

Civic Constitutionalism, the Second Amendment, and the Right of Revolution

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Chancellor Brehm, Dean Andrews, Vice-President Walker, Dean Robel, I am most grateful for your kind remarks. It's wonderful to be here. My mother and most of her siblings attended this university in the 1940s and 1950s. They were all small town kids, right off the farm. And on her first day in college, when all the freshman class was gathered, my mother climbed a lamp-post so that she could see all the students, because she had never seen so many people in one place before. For her and for so many, this university was and is a place of magic, where the whole world comes to Indiana. Afterwards, my family came back to visit every summer, and I grew up loving Bloomington. And then about a dozen years ago, my wife and I came here to teach at the law school, very much on a trial basis, to see whether the fit was good. And from the first week, wonderful people at this place have nurtured us—people like Fred Aman, Lauren Robel, and many others. They helped us figure out who we wanted to be, and then they helped us try to become those people. Without sentiment, I can say that I owe these friends more than I can repay.

So it is good to see people from the law school here today. But I am also very happy to see colleagues and students from outside the law school. I know that when you are not a lawyer, it takes a certain courage to come to a talk by a lawyer: you might imagine that it's going to be arcane and obscure to all but the initiate. But part of what I hope to suggest today is that law, or at least constitutional law, should not segregate itself in that way. Indeed, I mean to argue that the Constitution cannot usefully be studied in isolation from the rest of American sociopolitical life. And for that reason, a great law school has need of a great university; ideally, the law school should enter deeply into the general intellectual life of the institution, in the same way that the anthropology or economics or classics departments should.

In a narrow sense my subject today is the Second Amendment to the United States Constitution, which famously reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."¹ This provision is much in the news, and the political issue that gives it life is gun control. One school of thought, held by the National Rifle Association and the current United States attorney general, maintains that the amendment protects the right of private citizens to own guns for self-defense, hunting, or other lawful purposes. This view focuses on the second clause of the amendment, which maintains that "the right of the people"—meaning, for these interpreters, private individuals—"shall not be infringed." As a result, much gun

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1. U.S. CONST., amend. II.

control should be constitutionally suspect. A contrary school of thought, held by the lobbying group Handgun Control, Inc. and most federal appeals courts, is that the amendment protects only the right of the states to maintain their militias. This view focuses on the first clause of the amendment, which posits that "a well-regulated militia" is "necessary to the security of a free state." For that reason and only for that reason, according to this account, do we protect the people's right to arms. As a result, gun control of private arms should be constitutionally unproblematic. The debate over the Second Amendment thus has a particular tone and content. For most people, the amendment conjures a set of images that grow from the modern experience with violent crime: Some imagine the horror of guns in the hands of deranged killers, guns that should be locked somewhere in a government vault; others imagine guns in the hands of virtuous citizens who use them to repel the very same deranged killers.

But I would like to propose that the Second Amendment is much more than this contemporary policy debate. Indeed, I think that the Second Amendment can best be understood as a prism that allows us to understand the whole constitutional enterprise, rather than as a rule about any particular issue. And in this guise, the Second Amendment may be the most important provision of the whole Constitution. To many lawyers, that claim will seem odd, because the Second Amendment has been often ignored by the legal establishment and often embraced by crackpot activists. And the truth is that I have no idea how to assess which provision is the most important, so you can offer the First Amendment or the Fourteenth Amendment or even the Commerce Clause as the most important one, and despite our disagreement, we can still be friends. But I do want to suggest that the Second Amendment, no less than those others, reveals something deeply important about what it means to do constitutional law, or be constitutionalist, or even just to live in a constitutional republic. And that is why I have said that only in a narrow sense is my subject the Second Amendment; in a broad sense, the subject is constitutionalism itself.

To make the general claim, let me begin with two different paradigms of the function and purpose of the United States Constitution. The first was a virtual orthodoxy for many decades; the second has old roots but is newly emergent or re-emergent. Here is the first paradigm. In 1975, if you had asked a typical legal academic about the nature of the Constitution, he might have said something like this: The Constitution is fundamentally a law, and so it belongs primarily to courts. In fact, the United States Supreme Court has final say over its meaning through the process of judicial review. And every other citizen and governmental body is obligated to follow the Court's edicts. The Court is given this power because of its ability to stand apart from politics. As a result, the Court can protect individual rights against populist pressure, the angry baying for blood of a bigoted and ill-informed electorate. Indeed, many distinguished legal academics have argued that what it means to be constitutionalist is to have judicially entrenched protections for individual rights. We could call this vision the "juristic paradigm of the Constitution."

The other paradigm begins with a different role for the Constitution: In this view, what mostly happens in a constitution is that a people establish a government. And in constituting a government, the people are also constituting themselves as a distinct political society, with something in common, even if it is only commitment to the structure of the very government that they are creating, with all its implicit values. For that reason, the United States Constitution also delineates the core essentials of an American identity, however vague or

controverted it might be. But if that is the central goal of a constitution, then the central actor is not the Court but the people themselves, or perhaps I should say the People itself, as a singular noun—the people who make the constitution, who are responsible for its maintenance, who glimpse themselves in it, and who may perhaps cause its unmaking. We could call this vision ‘the civic paradigm of the Constitution.’

Both of these views have deep, old resonances. When I was in law school, my professors told stories about Sir Edward Coke, who as chief justice resisted the growing absolutism of the Stuart Kings in the name of a higher law. In 1608 at Hampton Court, Coke finally confronted the king, and with his finger in the air, peremptorily informed him, “*Quod Rex non debet esse sub homine, sed sub Deo et lege.*”² If your Renaissance Latin is a little rusty, that means: “The king ought not to be under man but under God and the law.” And of course, placing the king under the law was pretty much ipso facto treasonous. So I have this image of this great judge speaking truth to power, and even now it makes my heart beat a little faster. And I always tell this story to my Constitutional Law students, because it captures the power of the juristic vision so nicely.

But there is another story to be told about the origins of constitutionalism. Beginning in the thirteenth century, medieval jurists began to argue that the king held his power by delegation from the people. Eventually this argument would become seriously subversive: The people made the king, gave him instructions, and could unmake him if he proved faithless to his charge. Like the Coke story, this one is about resisting absolute power. But in this case, the principal hero is not a trained lawyer speaking for a higher law in defense of individual rights. Instead, the hero is the people speaking for a collective identity expressed in and through law, the law that creates and limits their government. And the defining habit of this people is not legal study but political mobilization, public dialogue, and sometimes even self-arming. Both stories—the juristic and the civic—begin in resistance to government, and as we will see, that fact is significant for the meaning of the Second Amendment. But the two stories grow out of quite different historical experiences of resistance: On the one hand, a judge searching his conscience, his texts, and his traditions; and on the other hand, a people coming into a sense of itself as a self with dignity and power. And what I want to argue today is that constitutionalism in general and the Second Amendment in particular need this civic paradigm; the Constitution cannot be merely juristic.

To make that case, let me emphasize two differences between the stories. First, as a matter of academic study, the civic constitutionalist view makes it even more important that academic lawyers be well integrated into the academic community as a whole. The reason is that if the Constitution is an expression of collective identity, then its proper study must extend to that collective identity. And for that end, lawyers need anthropologists, sociologists, historians, political theorists, and the like. Indeed, it might make sense to re-imagine the disciplinary divisions: Rather than being first and foremost lawyers and political scientists and historians, we might imagine our shared field as the domain of constitutional studies. In fact, something of the like has been occurring in writing on the Second Amendment: Some have begun speaking of Second Amendment studies, with contributions from

2. See EDWARD S. CORWIN, *LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING AND DECLINE OF A JURIDICAL CONCEPT* 30-31 n.34 (1978).

lawyers, public health professionals, criminologists, historians, and political theorists. By contrast, if the Constitution is merely a set of judicially enforced rules, then some would claim that the Supreme Court should enjoy an ultimate authority in its interpretation, and lawyers should command an overriding preeminence in its exposition.

Here is the second difference between the two accounts: As a matter of constitutional practice, the civic constitutionalist view would give the people a central role not only in formal amendment but also in constitutional maintenance, interpretation, evolution, and termination. I should note that although civic constitutionalists agree among themselves that the people should have more of a role, they do not agree on the exact nature of that role. Commentators such as Mark Tushnet, Sanford Levinson, Bruce Ackerman, Akhil Amar, and John Finn all stake out slightly different claims.³ In a moment, I will suggest that the best approach may be contextual: The people should occupy the particular roles that the constitutional structure needs them to occupy, not some global and abstract function. I think, for example, that the people as a collectivity have a central role in giving meaning to the Second Amendment.

By contrast, for juristic constitutionalists, the people make the constitution, but then they mostly retire, leaving their written work in the good hands of sagacious judges. After making the constitution, these individuals make money, pursue callings, raise families, join houses of worship, and vote. They may even own guns for private pursuits, such as hunting or target practice, but surely not to keep a check on the government. To be sure, these people may formally amend the constitution, but they are not really supposed to, at least not very often: The amendment process is difficult precisely so as to keep the baying hounds of populism away from our judicially protected rights. We might almost imagine Chief Justice Coke with finger in the air, reproving the people to remember that their Constitution is sacred. In the words of John Marshall, "The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent."⁴

In sum, then, the juristic Constitution assigns dominant and perhaps exclusive authority to the judiciary, but the civic Constitution seeks to engage the people directly in the processes of constitutionalism. Formulating the distinction in that way makes me feel that I am stacking the deck in favor of civic constitutionalism: After all, who could deny that both the people and the courts should be engaged with their Constitution, should have something to say about its meaning, should shape its future? It seems plain that even juristic constitutionalists must pay heed to

3. See generally MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Sanford Levinson, *The Embarrassing Second Amendment*, 99 *YALE L.J.* 637 (1989); 1 BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE A. ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); John E. Finn, *The Civic Constitution: Some Preliminaries*, in *CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE* 41 (Sotirios A. Barber & Robert P. George eds., 2001).

4. *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

the Constitution's civic dimension, because in the long run judges need popular support for the protection of rights. And yet oddly, many legal scholars have in fact argued that constitutionalists should affirmatively ignore everything except the law as practiced by judges and members of the bar.

In this view, the Constitution is part of the world of law, and the law is a self-contained discourse with a special set of referents, principles, and ideas. To hold that the law must go beyond itself is to invite politics or values or something equally indeterminate into the hallowed temple of Reason. And if that ever happens, our rights will rest on nothing more stable than the shifting sands of public opinion. Again, this view grows out of historical experience. The halcyon days of the juristic Constitution were the decades following World War II, when the world wondered how fascism had overwhelmed Germany and Italy. Some legal academics concluded that Europe had been plunged into darkness because its politics—the baying hounds of populism—overwhelmed its respect for law and individual rights. What Hitler really needed was a Lord Coke with his reproving finger in the air. So America should be at root a legal nation, with law and politics sharply divided, and the development of law should occur only through the reasoned elaboration of its own internal structure.

To be honest, I am not sure whether anyone endorses that view in its extreme version anymore. I am not sure how many really endorsed it even in 1965. If the rest of social life goes sour, the law will not save you—as even juristic constitutionalists must realize, at least in their unguarded moments when they are at home in their socks. And that means that to fulfill the promise of a rights-based constitutionalism, you must pay keen attention to the content of the citizens' character. In fact, the historical practice of juristic constitutionalism itself illustrates this theme. From about 1954 to about 1975, the Supreme Court undertook a constitutional revolution to protect those whose rights were most imperiled by the hounds of populism, and many hoped that the Court might eventually remake America in a more progressive image. But a funny thing happened on the way to the future: Much of America did not come along for the judicial ride. Instead, something of a backlash occurred. And as political America retrenched, so eventually did the Supreme Court itself, as conservative presidents appointed conservative justices. As a result, the Court's attention turned from desegregation, voting rights, and sexual and procreative rights, to federalism, property rights, and rights against affirmative action. And now we face a rather pointed irony: In the 1960s many progressives celebrated judicial activism, but they now want to take the Constitution out of the hands of the Court; and in the 1960s, many conservatives denounced judicial imperialism, but they now defend the rule of judges against the pollution of a debased democracy. I would call this irony delicious, but I realize that it may not be to your taste.

I do find it delicious, but for a particular reason. It would be possible to perceive this flip-flopping through the lens of a vulgar legal realism: lawyers favor judicial activism when the courts are controlled by their friends, but they counsel judicial restraint when the courts are dominated by the other guys. In other words, legal theory is merely a matter of whose ox is gored. But I think that there is a deeper truth at work: When you control the courts, you tend to appreciate the real benefits of the juristic Constitution, and when you don't, you tend to appreciate that the nation cannot do without civic constitutionalism. In other words, the reason that some have flip-flopped is that their new perspective—their inclusion in, or exile from, judicial power—has brought them genuine new insights. And particularly, a

good-sized slice of the legal professoriate has newly glimpsed certain benefits in giving the people a role in the processes of constitutionalism.

So let me now recount some of those purported benefits—and because of the constraints of time, I offer these in shorthand and without any real effort at defense. First, it has become difficult to maintain that judicial analysis is uniquely truer or more objective or insightful than other sorts of reflection on the Constitution. It has also become difficult to maintain that legal analysis is radically independent of all other kinds of analysis. There are even those who hint that Supreme Court justices incorrigibly consult their own political values in deciding cases. Yet if judicial analysis is not uniquely better at finding the Constitution's meaning, it is not clear why the Court should enjoy an exclusive or preeminent role in interpreting this document that serves as the fundamental civic morality for the country as a whole.

It would be easy to get carried away with this point. Six weeks into Constitutional Law, a number of my students suffer what I think of as a rule of law attack. They realize that Constitutional Law is not objective in the strong sense that they had hoped, and so they become completely disillusioned with the Supreme Court. If the Court is not perfect, they wonder, why even keep it? Well, there are reasons. Judicial analysis is one sort of discourse with its own particular strengths, and probably no American constitutionalism can rightly dispense with it. But it is just one kind of discourse, and there are others with other strengths to bring to the table, so it is not clear why the Court's discourse should hold such dominance—except that the Court has said that it should.

Second, standing on its own, judicial review is a feeble protection for the Constitution. If the people, their presidents, and their representatives are implacably opposed to the Court's work, the Court will not in the long run prevail. Again, it would not do to overstate this point. The Court may prevail when opposition is diffuse or when the legislative majorities opposing it are slim or unstable. It may get ahead of the curve of change and push the legislature in the direction that it was already moving anyway. And sometimes it may even shame the legislature into facing up to a problem that it would have liked to ignore. But in the long run, if the people hold one vision of their Constitution and the courts hold another, the courts are not going to win. The best example here may also be the most famous: in the *Dred Scott* case, the Supreme Court held that the federal government could not prohibit slavery in the territories.⁵ Lincoln thought that it could, and the nation fought a great civil war over this question. The Court's view, happily, did not prevail.

Well, why are so many lawyers so worried about giving the people a role in the interpretation of their own Constitution? The reason, of course, is that lawyers tend to believe that ordinary Americans are not properly qualified to interpret the Constitution. They haven't been trained to think things through, pondering the effects down the line or on different sectors of the population. They tend to respond out of short-sighted passion and personal self-interest, and they often confuse their own separate good with the common good. As a result, different groups are likely to offer different interpretations of the Constitution, creating a chaos of legal hermeneutics. And this situation is precisely what the Constitution was supposed to forestall: it was designed to give a stable structure to make *unum e pluribus*. In this view, the Court is ideally situated to serve that end. Because they have life tenure and independence, the judges can offer sober, steady reflection, and because they

5. See *Scott v. Sanford*, 60 U.S. 393 (1856).

are a single body, they can offer a single definitive interpretation of our common frame. And so the Court keeps us from each other's throats. In the Court's own words, sometimes "the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."⁶

It would be easy to belittle this fear of populist constitutionalism as elitist lawyers protecting their turf. But actually, I think that the fear is neither baseless nor silly, and though there may be some turf protection about it, it's not only that. I've spent a good bit of the last decade studying material in which ordinary Americans express their view of the Constitution's meaning. Gunowners, for example, read and think and talk endlessly about the Second Amendment, because they think that it says something about their right to arms. Many motorcyclists believe that the Constitution protects their right to ride a motorcycle and not to wear a helmet. And many disgruntled groups believe that their states have a continuing constitutional right to secede from the Union; some even think that they have the right to secede from the social contract as individuals.

This material generally has two notable characteristics. First, it does suffer from all the vices that lawyers might imagine. It is full of immoderate passion, and it frequently fails to take any perspective seriously other than the writer's own—as though other Americans do not exist or have a right to be counted. For that reason, these popular interpreters of the Constitution often disagree vociferously among themselves, all the while proclaiming that anyone who disagrees must be a rogue or a knave or just can't read the plain English of the Constitution's text. So at first blush, this material does not give one a great deal of hope for popular constitutionalism.

And yet there is another, more hopeful quality to this writing, a quality that is quite remarkable: These writers are seeking to express their deepest fears and hopes through the language of constitutional argument. When they talk about guns or motorcycles or secession, they are offering far more than a technical claim about the rules laid down. Instead, they are trying to speak of their basic cultural identity, of what it means to be an American. And when they seek to explain this fundamental sense of their civic selves, they express themselves in constitutional terms because they believe that in the Constitution they will find the fundamental truth of our common life. Though these writers are often very angry—indeed some write about shooting other Americans—they still think that we are bound together through this document. It is a cliché of American culture that we are united not by a common language, ethnicity, religion, or history but by a common collection of values rooted in the Constitution. These popular writers, as schismatic as they may seem, plainly think so. In fact, I sometimes wish that certain lawyers and judges brought to the constitutional enterprise the kind of passion and reverence that these writers bring to it.

So here is the hope of civic constitutionalism as currently practiced: Although these writers may not be good at constitutional interpretation, they really want to do it. Even the most odious demagogue of the militia movement—racist, violent, and hate-filled—thinks that the best way to connect to others is through constitutional argument. That's our claim on each other. And so for civic constitutionalism to

6. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 867 (1992).

work, what's important is that ordinary Americans should want to engage with the Constitution in a better way. What's important, in other words, is to redeem the people.

And how do we redeem the people? Civic constitutionalists have traditionally answered that the people will responsibly embrace the Constitution only when they are given a responsible role in supporting the Constitution. If the judiciary alone has charge of the Constitution, then the people lose any sense that they must care for it: We need not protect it because they will. And though this point is a tired old chestnut, there is surely truth in it. The Second Amendment illustrates the point nicely: Politicians can make wild claims about the amendment's meaning for political gain, with the assurance that the Supreme Court will keep those claims from actually becoming law. For example, to please his gun-owning constituents, at least one local politician has reportedly argued that the amendment protects the right to keep a nuclear bomb in your garage. It is hard to believe that this was anything more than campaign rhetoric, yet the speaker feels free to make it because he believes that the Court will never let it come to pass. And thus judicial exclusivity helps to facilitate this kind of rhetoric, with the result that we never develop a more responsible dialogue.

At this point, however, many lawyers head for the hills, because the prospect of redeeming the people seems so utopian: Do we really want to commit our fundamental public morality to the average American citizen, who cannot even tell you the name of the Vice-President or a single federal statute? And that impulse is entirely understandable. But before we yield to it entirely, let's talk for a little bit about the Second Amendment—because I think that reflection on the amendment offers three reasons to hold out hope for redemptive civic constitutionalism.

First, moving to civic constitutionalism must be incremental and gradual. Of course, it would not be a good idea for citizens to decide the constitutional duties of the Vice-President if they have no idea what he or she does. But the point is that practice may make perfect, so that as the people practice taking responsibility for their Constitution, they may get better at it. Second, we should refrain from imagining the choice as dichotomous: Either the Court has complete constitutional authority, or the people do. Instead, we should be asking what good role the people might serve in constitutional interpretation, maintenance, and so forth. And so it may be that the courts really should be primarily responsible, for example, for protecting the rights of discrete and insular minorities—but the people might have other important jobs. And third, it may be that both the Constitution and practical necessity call for a popular role, so that even if it scares us, we need to start down this path.

To illustrate those themes, I return to the debate over the meaning of the Second Amendment. For decades, some have claimed that the amendment protects an individual right to arms, and others have claimed that it protects only the power of state governments to keep their militias armed. The primary legal issue in this debate is gun control, and the primary policy issue is crime control: Do guns in private hands increase or decrease the crime rate? But in the late twentieth century, a new concept arrived to complicate this discussion: Some began to claim that the original purpose of the Second Amendment was to ensure that the people could resist the government by force of arms if it should become corrupt, as the American revolutionaries had done in their War for Independence. This claim is far more radical than the idea that private persons have the right to resist private crime, because it challenges the state's very monopoly of force. As the political winds of the 1990s became more heated and turbulent, the revolutionary Second

Amendment was taken up by a variety of groups: the NRA, the militia movement, certain feminists, certain African-American activists, a group called Jews for the Preservation of Firearms Ownership, and a few serious legal scholars.

With some mixed feelings, I list myself among that last group. I conclude that our Second Amendment was born out of distrust of a central government, and it was designed to allow for popular resistance to that government, even by force of arms. I agree thus far with the NRA. But I would like to complicate matters still further, because I don't think that the historical record is as simple as the NRA would have it. NRA leaders argue that the amendment gives a right to individuals to keep arms so as to make a revolution against government. But, as Handgun Control might respond, that course portends anarchy. The Framers were acutely aware of that risk, and that is why they imagined that the people could make a revolution only as a collective whole, united by common ends, values, and attitudes. They imagined this organic entity, "the People" (commonly capitalized, as befits a proper noun) stalking across history, bearing arms, and making its own future. They emphatically did not imagine random individuals each going his own way, shooting at other random individuals.

Indeed, they had terminology for this distinction: They praised revolution, defined as an uprising by the body of the citizenry for the body of the citizenry; but they condemned rebellion, defined as an uprising by a faction for the interests of a faction. George Washington led a revolution against the British Empire, so as to create a nation born in blood. But once the genie of violence is let out of the bottle, it's not easy to stuff it back in, and in the years after the Revolution, the backcountry erupted in resistance against the new American governments, state and federal. And these unwashed farmers had the effrontery to claim the warrant of 1776: Just as Washington threw off the yoke of British oppression, so did these rural rebels seek to throw off the yoke of the eastern seaboard, with its distant governments and alien ways. So we witness an interesting irony: Having created a country through political violence, having staked their legitimacy on an act of revolution, the governors of the country now sought to repress insurrectionaries making the same claim. Yet the governors themselves saw no irony, because in their view, 1776 was a revolution, for the people as a whole, but these new insurrections were rebellions, made for debtors or rural people or general ne'er-dowells. In fact, in this view, rebellion is very similar to tyranny itself, because both seek to direct political violence toward selfish ends. And so, in his own mind, George Washington fought against the same basic threat both times, when he contended first with George III and then later with the Whisky Rebels.

For that reason, the debate over the Second Amendment revolved around the significance of the militia, because the militia was the institutional embodiment of this collective people. In other words, it was just the People—with a capital "P"—by another name. To understand this point, we need to understand how much our legal imagination has changed since the eighteenth century. Today, the debate over the meaning of the amendment is divided between those who believe that it protects a purely individual right and those who believe that it protects a purely state power. Our imagination has a hard time conceiving of a middle term between the state and private persons, and yet that is precisely where the eighteenth century militia fell. On the one hand, the militia had clear connections with the state: In theory, the state raised it, ensured that it comprised the whole people, and trained it to virtue. On the other hand, if the state should become corrupt, the militia was supposed to resist it in the name of the people, because it comprised the Body of the People. So what we have here is a universal entity that is yet not the state. That

status is hugely important, because the Framers thought that you could trust the militia with the means of violence only because it had that status. If the militia were identical with the state, then it could not resist the state if it became corrupt. But if the militia were only a bunch of atomistic individuals with guns in their hands and anger in their hearts, then resistance could never amount to anything more than rebellion or civil war—not a true revolution for the good of the whole.

All this may sound exotic to modern ears. We don't expect the people to exhibit that kind of unity, and yet the eighteenth century debate over the Second Amendment makes no sense unless we take this conceptualization seriously. As just one example, I offer you Tench Coxe, who famously asked, "Who are the militia? Are they not ourselves? Is it feared, then, that we shall turn our arms each man against his own bosom?"⁷ Here is a vision of the People assembled in militia, possessing such commonality that none could turn against any other, because it would be like turning arms against himself. In like fashion, the Framers identified the militia with what they called the Body of the People, and the organic metaphor was intentional. The People acted as one body, and when any member of the body was hurt, so were all. In fact, early drafts of the Second Amendment itself referred to a militia composed of the Body of the People. Later drafts omitted that language but apparently only for the sake of brevity: Everyone knew that a militia included the Body of the People, so you didn't have to say so. It is only because the militia is universal, organic, and trained to virtue that you can trust it with the means of revolution. If it were a select militia or a standing army or a local faction, then by definition it could make only a rebellion in a seditious interest, not a revolution by the whole for the good of the whole.

This belief, that the People were fundamentally united, also makes sense of what might otherwise seem a contradiction between the Second Amendment and Article One of the Constitution. I have just argued that the Second Amendment recognizes a right in the Body of the People to be armed so as to make a revolution. And yet Article One gives Congress the power to define treason and suppress insurrection. So how can these two be fit together—one provision that gives the people the right to rise up, the other that gives government the power to put them down? One answer is historical: One group of people (the Federalists) pushed for Article One, with its empowerment of Congress, and in reaction another group (the Anti-Federalists) pushed for the Second Amendment, with its celebration of the militia. From this perspective, the two provisions might be simply contradictory because they come from disagreeing groups. But any modern constitutional interpreter must find that conclusion unsatisfactory, and happily, the two are more coherent than would first appear, because their supporters shared more of a world-view than is often acknowledged.

Even the most ardent Federalists would have agreed that Congress has the power to suppress rebellion but not true revolution, made by the Body of the People for the Body of the People. And even the most fevered Anti-Federalist would have concurred that the militia may make a revolution but not a rebellion. Congress and the militia were thus both supposed to represent the Body of the

7. *A Pennsylvanian*, PENNSYLVANIA GAZETTE, Feb. 20, 1788, reprinted in 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (John P. Kaminski & Gaspare J. Saladino eds., Supp. 1981) (1778-1780).

People with its unified interests and views. They were twin routes for the expression of the popular will, and each route acted as a check on each other. Under ordinary circumstances, the federal government would undertake the routine business of suppressing rebellion, but if that unrest should become general, the People-in-Militia could launch a revolution. We hope that Congress will seek to suppress only rebellion, not revolution, but if Congress becomes confused or corrupt, the militia can correct it, speaking for the Body of the People. We hope that citizens will rise only in revolution, not rebellion, but if they should become confused or corrupt, Congress can take care of things, speaking for the Body of the People. In every case, the stability of the system rested on the theoretical unity of the People as the ultimate anchor in the constitutional organization of political violence.

By contrast, the most salient feature of the modern debate is the way that virtually everyone presupposes a citizenry wracked by division, violence, and hatred. Indeed, for modern commentators, the point in the Second Amendment is not to allow a unified people to overawe a few erring government officials. The point instead is to allow the good people (true Americans, however described) to control the bad people (traitors defined in various ways) by force of arms. The fact that almost all commentators agree on this portrait is the more striking because they disagree on almost everything else, particularly who the good and bad people are. In fact, the Second Amendment and gun ownership are central icons in not one but many cultural conflicts in America today: They have become symbols not of our unity but of what divides us. And these Second Amendment fables are disturbingly on the rise: More and more people have apparently become so frustrated with the normal political processes of mutual accommodation that they have turned to fantasies of violent, constitutionally sanctioned revenge. These people feel that America has failed to protect them or accord them the place that they are due, and they assert that the Second Amendment is a remedial provision for their lot.

A good part of my recent book is devoted to exploring this modern landscape of the Second Amendment—the folkloric Constitution, if you will.⁸ Any quick summary would fail to do justice to the remarkable discourse now going on, particularly the way that people take their deepest fears and hopes and render them into constitutional stories, so that others will have to take notice. But let me add one anecdote to make the general point. When I speak on the Second Amendment, I sometimes pose a hypothetical. Suppose that we adopt a militia like Switzerland's. We issue assault rifles to every citizen, and we tell them to use those guns to resist the government if it should become corrupt. Then I ask: How many think that the people could be counted on to use their guns only for unified revolution? How many think that the people would instead use them mostly for civil war or ordinary crime? In other words, which is more likely: 1776 or the bombing of the Federal Building in Oklahoma City? In general, the only people who think that Americans would use their guns as a single body are those who have a particular vision of the American citizenry: In their minds, it includes only people like them. When they are reminded that we are talking about arming all Americans in all their magnificent diversity, they generally change their answer.

8. See DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* (2003).

Notice, then, how this particular issue—Second Amendment revolution—instantiates the larger issue of civic constitutionalism in general. In both, we encounter the idea that the people as a whole should have some direct responsibility for constitutional maintenance, interpretation, or unmaking. Yet in both, when we seriously consider the possibility, we blanch at the thought—because of a fear that the people are fractured and irresponsible. Many would therefore suggest that we abandon this line of thought. It is better, in this view, to accept that the Constitution has become the property of the government, particularly the Supreme Court, and the people as citizens have moved into a peripheral role. The People are unruly in the literal sense, and so they must be kept within bounds. Perhaps they have some role in setting policy, but not in determining the fundamental framework.

And yet just as the Second Amendment illustrates the problem with civic constitutionalism, it also illustrates the reasons that we should not and perhaps cannot abandon the project altogether. First, both the Constitution and practical necessity may require a popular role in the organization of political violence, both private and governmental. Second, we need not imagine this role as dichotomous—either the government has a monopoly of violence or the citizenry does; instead, we might imagine an important role for both. And finally, we need to understand that the popular role may be incremental and gradual: The people should control the means of violence only insofar as they show the necessary characteristics, not as a matter of absolute individual right.

I will elaborate a little on each. First, the Second Amendment contemplates that the Body of the People should have a central role in the organization of political violence: In Congress, the People spoke indirectly, and in the militia it spoke directly on whether resistance to government was appropriate in a particular instance. Now it may be that the citizenry does not possess the commonality to speak in that unified way, so that by its own terms, the Second Amendment cannot bear its original meaning. Some might conclude therefore that the amendment has become outdated, so that we can abandon it with a twinge of conscience. But before we rush to that conclusion, a different course might recommend itself: Perhaps fidelity to our constitutional tradition suggests that we should ponder whether we can work toward creating that degree of connection on the use of political violence.

And if we did ponder this bit of the tradition, we might also discover that practical necessity strongly suggests that in a democratic republic, the people must be given a role in the domestication of political violence. As I mentioned earlier, many writers argue that the Second Amendment gives private individuals a right to arms to resist the government. Now I think that view bad history, but I also think that it would lead to disastrous results, as the bombing at Oklahoma City should remind us. But those at the other side of the spectrum are no less mistaken. In their view, the amendment guarantees only a state power to maintain the militia so as to keep local order. Again, I think that view bad history, as it proceeds from a modern conviction that the state must command a monopoly of violence. But I also think that it would lead to an untenable state of affairs, because it imagines that the strong arm of the state can keep us in line if it has all the guns. What both of these views fail to realize, in other words, is that the Framers gave the means of violence to the Body of the People because they felt practically compelled to do so. If we are not one body, then we must turn either to disparate individuals or to the government to save us from ourselves. And in the long run, neither course will work. If we are a stable country, it is because we want to be. If we are intent on

killing each other, we will, and no distribution of arms will save us—not if there is an assault weapon in every closet, and not if there is an assault weapon in no closet.

In other words, today, Second Amendment work does not primarily consist in deciding who gets the guns in a fractured, hate-filled, and dangerous landscape. Instead, it consists in the grueling work of constituting the people as a body, so that we don't have to live in that landscape anymore, so that there really will be someone we can trust with the guns, and that someone is us—not us as individuals nor us as the government but us as the American citizenry. And again paradoxically, our current Second Amendment myths actually make that prospect less likely, because they seek to convince us that common devotion is never possible, that the Second Amendment requires distrust and suspicion everywhere and always—and that is why we hold tight to our guns.

What that means is that under modern circumstances, Second Amendment work must be transformative and dynamic. And for that reason, the meaning of the Second Amendment—to the extent that it can be given meaning in the modern world—is neither absolute nor fixed. Instead, it will require imagination and experimentation. Again, we should not view this as an either/or choice: Either the state is the master or the citizens are. Instead, in realizing the amendment's ideals, state and citizenry must undertake an active relationship, dividing power the better to tame it. And that relationship should be evolutionary, as the people find new ways to assume responsibility for their own safety. The amendment cannot counsel giving ultimate power over violence to a fractured populace, but it might counsel giving more and more responsibility to citizens as they become capable of taming that violence for the general good.

How we might construct those connections—how we might do that Second Amendment work—is a subject too large for this lecture, which is already too long, though I pay it some attention in the book. Today, I would like only to draw attention to one final irony, which forms a piece of this construction project. As I suggested at the beginning of the talk, the Second Amendment is commonly taken as a symbol of the danger that we pose to one another: It's a jungle out there, so you better hold tight to your guns—or else make sure that the government has all of them. If only we (the good people) can dominate them (the bad ones) through force of arms, then all will be well. In fact, however, the Second Amendment really symbolizes just how deeply and desperately and hopelessly we depend on each other. If we are not a People, if we cannot do civic constitutionalism, if we cannot develop shared norms on the use of political violence, then we will surely face an endless series of Oklahoma Cities and Wacos. The Second Amendment, which to so many promises personal safety in the blued steel of a gun barrel, really promises only ultimate vulnerability. Without each other, we cannot tame the violence loose among us. And yet the world for which the Second Amendment yearns is made so difficult precisely by the world which the amendment is generally taken to represent. Once you have gone out into the world and been hurt, once you realize the danger that your fellow citizens pose, it is easier to stop hoping for more. It seems safer to trust in a gun.

So I close this lecture in the way that I close the book, with a fear and a hope:

It is a lot to hope for that sort of mutual devotion in a large, multicultural democracy. In the scheme of history, it may seem a miracle that humans ever tame political violence long enough to plan their lives in peace and promise, drinking up the good things that life can offer. It seems even more of a miracle that we could tame violence

through connection while still respecting freedom and diversity. And yet miracles happen because people believe they can happen. In 1776, few would have believed that women and people of color would ever enjoy formal—if not yet truly substantive—equality. Yet they do, because a few people found the courage to hope and, by hoping, made it possible for others to share their conviction. In 1976, few would have believed that democracy was about to sweep the world, bringing down one totalitarian government after another. And yet it did, because citizens of those governments found a way to believe that they could change the world in solidarity. As hope grows on hope, trust grows on trust, and love grows on love, and they all grow on the resources that our myths offer us. If we live out our stories, then, we need to be sure to tell the right ones, as they set the limits of our future. And to heal the violence that scars us, even as we recognize the fears and threats on every side, we must incorrigibly insist on believing in stories of endless possibility.⁹

9. *Id.* at 326.