Nathan Goetting

THE SECOND AMENDMENT HUSTLE

I'm a left-wing law professor. My favorite judge is Chief Justice Earl Warren. The one I agree with most is Associate Justice William O. "Wild Bill" Douglas. However, consistent with the spirit of a constitutional amendment even more important than the one we're discussing today—the First—I'd like to thank the Federalist Society ("FedSoc"), a bar association that, depending on the day, either depresses or repulses me, for inviting me here this morning. I'm confident I speak for the vast majority of my comrades on the academic left when I say that, despite all the false and breathless reports from right-wing media, we don't fear debate. In fact, many of us can't get quite enough of it, especially where groups like FedSoc and Dr. Halbrook's client, the National Rifle Association ("NRA"), are concerned.

I'm here to convince you of four things:

My first point is that you don't need to be an anti-gun stereotype like Beto O'Rourke to believe an assault weapons ban along the lines of the federal statute that expired in 2004[1] is perfectly consistent with the Second Amendment. One can believe guns have a place in our society, and even enjoy using them recreationally, while acknowledging that the gun lobby's increasingly dogmatic Second Amendment orthodoxy is ahistorical nonsense. We have a special duty to try to be reasonable when debating incendiary issues like this one, even when we believe the other side's reasoning is completely backward. Discourse is impossible unless we are as willing, or at least almost as willing, to be persuaded as we are to persuade.[2]

I was assigned one of Dr. Halbrook's books as a law student studying the Second Amendment. The text was fascinating and, unlike virtually

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everything else I was required to read in law school, I couldn't set it down. I came away from that book convinced he was wrong on the key question of whether the Second Amendment created an individual right, independent of the militia, to self-defense. However, we have some core beliefs in common and I admire some aspects of his scholarship.

As best I can tell, the two primary arguments for a right to possess a gun for personal purposes offered by gun industry lawyers is that the Second Amendment constitutionalized the common law right to self-defense (recognized in District of Columbia v. Heller[3]) and the Declaration of Independence's revolutionary right[4] to rebel against oppressive government, the so-called "insurrectionist theory."[5] Morally and politically, I support both these rights. But they have nothing to do with the Second Amendment.

I think non-criminal citizens of sound mind should have the constitutional right to own, transport, and use guns, including handguns and "assault" rifles, for personal self-defense and the defense of others. I own a handgun and will freely admit that blowing inanimate objects into smithereens while practicing with it is all sorts of fun. Most people who disagree need to actually try it for the first time or chill out and loosen up. When my three-year-old son knocked over a pop can with a pellet gun for a first time the other day I jumped two feet off the ground and pumped my fist like an idiot. But the primary reason I own a .45 is that I don't want any home invader who selects my house to have a pleasant experience.

I also stand foursquare behind what Lincoln called the natural "revolutionary right"[6] to possess guns in rebellion against intrusive government. This puts me in the illustrious company of Daniel Shays, John Brown, Emma Goldman, and the original Black Panther Party—right where a left-wing guy like me wants to be—but nowhere near the mindset of James Madison when drafting the Bill of Rights.

My second point is that, my philosophical attachment to these rights notwithstanding, they have nothing, as I said earlier, to do with the Second Amendment. The right of rebellion exists nowhere in the Constitution for the simple reason that the purpose of that document was to construct a stable government that would make the exercise of such a right unnecessary. Moreover, it would be especially ironic for Madison to have located such a political self-destruct button in the Second Amendment, which specifically

seeks to regulate militias whose purpose, Article I, Sect. 8 tells us, was to "suppress insurrections."[7]

The Second Amendment likewise cares little and says nothing about an individual right to self-defense. No meaningful contingent of scholars or jurists ever thought it did, until the "industrious band" of Second Amendment revisionists, Garry Wills calls them,[8] got together in the 1970s and hatched their new understanding. However, a strong argument can and should be made that the common law right to defend oneself and others with a gun exists under the Fifth and Fourteenth Amendment's Due Process Clauses. These are the same provisions that confer the unenumerated yet still fundamental rights to marry,[9] raise children,[10] have sex,[11] use birth control,[12] and otherwise be free from obnoxious and intrusive government interference. These rights are all aspects of what Justice Brandeis called the right to be "let alone," which he termed "the most comprehensive of rights, and the right most valued by civilized men."[13]

Like any good left-wing legal realist at the National Lawyers Guild, and unlike every right-wing "originalist" member of FedSoc I know of, my libertarian revulsion against an overweening government requires that I interpret the Constitution's Due Process Clauses expansively so as to recognize more of these substantive freedoms, including the ancient common law right, recognized by Blackstone[14] and routinely enforced in state and federal courts since the nation's founding, to defend oneself and others with a firearm.

The basic human right to defend oneself against physical aggression passes any test the Supreme Court has used in the past to recognize fundamental rights under the due process clauses. It's "deeply rooted in this Nation's history and tradition."[15] It's "implicit in the concept of ordered liberty."[16] And so on. If the common law right to self-defense with a gun exists anywhere in the constitution, it's in these provisions.

Back in the Paleolithic Era when I was a law school TA, I remember explaining a legal theory I believed in and was trying to promote, but that a court had recently rejected. After I sat down, the professor I worked for walked to the podium and nonchalantly announced to the class, "Nathan's wrong, everybody. You know how I know? The court just said so."[17]

I leave myself vulnerable the same way today. We all know that, in *Heller*,

the Court said the Second Amendment confers an individual right to possess a gun in the home for self-defense. But if a FedSoc idol like Associate Justice Clarence Thomas can be promiscuous enough with his allegiance to stare decisis to argue—in one of Dr. Halbrook's other gun cases[18]—that *The Slaughter-house Cases*[19] and its 147 years of consistent precedent should be scrapped, and that the individual right to possess a gun actually derives from the Privileges and Immunities Clause, it's hardly immodest of me to suggest that we reexamine a comparatively newborn precedent like Heller.

The new gun lobby orthodoxy that prevailed in *Heller* has no reasonable basis in law or fact. I don't have time enough to explain the numerous, perfectly sensible reasons why that's so right now. Fortunately, I don't really need to.

My position is simply the conventional wisdom that prevailed in classrooms and courtrooms without any meaningful opposition for the first 190 years or so of this nation's history. The accepted truths—truisms, really—of this conventional wisdom included that the Second Amendment was fundamentally a military regulation. Madison and other framers and ratifiers had recognized that the collective defense provisions in Art. I, Sect. 8, which split sovereignty over the militia between the federal and state governments, weren't adequate to assuage the fears of the anti-federalists, who worried that without a provision in the Constitution explicitly protecting state militias from federal disarmament, an imperial army of mercenary Hessians, perhaps this time emanating from the federal capitol, might destroy the sovereignty of autonomous state governments. The Second Amendment is of a piece with its fraternal twin, the Third Amendment, which restricts U.S. troops from occupying civilian homes. The objective of both Amendments was to limit the power of the federal armed forces.[20]

My third point is that the triumph of the industrious band representing the gun lobby in *Heller* was, in virtually every sense, a feat of political power, not legal reasoning. It was a victory for well-heeled, mobilized, energetic reactionary political organizations, like the NRA and FedSoc, who paid academics, public relations consultants, and politicians to evangelize their new Second Amendment orthodoxy and implement their agenda, both in society and government.

The Second Amendment theory that prevailed in *Heller*, that individuals possess a Second Amendment right to possess guns for self-defense un-

related to participation in the militia, was generated more or less *ex nihilo* in the 1970s. It was the unifying doctrine of a radical faction of the NRA, many of whom had recently been expelled, that launched the "Revolt at Cincinnati" in 1977.[21] The leadership emerging from the revolt transformed the NRA into an overtly political organization, officially non-partisan but reliably right-wing and Republican. The NRA had supported and believed in the constitutionality of Congress' first major attempts at gun regulation: the National Firearms Act of 1934[22] and the Federal Firearms Act of 1938.[23] Doing otherwise hadn't been dreamt of yet. After 1977, things became different.

The conservative legal establishment, which had been pushed to the margins during previous decades of liberal supremacy, had been resurrected by the time of the *Heller* decision. It had taken control of the Supreme Court and, thereby, the Constitution itself. Had *Heller* been heard in 1958, '68, or '78—or 1798—rather than 2008, the individual rights argument would've gotten zero votes instead of the five it needed to win. *Heller* was the triumph of politics over law, ideology over reason. It was Thrasymachus destroying Socrates.

Republican jurists who came of age before the new orthodoxy were particularly aggrieved by what was going on in this area of the law. Chief Justice Warren Burger thought it was a hustle. He famously said that the Second Amendment "has been the subject of one of the greatest pieces of fraud, I repeat the word fraud, on the American public by special interest groups that I have ever seen in my lifetime."[24] Associate Justice John Paul Stevens wrote that *Heller* is "unquestionably the most clearly incorrect decision that the Supreme Court announced during my tenure on the bench."[25] And he served on the court for over 100,000 years. (Actually, 34 1/2).

My fourth and final point is that while the argument for an individual right to possess a gun under the Second Amendment fails whatever the approach to judging one uses, its failure is especially egregious from an originalist perspective. The ascendency of the new Second Amendment orthodoxy paralleled, and was integrated into, FedSoc's and other right-wing legal organizations' mainstreaming of the originalist manner of judicial interpretation. This approach similarly existed on the margins of legal thought until—alongside the gun movement—right-wing groups popularized it just a few decades ago. The most astounding fact regarding the *Heller* case—in

which both the individual rights theory and the originalist approach to judging explicitly coalesce—is how, by deemphasizing the genuine concerns of the framers and ratifiers, originalism's greatest champion, Associate Justice Antonin Scalia, exposes originalism as a pretext for achieving long-sought political outcomes.

With that, I turn to the bar association currently stocking the judiciary full of "originalist" judges in Scalia's mold - my hosts today, The Federalist Society.

George Washington, who presided over the constitutional convention, admonished us not to form political parties.[26] "The Father of the Constitution," James Madison, lamented the rise of political factions.[27] Yet the current president has effectively outsourced the selection of federal judges—whose signature quality must be independence—to this faction of well-funded, deeply connected legal activists, exclusively aligned with the Republican Party.[28]

The judges FedSoc curates and selects for Donald Trump are themselves members of FedSoc and promote the legal and political objectives of their faction. Were they not reliable in this way, they'd never have been selected as judges in the first place. Whatever Washington and Madison originally intended—whatever their words meant when they wrote them—it couldn't have been this.

NOTES

1 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 § 110102, 108 Stat. 1769, 1997-8.

2 The most beautiful and essential expression of this sentiment is in Plato's *Gorgias*, where Socrates explains to his interlocutor, "Now if you are one of my sort, I should like to cross-examine you, but if not I will let you alone. And what is my sort? you will ask. I am one of those who are very willing to be refuted if I say anything which is not true, and very willing to refute any one else who says what is not true, and quite as ready to be refuted as to refute…" (Jowett Translation), *available online at* http://classics.mit.edu/Plato/gorgias.html.

3 *District of Columbia v. Heller*, 554 U.S. 570 (2008).

4 The Declaration of Independence is an aspirational and philosophical document, not law.

5 *See generally* Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 Geo. Mason U. L. Rev. 1 (1981).

6 *See* Lincoln's First Inaugural Address, *available online at* http://www.abrahamlincolnonline.org/lincoln/speeches/1inaug.htm.

7 *See* Akhil Reed Amar, BILL OF RIGHTS, 56-57 (1998) (italicizing the word "necessary," emphasizing the language in the Second Amendment recognizing that the rights it contains are "necessary to the security of a free State").

8 Garry Wills, *To Keep and Bear Arms*, The New York Review of Books, September 21st, 1995, pg 62.

9 *Loving v. Virginia*, 388 U.S. 1 (1967).

10 *Meyer v. Nebraska*, 262 U.S. 390 (1923).

11 *Lawrence v. Texas*, 539 U.S. 558 (2003).

12 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

13 *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928).

14 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Book 1, Ch. 1, § 177 (1765-77).

15 431 U.S. 494, 503 (1977).

16 *Palko v. Connecticut*, 302 U.S. 319 (1937).

17 That professor was Philip J. Prygoski. If there was ever a greater constitutional law teacher, I haven't met him.

18 *McDonald v. City of Chicago,* 561 U.S. 742, 805.

19 *The Slaughter-House Cases*, 83 U.S. 36 (1873).

20 *See* Amar, *supra* note 6, at 59-63 (referring to the Second and Third Amendments as "siblings").

21 Mark Waldman, *How the NRA Rewrote the Second Amendment*, Politico Magazine (May 19, 2014), *available online at* https://www.politico.com/magazine/story/2014/05/nra-guns-second-amendment-106856?o=1. For a lengthier and more comprehensive history of the gun rights movement, *see* Mark Waldman, The Second Amendment: A Biography (2015).

22 26 U.S.C. § 5861; I.R.C. § 5861.

23 52 Stat. 1250 (1938).

24 *Warren Burger and NRA: Gun Lobby's Big Fraud on Second Amendment*, Milwaukee Independent (Oct. 4, 2017), *available online at* http://www.milwaukeeindependent.com/syndicated/warren-burger-and-nra-gun-lobbys-big-fraud-on-second-amendment/.

25 John Paul Stevens, *The Supreme Court's Worst Decision of My Tenure*, The Atlantic (May 14, 2019), *available online at* https://www.theatlantic.com/ideas/archive/2019/05/john-paul-stevens-court-failed-gun-control/587272/.

26 *See* George Washington's Farewell Address, *available online at* https://www.presidency.ucsb.edu/documents/farewell-address.

27 *See* James Madison, Federalist No. 10, *available online at* https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-10.

28 Lydia Wheeler, *Meet the Powerful Group Behind Trump's Judicial Nominations*, The Hill (Nov. 16, 2017), *available online at* https://thehill.com/regulation/court-battles/360598-meet-the-powerful-group-behind-trumps-judicial-nominations.