Strauss, *The Living Constitution* (New York: Oxford University Press, 2010), 37–38.

¹⁶ The natural law of the Puritans had marked differences from the Catholic natural-law tradition. Due to their Calvinist theology, the Puritans understood natural law as (one might say) composed in a minor but sonorous key. For an early analysis, see John

formed the background assumptions of the age: rationality and morality go together, they thought, and human laws accordingly derive their authority from their correspondence with the moral order.”¹⁷ As insightful as nearly all of Forsyth’s book is, his chapter on William Blackstone is most relevant to the discussion here.

William Blackstone (1723–1780), the first Oxford professor of common law, is most well known in the United States for his *Commentaries on the Laws of England*, published from 1765 to 1769 and based on lectures he delivered at Oxford. The *Commentaries* are Blackstone’s four-volume compendium of English common law, but the impact of the Blackstone *Commentaries* far exceeds this brief description. By way of comparison, the best parallel in the history of moral theology, both in scope and impact, might be Peter Lombard’s *Sentences*, also in four volumes.

As Forsyth explains, Blackstone weaves natural law into his description of English common law in a variety of ways. At the general level, Blackstone affirms that “knowledge of ... principles [of good and evil] is available through the exercise of right reason,” even though, following Locke, “human reason is sufficiently weakened that it needs the support of the revealed law of Scripture.”¹⁸ This is very close to the classic definition of synderesis, the “understanding of principles” (ST I q. 79, a. 12) of good and evil that “survived even the Fall”¹⁹ and makes the application of right reason to understand natural law possible.²⁰ Similarly, human law is only right or wrong based on its consonance with natural law, at least where natural law is not silent.²¹ Natural law also provides Blackstone with the organizational structure of common law. Forsyth states, “With Blackstone’s eighteenth-century adoption and adaptation of natural-law concepts, he transformed a list of writs into a system of concepts and categories.”²² But natural law not only supplies first principles and organizing structures to common law generally, it also

D. Eusden, “Natural Law and Covenant Theology in New England, 1620–1670,” *Natural Law Forum* 5 (1960): 1–30.

¹⁷ Andrew Forsyth, *Common Law and Natural Law in America: From the Puritans to the Legal Realists* (New York: Cambridge University Press, 2019), 23.

¹⁸ Forsyth, *Common Law and Natural Law in America*, 51, 52.

¹⁹ Kenneth R. Himes, OFM, “The Formation of Conscience: The Sin of Sloth and the Significance of Spirituality,” in *Spirituality and Moral Theology: Essays from a Pastoral Perspective*, ed. James Keating (New York: Paulist, 2000), 60.

²⁰ For Aquinas, “All other precepts of the natural law are based upon ... [what is known through synderesis, to do good and avoid evil]: so that whatever the practical reason naturally apprehends as man’s good (or evil) belongs to the precepts of the natural law as something to be done or avoided” (ST I-II q. 94, a. 2). “Wherefore we judge naturally both by our reason and by ‘synderesis’” (ST I q. 79, a. 12, ad 3).

²¹ Forsyth, *Common Law and Natural Law in America*, 55–56.

²² Forsyth, *Common Law and Natural Law in America*, 57.

undergirds, explains, and justifies specific laws or defenses. ... [For example,] in volume three [published in 1768], concerning private wrongs, Blackstone suggests that the best justification of self-defense is the prompting of nature. Self-defense, indeed, is “justly called the primary law of nature,” he says, because of its direct relationship to the human drive to survival.²³

Blackstone’s opponents, both contemporary and modern, accuse him of invoking natural law to bolster his defense of the status quo.²⁴ These opponents omit, argues Forsyth, the occasions when Blackstone invokes natural law to critique specific existing laws, particularly the disproportionate and arbitrary use of capital punishment.²⁵ As Forsyth states, “Blackstone recognizes ... that human positive law stands in tension with natural law.”²⁶ He concludes:

[For Blackstone], in matters of legal determination, human law is in conversation with natural law. And this conversation, he suggests, is not one in which natural law necessarily has the final word. One result is that natural law may explain and stabilize human laws while simultaneously rendering them contingent and revisable. Given the realities of sin, says Blackstone, human reason must be suitably modest in its claims to track natural law’s revelation of God’s reason and will.²⁷

Ultimately, Blackstone’s success in weaving natural and common law together may have had a paradoxical effect, in that by tying the two together so well, he muddled the distinction between them and made possible the eclipsing of natural law by common law in the work of his successors. Forsyth states, “Believing natural law to structure the law of England, and to serve, with divine law, as one of its foundations, Blackstone devotes little time to distinguishing natural law from English common law. In his treatment of laws, penalties, and procedures, natural law and common law are combined or separated depending on immediate context.”²⁸ After years of updates and competitors, written by Joseph Story and others, “The *Commentaries* slipped from the prescriptive to the historical: a book consulted for what the law *is* became a record of what the law once *was*.”²⁹ As we

²³ Forsyth, *Common Law and Natural Law in America*, 58.

²⁴ See most notably Duncan Kennedy, “The Structure of Blackstone’s *Commentaries*,” *Buffalo Law Review* 28, no. 2 (Spring 1979): 205–382.

²⁵ Forsyth, *Common Law and Natural Law in America*, 59.

²⁶ Forsyth, *Common Law and Natural Law in America*, 61.

²⁷ Forsyth, *Common Law and Natural Law in America*, 69.

²⁸ Forsyth, *Common Law and Natural Law in America*, 60.

²⁹ Forsyth, *Common Law and Natural Law in America*, 68.

will see, this would have special relevance in debates about the Second Amendment.

GUN POLITICS

As has been well documented, while the National Rifle Association has roots going back to the nineteenth century, a major turning point in its recent history occurred in 1977, when conservative gun activists led by Harlon Carter and Neal Knox staged a takeover of NRA leadership at the annual meeting, known as the Cincinnati Revolt, named after the city where the meeting was held. With the federal Omnibus Crime Control and Safe Streets Act and the Gun Control Act of 1968 passed in the aftermath of a wave of political assassinations and the perception of growing urban crime, gun advocates were on the defensive. Prior to 1977, the NRA had adamantly opposed gun control legislation,³⁰ but for its conservative members, it was not adamant enough. As one of the activists explained the perception motivating the “revolt,” “Before Cincinnati, you had a bunch of people who wanted to turn the NRA into a sports publishing organization and get rid of guns.”³¹ In the words of legal scholar Reva B. Siegel:

What the insurgents wanted was freedom for the ILA [the Institute for Legislative Action, the NRA's lobbying arm created two years prior] to defend “the political, civil, and inalienable rights of the American people to keep and bear arms as a common law and Constitutional right both of the individual citizen and of the collective militia.” Thereafter, *American Rifleman* ran an article reporting on the difference between a “collective” right and an “individual” right interpretation of the Second Amendment, and insisting that reports of Supreme Court precedents to the contrary were mistaken: the collective right view could not be historically or legally substantiated.³²

³⁰ See James E. Serven, ed., *Americans and Their Guns: The National Rifle Association Story through Nearly a Century of Service to the Nation*, compiled by James B. Trefethen (Harrisburg, PA: Stackpole, 1967), 290–302.

³¹ Joel Achenbach, Scott Higham, and Sari Horwitz, “How NRA's True Believers Converted a Marksmanship Group into a Mighty Gun Lobby,” *Washington Post*, January 12, 2013, www.washingtonpost.com/politics/how-nras-true-believers-converted-a-marksmanship-group-into-a-mighty-gun-lobby/2013/01/12/51c62288-59b9-11e2-88d0-c4cf65c3ad15_story.html. See also Andrew C. McKeivitt, *Gun Country: Gun Capitalism, Culture, and Control in Cold War America* (Chapel Hill: University of North Carolina Press, forthcoming).

³² Reva B. Siegel, “Dead or Alive: Originalism as Popular Constitutionalism in *Heller*,” in *The Second Amendment on Trial: Critical Essays on District of Columbia v. Heller*, ed. Saul Cornell and Nathan Kozuskanich (Amherst: University of Massachusetts Press, 2013), 95, citing Joseph P. Tartaro, *Revolt at Cincinnati* (Buffalo, NY: Hawkeye, 1981), 36, and “Institute Reports: The Right to Keep and

It should be kept in mind that this “takeover” or redirection was part of a national mobilization of conservative activism. In 1968, during its annual convention—held the very week Senator Robert Kennedy was assassinated in California—the Southern Baptist Convention passed a resolution commending President Lyndon Johnson for his attempt to “pass laws to bring the insane traffic in guns to a halt.”³³ In 1979, it too was subject to a conservative takeover of its leadership, resulting in a radical redirection of that organization continuing to this day. This multifront activism culminated in 1980, when Ronald Reagan, whose 1976 political campaign had been fueled by conservative grievance symbolized by his mocking of an unnamed “welfare queen” in Chicago,³⁴ was elected president in a landslide vote.³⁵

The outsize importance of the NRA’s lobbying efforts is often noted.³⁶ Not only does the NRA publish ratings for members of Congress and other elected officials with regard to their positions on gun control, they also have aggressively gone after scholarship which might reveal their arguments as specious. After historian Saul Cornell published his history on the Second Amendment in 2006 which was critical of an individual right to bear arms,³⁷ the NRA took the unusual step of paying a gun-rights advocate \$15,000 to write a highly critical review of the book, “a truly staggering amount of money when one considers that academic book reviews and articles are typically written without any compensation.”³⁸

Paying attention only to the NRA’s political lobbying and public advocacy campaigns still does not give the whole picture. Two

Bear Arms; An Analysis of the Second Amendment,” *American Rifleman*, August 1977, 37.

³³ “LBJ Commended in Effort to Get Stronger Gun Control Law,” *Biblical Recorder* (NC), June 15, 1968, 9.

³⁴ “‘Welfare Queen’ Becomes Issue in Reagan Campaign,” *New York Times*, February 15, 1976, 51; Gillian Brockell, “She was Stereotyped as ‘The Welfare Queen.’ The Truth was More Disturbing, a New Book Says,” *Washington Post*, May 21, 2019, www.washingtonpost.com/history/2019/05/21/she-was-stereotyped-welfare-queen-truth-was-more-disturbing-new-book-says.

³⁵ See Daniel Schlozman, “From the Moral Majority to Karl Rove,” in *When Movements Anchor Parties: Electoral Alignments in American History* (Princeton, NJ: Princeton University Press, 2015), 198–222.

³⁶ See Louis Jacobson, “Counting Up How Much the NRA Spends on Campaigns and Lobbying,” *Politifact*, October 11, 2017, www.politifact.com/article/2017/oct/11/counting-up-how-much-nra-spends. See also Frank Smyth, *The NRA: The Unauthorized History* (New York: Flatiron, 2020).

³⁷ Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (New York: Oxford University Press, 2006).

³⁸ Saul Cornell and Nathan Kozuskanich, “Introduction: The DC Gun Case,” in *The Second Amendment on Trial*, 10.

broader developments must also be borne in mind. First, the NRA's rise in political power coincides with the decline of the political parties' institutional importance. Throughout much of US history, the parties played a central role in selecting candidates for the general election. With the rise of party primaries instead of caucuses, the process was significantly democratized, though parties continued to play a large role. In 1976, the Supreme Court case *Buckley v. Valeo* struck down the cap on independent campaign expenditures included in campaign finance reform legislation passed in the wake of Vice President Spiro Agnew's resignation and the wider Nixon-related scandals. The Court's rationale was that in a modern context, money equals speech and therefore held that the limit on independent expenditures violated the First Amendment's free speech protections.³⁹ Even though donations to political parties for party-building activities and "get the vote out" efforts (known as "soft money") were not affected by the campaign reform legislation (or addressed by the Court), the upshot was that political parties were no longer the exclusive nexus for candidate financing they once were.

In 2002, another wave of campaign finance reform purported to limit "soft money" contributions as well, though the parties and lobbyists eventually found ways around these limitations.⁴⁰ Even so, the hampering effect on party fundraising due to this new legislation, though eventually circumvented, likely served to solidify the preexisting trend of outside groups directly financing campaign advertising, and taken together these developments allowed for the supplanting of the political parties' role in selecting candidates for the general election, in favor of an independently funded ad war carried out during primary elections in local television markets and online.⁴¹

³⁹ See Daniel Liechty, "Campaign Finance Reform," in *Culture Wars: An Encyclopedia of Issues, Viewpoints, and Voices*, vol. 1, ed. Roger Chapman (Armonk, NY: M. E. Sharpe, 2009), 67–68.

⁴⁰ See Andrew Kreighbaum, "Supreme Court Reaffirms Ban on Soft Money, Once a Powerful Factor in Political Campaigns," *OpenSecrets.org*, June 29, 2010, www.opensecrets.org/news/2010/06/supreme-court-re-affirms-ban-on-soft-money; Carrie Levine, "Soft Money Is Back—And Both Parties Are Cashing In: Critics Deride the Practice as 'Legalized Money Laundering,'" *Politico Magazine*, August 4, 2017, www.politico.com/magazine/story/2017/08/04/soft-money-is-back-and-both-parties-are-cashing-in-215456.

⁴¹ Legally, such expenditures are not supposed to be coordinated with the candidate's campaign committee, but this prohibition is difficult to enforce. See US Federal Election Commission, "Making Independent Expenditures," www.fec.gov/help-candidates-and-committees/making-independent-expenditures; Trevor Potter, "The Failed Promise of Unlimited 'Independent' Spending in Elections," *Human Rights* 45, no. 3 (June 25, 2020): www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/the-failed-promise-of-unlimited-independent-spending.

Second, also over this same time period, there has been a shift in political strategy in many general election campaigns. Throughout much of the postwar period, candidates in general elections in the US generally tried to appeal to median voters to win the necessary majority. Because the means for identifying, persuading, and then turning out these voters at the polls were relatively crude, the conventional wisdom was to aim for winning by as big a margin of victory as possible, or at least by a comfortable one. As recently as the 2000 presidential campaign, this was still the dominant strategy. With George W. Bush's reelection campaign in 2004, however, chief campaign strategist Karl Rove took advantage of new comprehensive voter databases enabling analysis of past voting behavior, combined with marketing data about the best ways to persuade voters and then get them to turn out to vote, to make a radical shift from a "median-voter" to a "base-voter" strategy. Moreover, because this data was able to predict behavior with such accuracy, there was no longer a need to build a large coalition. It has long been a truism in politics that a candidate only *needs* fifty percent of the votes plus one to win. With the new targeted voting strategies, this could be done with precision.⁴² In this environment, the NRA's ability to generate a highly cohesive group identity,⁴³ increasingly aligned with the Republican party exclusively,⁴⁴ was a perfect fit. The collateral ability of the NRA to funnel donations to various Republican causes⁴⁵—in some cases

⁴² See "2004: The Base Strategy," www.pbs.org/wgbh/pages/frontline/shows/architect/rove/2004.html, and "How Rove Targeted the Republican Vote," www.pbs.org/wgbh/pages/frontline/shows/architect/rove/metrics.html, interview transcripts from *Frontline*, "Karl Rove—The Architect," written, produced, and directed by Michael Kirk, aired April 12, 2005, on PBS; Todd Purdum, "Karl Rove's Split Personality," *Vanity Fair*, October 30, 2006, www.vanityfair.com/news/2006/12/rove200612.

⁴³ See Kimberly D. Elsbach and C. B. Bhattacharya, "Defining Who You Are by What You're Not: Organizational Disidentification and the National Rifle Association," *Organization Science* 12, no. 4 (July–August 2001): 393–413; Matthew J. Lacombe, "The Political Weaponization of Gun Owners: The National Rifle Association's Cultivation, Dissemination, and Use of a Group Social Identity," *Journal of Politics* 81, no. 4 (October 2019): 1342–1356; Kevin Lewis O'Neill, "Armed Citizens and the Stories They Tell: The National Rifle Association's Achievement of Terror and Masculinity," *Men and Masculinities* 9, no. 4 (April 2007): 457–475.

⁴⁴ See Amber Phillips, "The NRA-ification of the Republican Party," *Washington Post*, August 14, 2015, www.washingtonpost.com/news/the-fix/wp/2015/08/14/the-nra-ification-of-the-republican-party/; and Karen Pinchin, "With NRA under Investigation, Former Fundraiser Says Gun Group Is Republican 'Through and Through,'" *Frontline*, March 24, 2020, www.pbs.org/wgbh/frontline/article/aaron-davis-nra-lapierre-trump-republican-investigation-guns.

⁴⁵ See Alex Isenstadt, "NRA Meltdown Has Trump Campaign Sweating," *Politico*, July 3, 2019, www.politico.com/story/2019/07/03/nra-guns-trump-campaign-1395970; Luke Johnson, "NRA's 2016 Donation to Trump's Campaign Pays Off," *Fortune*, August 21, 2019, fortune.com/2019/08/21/how-much-did-nra-contribute-trump-campaign.

allegedly including funds from foreign sources⁴⁶—in the context of the various limitations placed on campaign fundraising mentioned above only tightened the relationship further.

Stepping back for a moment, we can see the detrimental effect this fragmentation of the electorate into minute segments—each given a narrowly tailored message designed to generate political campaign donations and voter turnout—would have on all political discourse, not just discourse around guns. More specifically, we might say that it both takes advantage of and exacerbates the breakdown of “Cold War liberalism”⁴⁷ as a unifying Rawlsian public reason. In the aftermath, “neutral” public reason seems to be a dog’s breakfast of legal and constitutional textual analysis, scientific research (which finds itself increasingly politicized, whether in the context of climate change or public health), economic growth measured in capitalist metrics (“jobs!” referring to quantity not quality, and worker productivity not satisfaction), and an individualistic, blandly spiritual-but-not-religious right to happiness, played out in a field of Machiavellian power politics—which the recent infatuation with game theory has encouraged—fueled in many cases by ideology serving only as opportunistic means for personal ambition. Everything else, under the guise of libertarianism, is relegated to private morality.

Notice that I included legal and constitutional textual analysis in this list as one of the few areas still putatively broadly accessible as a form of public reason in the US. In the absence of a broader, socially, culturally, philosophically, and theologically “thicker” public reason (of the type a retrieved natural-law tradition might provide), it is unclear how long the US can abide by a constitutional process where the literal interpretation of *any* bare text is the only recourse for resolving some of the most complicated political issues, such as those involving guns. As I have explained in this section, the problem is not only legal. Rather, a variety of political factors have conspired to place more pressure on the legal system and its modes of reasoning than they

⁴⁶ See Chris Smith, “‘Coincidence Number 395’: The NRA Spent \$30 Million To Elect Trump. Was It Russian Money?,” *Vanity Fair*, June 21, 2018, www.vanityfair.com/news/2018/06/the-nra-spent-dollar30-million-to-elect-trump-was-it-russian-money; “Timeline of Russian Plot to Infiltrate NRA and GOP,” *CBS News*, September 10, 2018, www.cbsnews.com/news/time-line-of-russian-plot-to-infiltrate-nra-and-gop; Mark Maremont and Julie Bykowicz, “NRA’s Ties to Russian Nationals Alleged in New Report,” *Wall Street Journal*, September 27, 2019, www.wsj.com/articles/nras-ties-to-russian-nationals-detailed-in-new-report-11569593888; Heather Cox Richardson, “The NRA within the Sights,” *BillMoyers.com*, August 7, 2020, billmoyers.com/story/the-nra-within-the-sights.

⁴⁷ On Cold War liberalism, see Jan-Werner Müller, “Calming the Ideological Storms? Reflections on Cold War Liberalism,” in *Ideological Storms: Intellectuals, Dictators, and the Totalitarian Temptation*, ed. Vladimir Tismaneanu and Bogdan C. Iacob (New York: Central European University Press, 2019): 465–485.

may be able to bear—at least that is a question to keep in mind for the succeeding sections of this essay.

HELLER AND ITS PROGENY IN THE CONTEXT OF CONSTITUTIONAL LITIGATION AND THEORY

As described above, originalism arose in the 1970s as a reaction to the perception that judges lacked a proper basis—implicitly in natural law, though it was not framed this way—for the power they were able to wield, and specifically to the relative indifference to the written Constitution shown in some “decisions of the Warren and early Burger Courts, which by the standards of the time, aggressively protected the rights of racial and religious minorities, women, and criminal defendants.”⁴⁸ For the supporters of these decisions and the civil rights advances they represented, originalism represented an attack on these advances; for the decisions’ critics, originalism was “predominantly a theory of judicial restraint.”⁴⁹ Over this same period, the opposite of originalism came to be known as “living constitutionalism,” the idea that the constitution is a living document that should be interpreted differently in different times.⁵⁰

It is widely observed that until *Heller* in 2008, the Supreme Court had never ruled on the issue of whether the Constitution guarantees a collective right to bear arms or an individual one, and there was a paucity of opinions by lower courts on this issue as well. In 1994, constitutional scholar William Van Alstyne attributed this dearth of relevant case law to the absence of substantial effort to regulate personal gun ownership and use until the twentieth century,⁵¹ though the subsequent work of Saul Cornell and other historians belies this assertion.⁵² Again, though, there were broader trends at work.

For one thing, the rise in popularity of suing for money damages for a violation of one’s constitutional rights seems likely to have contributed to perceiving one’s rights under the constitution as primarily *individual*. Major turning points here were *Monroe v. Pape* (1961) and *Monell v. Department of Social Services of the City of New*

⁴⁸ Andrew Coan, “Living Constitutional Theory,” *Duke Law Journal Online* 66 (June 2017): 101, scholarship.law.duke.edu/dlj_online/26/.

⁴⁹ Coan, “Living Constitutional Theory,” 101.

⁵⁰ See Lawrence Solum, “Legal Theory Lexicon: Living Constitutionalism,” *Legal Theory Blog*, November 25, 2018, lsolum.typepad.com/legaltheory/2018/11/legal-theory-lexicon-living-constitutionalism.html.

⁵¹ William Van Alstyne, “The Second Amendment and the Personal Right to Arms,” *Duke Law Journal* 43, no. 6 (April 1994): 1240.

⁵² See Kevin M. Sweeney, “Firearms, Militias, and the Second Amendment,” in *The Second Amendment on Trial*, 310–382.

York (1978),⁵³ offering new interpretations of 42 U.S.C. § 1983, the Reconstruction-era statute which allowed an individual cause of action for the violation of certain constitutional rights. While actions for injunctive relief (such as *Heller*) could be brought before that—and in the area of the Second Amendment, they were—the rise of individual actions for damages would at least partially explain why belief in an *individual* right to bear arms became prominent in the national consciousness and why litigation over this issue became more common after this development. As constitutional scholar Walter Dellinger wrote during this era in a related context, “Once it is admitted that the Constitution may be used as a sword in litigation, the issues raised, unsurprisingly, extend far beyond the specific questions litigated.”⁵⁴ This increasing focus on individual rights coincided with the rise in US contexts of what might be termed the “opt-out conscience,” the notion that an individual should be exempted from a generally applicable rule based on the demands of conscience; obviously if one can claim the protection of a constitutional provision for a right to opt-out (in this case, from gun control provisions), all the better.⁵⁵

Moreover, *because* so many constitutional issues are now litigated as arising under § 1983, the courts have adopted certain rules for dealing with such claims which tend to carry over to constitutional theory more generally. For example, when a constitutional violation is alleged in a § 1983 case, “the first step ... is to identify the specific constitutional right allegedly infringed.”⁵⁶ There is a way to allege a violation of a right *not* specifically enumerated in the Constitution, the “substantive due process claim,” a claim pertaining to rights “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”⁵⁷ As such, their denial is deemed to constitute a potential violation of the Due Process Clause “regardless of the fairness of the procedures used” to do so.⁵⁸ Because of the courts’ strong preference to avoid substantive due process claims or identify fundamental rights where there already is a constitutional provision that seems to pertain, the courts will almost always decide the case

⁵³ *Monroe v. Pape*, 365 US 167 (1961), and *Monell v. Department of Social Services of the City of New York*, 436 US 658 (1978).

⁵⁴ Walter E. Dellinger, “Of Rights and Remedies: The Constitution as a Sword,” *Harvard Law Review* 85, no. 8 (June 1972): 1564. Decades later, Dellinger was the lawyer who argued *Heller* on behalf of the District of Columbia in the Supreme Court.

⁵⁵ See James Keenan, SJ, “Redeeming Conscience,” *Theological Studies* 76, no. 1 (2015): 134–135.

⁵⁶ *Albright v. Oliver*, 510 US 266, 271 (1994). Internal citations and quotation marks in case quotations are omitted throughout.

⁵⁷ *Albright*, 282.

⁵⁸ *Daniels v. Williams*, 474 US 327, 331 (1986).

under the apparently applicable provision. As the Supreme Court stated in *Albright v. Oliver* (1994), “Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.”⁵⁹ The *Albright* Court justified its extreme reluctance to rely on Fourteenth Amendment substantive due process doctrine by referring to the “scarce and open-ended guideposts” associated with substantive due process analysis.⁶⁰

This at least helps explain why cases—such as *Heller*—involving an *individual’s* right to carry a gun are framed and funneled through the Second Amendment (instead of some generalized natural- or common-law right), despite the Amendment’s seeming inappositeness to such cases based on its language associating the right to bear arms with “a well-regulated militia.” Cornell has pointed out that confusion over whether the Second Amendment protects the right to bear arms solely in the context of a militia formed for the “public defense” versus “the individual right to bear a gun in self-defense” is not *completely* novel and has roots dating to the Jacksonian era.⁶¹ The Court’s overwhelming preference for deciding cases based on explicit rights rather than implicit ones seems to have made a Second Amendment framing for cases alleging an individual right all but certain. Ironically, the fact that there was wide historical consensus in the twentieth century that the Second Amendment had been rendered anachronistic by the “replace[ment] [of] the Founding era’s universal militia with the modern National Guard,” thereby restricting the Amendment’s applicability to “participants in legally sanctioned military organizations,”⁶² only heightened the availability of the Amendment for use as a vehicle for individual gun rights, insofar as the Amendment had been vacated of its original meaning and thus there was no competing contemporaneous use of it in a different context which might make its reinterpretation more difficult.

A last background factor for consideration here is the slow evolution of the “selective incorporation doctrine,” the principle that many (though not all) of the rights contained in the Bill of Rights, which on their own terms apply only to the federal government, were made applicable to the states via the Fourteenth Amendment, adopted in 1868 as part of Reconstruction. While Cornell’s historical research has highlighted the high degree of weapons regulation which appertained to militia participation during the Revolutionary period,

⁵⁹ *Albright*, 273.

⁶⁰ *Albright*, 275. See more recently *NASA v. Nelson*, 562 US 134, 147, n. 10 (2011).

⁶¹ Cornell, *A Well-Regulated Militia*, 4.

⁶² Cornell, *A Well-Regulated Militia*, 6.

laws forbidding the carrying of handguns and other concealed weapons—that is, laws of the type most objected to by gun-rights activists—were largely a nineteenth-century initiative in state legislatures, and therefore a matter whose limits were a matter of state constitutional interpretation.⁶³ It was only in the twentieth century, in the context of a broader shift to federal regulation in many areas of American life, that *this* type of gun regulation was taken up at the national level,⁶⁴ and thus it took some time for the issue to be presented as one for the federal courts. Since it is easier for the Court to apply a reading of the Second Amendment that includes an individual right to bear arms to the states via the Fourteenth Amendment when it has already found such a right to exist in the first place, there was no rule to even apply to the states (that is, restricting a state or local government from regulating firearms) until the new rule was devised with regard to the federal government itself.

With this context as background, on its face *District of Columbia v. Heller* is a straightforwardly originalist decision. In the opinion, written by Justice Scalia, the Court first parsed the structure of the Second Amendment, deciding that the Amendment is “naturally divided into two parts: its prefatory clause and its operative clause” and that the prefatory clause serves only to clarify situations not resolvable by the operative clause.⁶⁵ The remainder of the opinion decides the case by applying the operative clause alone, essentially rendering the prefatory clause “a well regulated militia, being necessary to the security of a free State” a nullity. The Court analyzed the language of the operative clause in its historical context, especially the phrases “the people” and “keep and bear arms”⁶⁶—including an analysis of the Amendment’s reception history⁶⁷—to determine whether these indicate an individual or collective right. Finding that they support an individual right and that no precedent of the Court precludes such a reading,⁶⁸ the Court then determined the individual right to exist and struck down the general prohibition on possession of handguns at issue in the case.⁶⁹ In doing so, however, the Court specified that the Second Amendment right to bear arms only applied

⁶³ Cornell, *A Well-Regulated Militia*, 4–5.

⁶⁴ The National Firearms Act was enacted in 1934, which Cornell calls “the first comprehensive federal firearms law” (*A Well-Regulated Militia*, 200). Nonetheless, even today the majority of firearms restrictions are matters of state and local law.

⁶⁵ *District of Columbia v. Heller*, 554 US 570, 577 (2008).

⁶⁶ *Heller*, 579–595.

⁶⁷ *Heller*, 605–619.

⁶⁸ *Heller*, 619–626.

⁶⁹ The challenged weapons regulation was enacted by the local government of the District of Columbia. Because DC is under direct federal jurisdiction (and not part of any state), the incorporation doctrine was not at issue.

originally to those weapons “in common use at the time” and did not include “dangerous and unusual weapons”⁷⁰ and that the Court would apply the Amendment similarly today—notwithstanding that such a reading would preclude allowing the type of weapons necessary to modern military applications. The Court stated, “Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.”⁷¹

Straightforward enough, right? The problem is, the *Heller* opinion is both bad history and bad constitutional theory. The opinion is bad history because, as a threshold matter, the framing of the question as one of individual versus collective rights is anachronistic. As Cornell has stated, “The original understanding of the Second Amendment was neither an individual right of self-defense nor a collective right of the states, but rather a civic right that guaranteed that citizens would be able to keep and bear those arms needed to meet their legal obligation to participate in a well-regulated militia.”⁷² Stated differently, we might say that the Second Amendment right to bear arms was a civic imperative that vested as an individual right, indivisible from one other. That this imperative was understood in the broader context of a natural-law or common-law right to individual self-defense is uncontested, as Cornell and Kozuskanich admit: “There is little disagreement among scholars that an individual right of self-defense was well understood to be protected under common law.”⁷³ But that is not the same as saying that the individual right to keep and bear arms for self-defense, severed from the civic imperative, was protected activity under the Second Amendment as it was originally understood.

More generally, an originalist understanding of the Bill of Rights might not require the individual right of self-defense to be found in the words of the Second Amendment itself to be valid—nor would such a right necessarily be vitiated by the Amendment’s repeal. On this point, it is helpful to note James Madison’s perspective on the Bill of Rights and his initial reluctance to write it for fear that to enumerate a few rights would be interpreted as excluding those not listed—the legal canon of construction here is *expressio unius est exclusio alterius*—hence the explicit statement in the Ninth Amendment that the people retain all rights not otherwise mentioned. Madison was persuaded to write the Bill of Rights in order to obtain assent to ratification of the

⁷⁰ *Heller*, 627.

⁷¹ *Heller*, 627–628.

⁷² Cornell, *A Well-Regulated Militia*, 2.

⁷³ Cornell and Kozuskanich, “Introduction: The DC Gun Case,” 11.

Constitution by certain holdouts who insisted on its inclusion, though he did come around to agreeing first on the bill's utility and later on its importance. Like nearly everyone in his day, Madison still held to a robust notion of natural rights, and the question of whether the failure to list a natural-law right in the Bill of Rights might mean it did not enjoy legal protection was an open (or at least disputed) one in early Supreme Court jurisprudence if not for Madison himself.⁷⁴

Alternatively, an originalist reading might compare the language of the Second Amendment to the language of similar provisions in state constitutions which explicitly protected the right to bear arms as related to *both* an individual right to self-defense *and* the civic imperative to participate in a militia,⁷⁵ and thereby find, precisely under the legal canon cited above, that the Second Amendment does not protect an individual right to bear arms as part of a right to self-defense because it only mentions one of these bases and not the other. Instead, Scalia takes the different tack of arguing that the Constitution and Bill of Rights should be read as codifying those preexisting rights associated with the enumerated rights, so that the individual right to self-defense, merely by virtue of its general recognition when the Second Amendment was drafted and ratified, is included in the purview of the Second Amendment's protection of the right to bear arms in association with the necessity of a well-regulated militia.⁷⁶

There are several problems with Scalia's approach. The first is that Scalia claims more objectivity (and therefore determinative value) for his history than it merits. As noted above, there has been an overall breakdown in public political discourse across many important issues in American life. To make a putatively "objective" reading of history

⁷⁴ See James Madison to Thomas Jefferson, New York, October 17, 1788, in *The Mind of the Founder: Sources of the Political Thought of James Madison*, ed. Marvin Meyers, rev. ed. (Hanover, NH: Brandeis University Press/University Press of New England, 1981), 156–157; Ralph Ketcham, *James Madison: A Biography* (Charlottesville: University Press of Virginia, 1990), 290–292, 293–296. On the natural law and early Supreme Court jurisprudence, see H. Jefferson Powell, "Calder v. Bull," in *The Oxford Guide to United States Supreme Court Decisions*, ed. Kermit L. Hall and James W. Ely, Jr., 2nd ed. (New York: Oxford University Press, 2009): www.oxfordreference.com/view/10.1093/acref/9780195379396.001.0001/acref-9780195379396-e-75; Douglas S. Mock, "Natural Law in American Jurisprudence: *Calder v. Bull* and *Corfield v. Coryell* and Their Progeny" (PhD diss., Boston University, 2017), ProQuest Dissertations & Theses.

⁷⁵ *Heller*, 584–585. See Saul Cornell, "The Changing Meaning of the Right to Keep and Bear Arms: 1688–1788; Neglected Common Law Contexts of the Second Amendment Debate," in *Guns in Law*, ed. Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey (Amherst: University of Massachusetts Press, 2019), 33–34.

⁷⁶ See Nelson Lund, "The Second Amendment, *Heller*, and Originalist Jurisprudence," in *The Second Amendment on Trial*, 155–158, discussing Scalia's approach to preexisting rights. See also Cornell, "The Changing Meaning of the Right to Keep and Bear Arms: 1688–1788," 21.

dispositive in the recognition of natural rights in the absence of functioning public reason is to make a situation where the NRA pays someone \$15,000 to write a negative review of Cornell's work inevitable and the urge to commit eisegesis in reading the historical record inescapable.⁷⁷ Conversely, in raising historical speculation to determining significance, moral theology and philosophy have been excluded from what might be an extraordinarily valuable role in debating the parameters of what is at root a natural-law right.

Two years later, in *McDonald v. City of Chicago*, the Court was asked to extend *Heller* to the states via the incorporation doctrine (described above), which the Court did, in an opinion written by Justice Alito rather than Scalia.⁷⁸ In doing so, the Court recapitulated the history of the Court's application of the Bill of Rights to the states and noted that, while at a previous point in its jurisprudence it had considered the rights set forth in the Bill of Rights under the general analysis of substantive due process claims and fundamental rights, this approach had been replaced by a more mechanical application of the Bill of Rights to the states via the incorporation doctrine, coinciding with a general disfavoring of (if not outright hostility towards) the recognition of non-enumerated fundamental rights.⁷⁹ Accordingly, the Court did not consider the issue as arising under a natural-law, common-law, or substantive-due-process-type "fundamental" right to self-defense, only the right's centrality to the Second Amendment, as the *Heller* Court had held.

This disclaimer notwithstanding, Alito nonetheless framed the question as "whether the right to keep and bear arms is fundamental to our scheme of ordered liberty ... or ... deeply rooted in this Nation's history and tradition," language highly similar to that used in cases decided under substantive due process analysis.⁸⁰ Likewise, parts of his discussion could be described as "popular constitutionalism," the theory that the Constitution means what it is popularly understood to mean, as when he states:

Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is the *central component* of the Second Amendment right. ... Explaining that the need for defense of self, family, and property is most acute in the home, we found that this right applies to handguns because they are the most preferred firearm in the nation to "keep"

⁷⁷ See Cass Sunstein, "Second Amendment Minimalism: *Heller* as *Griswold*," in *The Second Amendment on Trial*, 262–263.

⁷⁸ *McDonald v. City of Chicago*, 561 US 742 (2010). Alito's opinion was not a majority opinion in its entirety; portions had the support of only four justices not five.

⁷⁹ *McDonald*, 759–766.

⁸⁰ *McDonald*, 767.

and use for protection of one's home and family. ...Thus, we concluded, citizens must be permitted to use handguns for the core lawful purpose of self-defense.⁸¹

While Alito does not address the natural-law right directly, this language certainly is more compatible with natural-law reasoning than Scalia's narrow (and politically biased) historical analysis—and therefore more amenable to engagement by moral theologians and philosophers in natural-law discussions.

Perhaps more interesting is the recent Seventh Circuit case *Kanter v. Barr*, in which a person challenged the lifetime prohibition of his ability to possess a firearm, as required by a state statute based on his conviction of a non-violent felony. The question was whether a state statute could permissibly subject *all* felons to a blanket lifetime firearm ban, with the ability to have possession rights restored upon executive pardon or expungement of record, or whether the statute's application should be restricted to only those convicted of *violent* felonies, based on *Heller*. The majority held that the statute as written was permissible. In dissent, however, was then-Circuit Judge (now Supreme Court Justice) Amy Coney Barrett, who wrote a lengthy opinion explaining her views. Barrett explained that precisely because the individual right to bear arms, "intimately connected with the natural right of self-defense,"⁸² was not tied to a civic right (as Justice Stevens had argued in his *Heller* dissent that it was, drawing on Cornell), there was no basis for presumptively imposing what was essentially a "virtue" test on gun ownership. Barrett specified that it *was* permissible to impose virtue tests on the right to vote and the right to serve on a jury, because it had been historically permissible to do so and because these rights *were* tied to a civic right.⁸³

Here, a natural-law analysis would seem to be highly relevant. Obviously a person does not lose the right to defend themselves in a physical conflict no matter how vicious they might be or what they had been convicted of. Tying the natural right to self-defense to the right to possess a handgun, as the Court did in *Heller*, confuses the issue, and Barrett takes advantage of this confusion to argue that the right to possess a handgun is more fundamental than the right to participate in self-government through voting. To put the matter more directly, we might say that the right to self-defense and the right to participate in collective self-government through voting are both properly understood as natural rights, while the right to bear arms, by

⁸¹ *McDonald*, 767–768. See also Siegel, "Dead or Alive," 81–89, which understands *Heller* as adopting an originalist variant of popular constitutionalism.

⁸² *Kanter v. Barr*, 919 F.3d 437, 464 (7th Cir. 2019) (Barrett, dissenting).

⁸³ *Kanter*, 462–464 (Barrett, dissenting).

itself, is not. By following the reasoning of *Heller* tying the positive right to bear arms with the natural right to self-defense, Barrett is able to argue that legislative attempts to deny a person the right to purchase and carry a handgun face a higher hurdle than denying a person the right to vote.

One might think, based on originalism's dominance, that courts are not likely to return to explicit engagement with natural law anytime soon, beyond the piecemeal, anachronistic question of what natural law rights were implicitly assumed as part of the explicit guarantees of the Constitution. As illustrated by the Supreme Court's opinion in *Obergefell v. Hodges* recognizing a fundamental right to marriage, including for same-sex couples, that return may already be upon us. In fact, Justice Kennedy's majority opinion in *Obergefell* is remarkable precisely for its natural-law-style discussion of the history of marriage.⁸⁴ More intriguingly, Kennedy describes the Court's role in terms starkly different from that described by Scalia in *Heller*. As Kennedy states:

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility ... has not been reduced to any formula. Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.⁸⁵

In any event, moral theologians and philosophers need not wait for such explicit engagement to analyze legal issues in terms of natural law, where the issue is already rooted in such a history, as the right to defense most certainly is.

Lastly, the issue has taken on added urgency with the development of a new theory of constitutional interpretation known as "common-good constitutionalism," developed by Harvard Law professor Adrian Vermeule. This theory is based on two principles: that "government [should] help direct persons, associations, and society generally toward the common good, and that strong rule in the interest of attaining the common good is entirely legitimate."⁸⁶ To that end,

⁸⁴ *Obergefell v. Hodges*, 576 US 644, 656–676 (2015).

⁸⁵ *Obergefell*, 663–664.

⁸⁶ Adrian Vermeule, "Beyond Originalism," *The Atlantic*, March 31, 2020, www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037.

common-good constitutionalism rejects any pretense of originalism, or even of liberalism, in favor of an emphasis on the natural-law basis for “the right, duty, and authority of the ruling power, whatever form that power might take in a particular jurisdiction, to act through and by means of law, that is, by means of rational ordinances for the common good.”⁸⁷ As Vermeule states, the “main aim” of common-good constitutionalism “is certainly not to maximize individual autonomy or to minimize the abuse of power (an incoherent goal in any event), but instead to ensure that the ruler has the power needed to rule well.”⁸⁸

Vermeule’s understanding of the “common good” is striking for the absence of meaningful individual participation in collective self-government in its conception, and his theory of “common-good constitutionalism” has unsurprisingly elicited a flurry of critical responses from a variety of quarters and may elicit more study over the years to come. While a meaningful engagement with Vermeule’s proposal is not possible in the current essay, even this brief mention is enough to highlight that originalism is beginning to show its limitations, and some type of return to natural law seems likely to play a role in the next chapter of constitutional theory. I would suggest that moral theologians and philosophers have an interest in (and should be prepared for) this debate.

NATURAL LAW RETURNED

As readers of this journal are well aware, natural law has had a comeback of late in moral theology, and not merely as a result of the “new natural law” approach of Germain Grisez and John Finnis. Church historian Mark Massa, SJ, has highlighted, for example, the “robust realism” of Jean Porter’s work on natural law, as well as Lisa Sowle Cahill’s natural-law-based approach to feminist global ethics.⁸⁹ Theological ethicist Stephen Pope has illustrated the ways in which a natural-law approach might be adapted to the scientific understanding of human evolution.⁹⁰ Other groundbreaking work by Cristina L. H.

⁸⁷ Adrian Vermeule, “Common-Good Constitutionalism: A Model Opinion,” *Ius & Iustitium*, June 17, 2020, iusetiustitium.com/common-good-constitutionalism-a-model-opinion.

⁸⁸ Vermeule, “Beyond Originalism.”

⁸⁹ Mark S. Massa, SJ, *The Structure of Theological Revolutions: How the Fight Over Birth Control Transformed American Catholicism* (New York: Oxford University Press, 2018), 128–175.

⁹⁰ Stephen J. Pope, *Human Evolution and Christian Ethics* (New York: Cambridge University Press, 2007), 268–296. Pope has also written an excellent summary of the history of natural law, “Natural Law and Christian Ethics,” in *Cambridge Companion to Christian Ethics*, 2nd ed., ed. Robin Gill (Cambridge: Cambridge University Press, 2012), 67–86.

Traina, Vincent W. Lloyd, and Craig A. Ford, Jr., has insisted that natural-law ethics can and must be informed by the human bodies, lived experiences, and distinct traditions of those who historically have not been considered when the prevailing norms were made unless it was to ensure their exclusion.⁹¹ Adding to this rich conversation from a different direction is theological ethicist Kevin Jung and his work on “commonsense morality,” which retrieves an intuitionist account of moral realism, persuasively defending against those who would discount the entire enterprise as too historically and sociologically contingent to have much value.⁹²

Taken as a whole, one sees that far from natural law merely being a primitive stage in the development of law, from which first common law and then positivism could develop, it rather is a rich tradition in its own right that has continued to grow and develop in robust and innovative fashion. One also senses what is lost when the legal tradition values only a Revolutionary-era conception of natural law, literally and figuratively “antebellum,” without taking account of its potential as a source of contemporary moral and legal reflection. It bears adding that natural law is also not without its own rigor—it hardly is an “anything goes” bastion of moral relativism—as it consists of an identifiable tradition of moral theory, with its own standards and sources at least as clear as the history in which originalists like Scalia claim to find refuge. And it is one which, even in its contemporary form, is compatible with the methods of common-law reasoning still used in US jurisprudence, given its roots and history.

More importantly, natural law provides an arena for engagement, beyond the narrow echo chambers and politicized, walled-off media environments in which our culture wars are fought, and offers the potential to reconnect legal discourse with a rich tradition of moral reflection, without the intellectual dishonesty of anachronistically asking, to paraphrase a hackneyed catchphrase, “What Would Blackstone Do?” Rather, were constitutional jurisprudence to reengage with natural law, it would manifest a return to the *method* of



⁹¹ See Cristina L. H. Traina, *Feminist Ethics and Natural Law: The End of Anathemas* (Washington, DC: Georgetown University Press, 1999); Vincent W. Lloyd, *Black Natural Law* (New York: Oxford University Press, 2016); Craig A. Ford, Jr., “Transgender Bodies, Catholic Schools, and a Queer Natural Law Theology of Exploration,” *Journal of Moral Theology* 7, no. 1 (January 2018): 70–98.

⁹² Kevin Jung, *Christian Ethics and Commonsense Morality: An Intuitionist Account* (New York: Routledge, 2015). See also Kevin Jung, “Models of Moral Realism in Christian Ethics,” *Harvard Theological Review* 108, no. 4 (October 2015): 485–507; Kevin Jung, “Christian Morality: An Intuitionist Account,” *Heythrop Journal* 53, no. 4 (July 2012): 560–573.

Blackstone and Madison, and not merely impose mechanically their worldview.⁹³

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⁹³ Sincere thanks to H. Jefferson Powell for his invaluable feedback on an early draft of this essay. Remaining errors of any sort are my own.