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## FEAR AND FIREARMS

Darrell A.H. Miller\*

MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* (SIMON & SCHUSTER 2014). PP. 272. PAPERBACK \$16.00.

FIRMIN DEBRABANDER, *DO GUNS MAKE US FREE? DEMOCRACY AND THE ARMED SOCIETY* (YALE UNIVERSITY PRESS 2015). PP. 296. HARDCOVER \$30.00.

The principal actor in America’s gun policy drama isn’t the Second Amendment or even guns—it’s fear. In Michael Waldman’s brisk *The Second Amendment: A Biography*, the main character doesn’t appear until the end of the third act. “What matters,” Waldman tells us, “is what people fear.”<sup>1</sup> In Firmin DeBrabander’s more academic, *Do Guns Make Us Free? Democracy and the Armed Society*, the star takes center stage from the outset. Chapter one is titled “The Culture of Fear.”<sup>2</sup> But in both books, it was fear—what we fear, who we fear, and what we do with fear—that I lingered over, long after I read the last line.

Waldman is president of the Brennan Center for Justice and a recurrent guest on cable news shows. His book is a breakneck tour of over two hundred years of constitutional law and politics, written in a beach-reading patter, and sprinkled with winking asides to his lay audience. (Popular politicians in the 1700s are ones you’d want to “‘drink a cider’ with.”<sup>3</sup>) His goal is to explain how a coalition of conservative think tanks, gun rights groups, Justice Department ideologues, and small government populists turned a poorly worded, historically and politically contested constitutional provision into an individual right. The champion in this narrative is the late Justice Antonin Scalia, the weapon is a method called “originalism,” and the prize is the Supreme Court’s decision in *District of Columbia v. Heller*.<sup>4</sup>

The politico-legal alchemy that transformed an individual right to keep and bear arms from a “fraud,” in the words of the late Chief Justice Warren Burger,<sup>5</sup> into the

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1. MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* 168 (2014).

2. FIRMIN DEBRABANDER, *DO GUNS MAKE US FREE? DEMOCRACY AND THE ARMED SOCIETY* 1 (2015).

3. WALDMAN, *supra* note 1, at 46.

4. *District of Columbia v. Heller*, 128 S. Ct 2783 (2008).

5. WALDMAN, *supra* note 1, at 84 (quoting “This 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.”).

law of the land is a familiar tale to scholars,<sup>6</sup> but Waldman tells it with wit and style. As Waldman recounts, the Framers of the original Constitution were dubious of standing armies and embraced the politics of the republican militia, even as they privately came to doubt its effectiveness.<sup>7</sup> The Constitution was the direct result of the abject failure of the Articles of Confederation—and the state militias—to deal effectively with threats external (like the British) and internal (like Daniel Shays eponymous rebellion).<sup>8</sup> In the drafting of the new constitution, the Framers hardly mentioned specific issues of self-defense or self-protection. Most debates over the right to keep and bear arms arose in the context of broader conflicts over federalism, separation of powers, and the relative role of the states and the national government in military preparation.

Waldman reminds us that the Bill of Rights—so revered today—was nothing more than a belly ache for James Madison. (Madison referred to it as “the nauseous project of writing amendments.”<sup>9</sup>) The first ten amendments, including the second, were a political expedient. They were a way to head off what Madison considered the worse disaster: repudiation of the newly ratified United States Constitution and assembly of yet another constitutional convention.<sup>10</sup> As a result, the Second Amendment that we have is a syntactical mangle, pieced together from various sources, with no clear record of its drafting, and even less record of its passage and ratification. We simply cannot know, Waldman insists, what the Framers wanted the Amendment to mean, because their understandings are as alien to us as “bleeding for medical care, wearing wigs, and keeping slaves.”<sup>11</sup>

The Civil War and Reconstruction did little to clarify the meaning of the Second Amendment in Waldman’s account. Waldman does not understand Reconstruction to have turned the Second Amendment from a redoubt for a discredited militia into a personal guarantee.<sup>12</sup> In this sense, he seems skeptical of the pro-gun interpretations of left-leaning scholars like Akhil Amar.<sup>13</sup> Although there are some hints at a change in Second Amendment meaning during the nineteenth century, Waldman sees the evidence as too contingent for any definitive statement. The men who passed the Civil Rights Act of 1866 and ratified the Fourteenth Amendment, he suggests, are as remote and inscrutable to a modern audience as their bewigged predecessors.<sup>14</sup>

6. See ADAM WINKLER, *GUN FIGHT* (2011); Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 224 (2008).

7. See WALDMAN, *supra* note 1, at 5, 9, 12, 14, 15-16, 67.

8. *Id.* at 15-16, 19.

9. *Id.* at 49 (quoting James Madison Letter to Richard Peters, Aug. 19, 1789, in *THE PAPERS OF JAMES MADISON VOL.12* 346-347 (Charles F. Hobson et al. eds., 1979)).

10. *Id.* at 49.

11. *Id.* at 64.

12. See WALDMAN, *supra* note 1, at 75.

13. *Id.* See also AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 326 (2005)

14. WALDMAN, *supra* note 1, at 75.

What can't be gainsaid, according to Waldman, is that from at least Reconstruction through the first half of the twentieth century, guns were both thoroughly available and increasingly regulated.<sup>15</sup> (Waldman offers selective support for this assertion, and his book would have been better served by more extensive use of a compilation like that of Anthony Frassetto.<sup>16</sup>) There was very little in the way of a Second Amendment opposition to regulation because the Second Amendment—indeed none of the Bill of Rights—applied to the states.<sup>17</sup> The only case to address the right on a federal level, *United States v. Miller*,<sup>18</sup> rejected the Second Amendment challenge.<sup>19</sup>

Three events converged in the late twentieth century that changed everything. The National Rifle Association, previously a sleepy marksmanship and hunting organization, transformed into a single-issue political juggernaut, with a near-fanatical opposition to any form of gun regulation.<sup>20</sup> Lewis Powell, just weeks prior to his appointment as Associate Justice, circulated his Powell Memo, which called upon businesses to invest in think tanks, academic posts, and media outlets that would push pro-business, free market ideas.<sup>21</sup> And Associate Justice Antonin Scalia, with his rapier pen, fearsome intellect, and “operatic persona” brought “originalism” out the cloisters of the academy and into the courtrooms of the federal judiciary.<sup>22</sup>

The result of this convergence was Justice Scalia's *District of Columbia v. Heller* opinion; a tour de force that married old time religion's veneration for the past with neoliberal deregulatory ideology.<sup>23</sup> Claiming a rigorous application of originalist principles, Scalia found that the Second Amendment as enacted in 1791 codified an individual right for law-abiding citizens to keep and bear an operable handgun in the home for self-defense. The text, “A well regulated Militia, being necessary to the security of a free State,” was only a preface;<sup>24</sup> the operative portion of the amendment was “the right of the people to keep and bear Arms, shall not be infringed.”<sup>25</sup> It guaranteed an individual right, unconnected to the militia. Of course, this was not a right free from all regulation: government still could prevent felons, children, and the mentally ill from owning firearms; it still could regulate the commercial sale of firearms; certain kinds of weapons could be prohibited entirely; and authorities still could designate an undefined set of “sensitive places” firearm-free.<sup>26</sup> But the basic

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15. *Id.* at 77.

16. *See id.* at 214 n. 78. *See also* Anthony Frassetto, *Firearms and Weapons Legislation up to the Early 20th Century*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2200991](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200991).

17. Incorporation of the Bill of Rights didn't really begin until the early twentieth century. *See Gitlow v. New York*, 45 S. Ct. 625, 630 (1925); *Twining v. New Jersey*, 29 S. Ct. 14 (1908).

18. *United States v. Miller*, 307 U.S. 174 (1939).

19. *See* WALDMAN, *supra* note 1, at 82-83.

20. *Id.* at 87-91.

21. *Id.* at 107-08.

22. *Id.* at 114-15.

23. *Id.* at 117-21. *District of Columbia v. Heller*, 128 S. Ct 2783, 2788 (2008).

24. 128 S. Ct at 2799.

25. *Id.* at 2790.

26. *Id.* at 2817.

division between the militia and the individual right that had dominated Second Amendment thought and scholarship was resolved. The right was an individual one.

Conservatives cheered the result, although some fretted about the exceptions. Progressives saw the decision as dynamic constitutional interpretation, not originalism at all. Pragmatists wondered what kind of Pandora's box the Court had opened.<sup>27</sup>

Then in 2012, Sandy Hook. Twenty first graders and six adults massacred in an elementary school by one man with a semiautomatic rifle. Suddenly, sections of the public pushed for more regulation in an environment where the veto gates weren't just political anymore, they were constitutional. But, Waldman says, the judiciary was "flying blind."<sup>28</sup> The conventional tiers of scrutiny—strict, intermediate, and rational basis—seemed to have been discarded, but with no instruction on a replacement, other than some hazy idea of history. *Heller* and its sequel *McDonald v. City of Chicago* had left lower courts uncertain as to even the right Second Amendment questions to ask, much less how to answer them. For gun rights advocates and organizations, the answer is the Constitution: "What part of the word *infringe* don't you understand?" they say. But, as Waldman notes, that position "inject[s] . . . constitutional fundamentalism into gun policy . . . at precisely the moment when it might do the most harm in the long run."<sup>29</sup>

Waldman's critique is a familiar one: an array of movement conservatives, aided by some left-leaning scholars, foisted a dangerously truncated reading of the Second Amendment upon the nation with a humble-brag methodology called "originalism." It has been voiced by those on the left, like Professor Mark Tushnet,<sup>30</sup> and those on the right, like Judge Richard Posner and Judge Harvie Wilkinson.<sup>31</sup> Waldman works hard not to create a caricature of pro-individual rights scholarship and, for the most part, he succeeds. He recognizes the passages that appear to support an individual right in the Founding era.<sup>32</sup> He is candid about the evidence for an individual right to keep and bear arms during the nineteenth century.<sup>33</sup> He acknowledges the deep damage that Michael Bellesiles's fabricated history of gun ownership did to reputable Second Amendment historiography and to gun-control politics in particular.<sup>34</sup>

That said, Waldman's biography has heroes and villains, and it's not hard to work out who is who. The late Justice Scalia comes across as a sanctimonious pedant. As Saul Cornell has noted, Scalia not only reads the Second Amendment text backwards, by beginning with the "right . . . to keep and bear Arms" clause rather than the "well regulated Militia" clause, he also reads the *history* of the Second Amendment

27. WALDMAN, *supra* note 1, at 129-32.

28. *Id.* at 161.

29. *Id.* at 160.

30. Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609 (2008).

31. WALDMAN, *supra* note 1, at 130-32 (citing J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unravelling Rule of Law*, 95 VA. L. REV. 253, 264-65 (2009) and Richard A. Posner, *In Defense of Looseness*, THE NEW REPUBLIC, Aug. 27, 2008, <http://www.newrepublic.com/article/books/defense-looseness>).

32. WALDMAN, *supra* note 1, at 35-37, 59.

33. *Id.* at 70, 74.

34. *Id.* at 102.

backwards, using historical sources and grammatical conventions from the nineteenth century to construe an eighteenth century document.<sup>35</sup> This may be okay if he acknowledged what he was doing, but what really galls Waldman is Scalia's insistence that he is conducting a dispassionate investigation into original understanding.<sup>36</sup> Puh-lease.

By comparison, Justice Stephen Breyer is portrayed as a voice of moderation and wisdom. Breyer wrote a dissent in *Heller*. Breyer acknowledged, as did everyone on the Court, that there was an individual right. It's just that the right is to have arms when one is in a militia. Any issues related to the private use of arms are matters of legislation or common law. Most of all, Breyer criticized the majority for announcing a right and then disregarding all the conventional tools of constitutional law that courts use to administer that right.<sup>37</sup> It is Breyer's notion of "active liberty," the notion that the Constitution specifies negative rights, but also positive ones that enable civic engagement and empowerment, that Waldman sees as a proper response to originalism.<sup>38</sup>

Waldman's description of originalism isn't terribly sophisticated, which is not surprising given his target audience is the casual reader, not the constitutional scholar. Originalism in the academy has moved beyond even the "original public meaning" variety Waldman identifies in his book.<sup>39</sup> Consequently, Waldman may be critiquing an originalism already on its way out. (Although some of his lay readers, still fixated on the intent of the Framers, may be surprised to learn that the "Let's-channel-James-Madison" variety of originalism has become passé.<sup>40</sup>)

Waldman disparages originalism as an intellectual front for conservative policy preferences. Justice Scalia and his conservative colleagues "did not choose conservatism because they were originalists; they chose originalism because they were conservatives."<sup>41</sup> The accusation that originalism is just a way of disguising conservative politics is not particularly novel. But more to the point, it's not completely true. Justice Scalia's political conservatism doesn't explain his pro-criminal defendant jurisprudence on the Sixth Amendment right to a jury,<sup>42</sup> or the Confrontation Clause,<sup>43</sup>

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35. Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 746 (2013) ("Approaching history and texts backwards lends Scalia's *Heller* opinion an *Alice in Wonderland* quality."); see also WALDMAN, *supra* note 1, at 123-27.

36. WALDMAN, *supra* note 1, at 174.

37. *Id.* at 128.

38. *Id.* at 128, 176-77. See also generally STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

39. See, e.g., Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 730, 777 (2011); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817 (2014).

40. Colby, *supra* note 39, at 777 (noting popular attachment to original intent).

41. WALDMAN, *supra* note 1, at 176.

42. *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

43. *Crawford v. Washington*, 541 U.S. 36 (2004).

or the war on terror,<sup>44</sup> all products of his originalist methodology. Yes, originalism as practiced tends to generate conservative policy outcomes, but not always.<sup>45</sup>

Finally, there is Waldman's preferred alternative. Originalism may offer only an illusion of objectivity, but the underlying impulse—to have law be something different than politics—is an instinct shared by every generation and by individuals of most ideological persuasions. Waldman's resort to the kind of legal process theory championed by figures such as Justice Breyer is a common move among those who find originalism either deceptive or delusional. But that still leaves us with all the unsatisfactory elements of legal process that have never been worked out.<sup>46</sup> Waldman offers only the most cursory defense of why his version of constitutionalism is the normatively superior methodology. Readers who want more meat and less milk when it comes to constitutional theory may leave feeling unsatisfied.

DeBrabander, a philosopher at the Maryland Institute College of Art, and frequent contributor to the *Washington Post*, *Salon*, and the *New Republic* writes a more conventionally academic book, but one blessedly free of the jargon that scholars (myself included) sometime mistake for precision. DeBrabander is not concerned with constitutional history or doctrine like Waldman, but with the political philosophy of guns. His most consistent rhetorical maneuver, and an effective one, is to identify those philosophical traditions typically embraced by gun rights supporters and show how the tradition actually repudiates the strong gun rights position.

DeBrabander sees in the NRA's reaction to the Sandy Hook massacre a prime example of how toxic gun rights ideology is to democracy. After Sandy Hook, Wayne LaPierre, the NRA's executive vice president, refused to identify guns as the problem; instead, he blamed our violent media, the mentally ill, innate evil, and feckless or corrupt politicians who want to disarm the "good guys" and leave us all at the mercy of the "bad guys." The NRA's reaction, according to the author, shows us everything that is wrong with gun rights ideology.

DeBrabander agrees with the NRA that the media saturates us with stories of mayhem and bloodshed, in which every neighbor is a serial killer and every social encounter ends with a corpse. But DeBrabander doesn't think LaPierre appreciates just how much his organization and its allies promote this climate of fear. The litany of quotations from pro-gun supporters is damning: the mental health system has "completely and totally collapsed;"<sup>47</sup> an insidious cancer of "killers, robbers, rapists, and drug gang members" afflicts "every community in this country."<sup>48</sup>

44. *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting); Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?* 34 HARV. J.L. & PUB. POL'Y 5 (2011).

45. Fallon, *supra* note 44, at 26 n.95.

46. See Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 561 (2016); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064-65 (1980).

47. DEBRABANDER, *supra* note 2, at 47 (quoting Wayne LaPierre, interview by David Gregory, *Meet the Press*, NBC, Dec. 23, 2012, [http://www.nbcnews.com/id/50283245/ns/meet\\_the\\_press-transcripts/t/december-wayne-lapierre-chuck-schumer-lindsey-graham-jason-chaffetz-harold-ford-jr-andrea-mitchell-chuck-todd/#.V9YU\\_pMrKRrs](http://www.nbcnews.com/id/50283245/ns/meet_the_press-transcripts/t/december-wayne-lapierre-chuck-schumer-lindsey-graham-jason-chaffetz-harold-ford-jr-andrea-mitchell-chuck-todd/#.V9YU_pMrKRrs)).

48. *Id.* at 33 (quoting Wayne LaPierre, Exec. Vice President, Nat'l Rifle Ass'n, Press Conference Following Sandy Hook Shooting (Dec. 21, 2012)).

Governments cannot be trusted to help, and most likely will hurt, according to this dark view of politics. DeBrabander uses the rhetorical excesses of celebrity judge Andrew Napolitano to show just how corrosive this attitude is to a functional state. Government, no matter how it comes to power is an aberration, according to Napolitano. Freedom is “the essence” of mankind.<sup>49</sup> Therefore, all men must be armed with those weapons that are capable of resisting the military power of the United States government.<sup>50</sup> Relatedly, government is not to be trusted with a monopoly on the legitimate use of force. All individuals should have the power to enforce their natural freedom against any opposition. Even if that enforcement means that innocent people are killed under laws like “Stand Your Ground.”

The sense that the world is irredeemably hostile and corrupted leads to an attitude that is intolerably Manichaeic. There are the good and the bad, the saved and the damned.<sup>51</sup> Only the good guy with the gun can save us from the bad guy with the gun. It is no wonder that DeBrabander spends a portion of his book describing the quasi-religious devotion of some gun-rights proponents. “You would get a far better understanding if you approached [the NRA] as if you were approaching one of the great religions of the world,” says a former NRA leader.<sup>52</sup>

The kind of apocalyptic rhetoric that generates donations, gun sales, and votes is perfectly captured in one paragraph from a LaPierre column that DeBrabander quotes at length:

President Obama is leading this country to financial ruin, borrowing over a trillion dollars a year for phony “stimulus” spending and other payoffs for his political cronies. Nobody knows if or when the fiscal collapse will come, but if the country is broke, there likely won’t be enough money to pay for police protection. And the American people know it. Hurricanes. Tornadoes. Riots. Terrorists. Gangs. Lone Criminals. These are the perils we are sure to face—not just maybe. It’s not paranoia to buy a gun. It’s survival. It’s responsible behavior, and it’s time we encourage law-abiding Americans to do just that.<sup>53</sup>

There you have it: we are at the cusp of societal collapse; nature and your fellow man is against you; government is weak and corrupt; it’s just you and your gun.<sup>54</sup>

But, as DeBrabander notes, the political philosopher typically revered by gun-rights advocates, John Locke, would have considered this dystopian attitude as the failure of politics, not its expression. When everyone must arm himself, everyone is

49. *Id.* at 62 (citation and internal quotation marks omitted); see Andrew P. Napolitano, *The Right to Shoot Tyrants, Not Deer*, WASH. TIMES, Jan. 10, 2013, <http://www.washingtontimes.com/news/2013/jan/10/the-right-to-shoot-tyrants-not-deer>.

50. DEBRABANDER, *supra* note 2 at 89; see Napolitano, *supra* note 49.

51. DEBRABANDER, *supra* note 2 at 33-35 (discussing this Manichean and religious worldview).

52. *Id.* at 52 (quoting JOSH SUGARMAN, NATIONAL RIFLE ASSOCIATION: MONEY, FIREPOWER, AND FEAR 14 (1992)) (internal quotation marks omitted) (alteration added).

53. *Id.* at 40 (quoting Wayne LaPierre, *Stand and Fight*, DAILY CALLER, Feb. 13, 2013, <http://dailycaller.com/2013/02/13/stand-and-fight>) (internal quotation marks omitted).

54. *Id.* at 40, 203.

equal, but equal only in his insecurity.<sup>55</sup> That's not a very satisfying type of equality.<sup>56</sup> Certainly it seems a cramped view of freedom. One is reminded of Isaiah Berlin's "retreat to the inner citadel"—the freedom that comes only by rejecting any desire that must be satisfied by others.<sup>57</sup> Yes, in the citadel one lives an autonomous life, but it is a very small and impoverished one.

Moreover, widespread possession of firearms, according to DeBrabander, provides only the illusion of security. Niccolo Machiavelli, father of the ideal of the armed citizen, also encouraged the cunning would-be dictator to arm the people. Why? Because it distracts, it soothes, it lulls. Meanwhile, the actual tools of despotism—surveillance, suspicion, and secret assassinations—are given free play.<sup>58</sup> The author points to revelations of data tracking by the National Security Agency and the drone strike on American Anwar al-Awlaki in Yemen. The implication is stark: what good is your AR-15 if the government can rain death from the sky as you drive to the grocery store?

Finally, DeBrabander believes that an armed society may be a polite society, but is not necessary a political one.<sup>59</sup> "Pervasive arms inhibit free speech and make assembly and democratic protest ultimately impossible."<sup>60</sup> He is particularly concerned about efforts to make our public schools and universities, what Paul Horwitz regards as our "training grounds for public discourse,"<sup>61</sup> into quasi-military encampments. A fortified school is an environment in which our children and young adults learn that the world is unsafe, that voicing opinions is dangerous, and that persuasion is indistinguishable from coercion. Not the kind of instruction John Dewey thought necessary to survive in a pluralistic republic.<sup>62</sup>

Democratic culture cannot thrive, according to the author, when government is more alert to the threat of violence than to the merits of dissent. DeBrabander's most trenchant example is the American civil rights movement. That movement was possible because it *rejected* violence as a political tool. The March on Washington, Selma, the sit-ins are part of our national narrative because they had a deep faith in power of politics as *opposed* to the power of the gun.<sup>63</sup> An armed march on Washington would have generated a backlash, and undermined the moral case for the Civil Rights Act of 1964 and every subsequent civil rights victory in the twentieth century.

Like Waldman, DeBrabander takes refuge in a kind of process theory to respond to the dark political vision of gun stalwarts. He ends his book with a thought

55. *Id.* at 88 ("In a society where peace is maintained by private firearms, all are insecure, and all must fear for their lives.").

56. *Id.* at 73.

57. ISIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* (1969).

58. DEBRABANDER, *supra* note 2, at 110.

59. See Darrell A.H. Miller, *Guns as Smut: Defending the Home-bound Second Amendment*, 109 COLUM. L. REV. 1278, 1310 n.219 (2009); see also DEBRABANDER, *supra* note 2, at 145.

60. DEBRABANDER, *supra* note 2, at 233.

61. PAUL HOROWITZ, *FIRST AMENDMENT INSTITUTIONS* 107 (2013).

62. DEBRABANDER, *supra* note 2, at 170-73.

63. *Id.* at 213. One thinks how the killings of police officers by those purporting to be affiliated with Black Lives Matter undermine the moral power of that movement.

experiment: What if the mechanisms for legal change and civic engagement were more fluid, more open, something akin to how Hannah Arendt understood the Jeffersonian ward system.<sup>64</sup> What if we were to revive the kind of localism in which everyone participates in the republican project, and the Constitution is amended frequently to reflect those civic republican values.<sup>65</sup> But that kind of project will take courage, “courage to be a democracy, to hear the voices of all—even those we fear, or suspect—and demand a forum for our voices in turn.”<sup>66</sup>

DeBrabander’s book is thoughtful and learned. He lapses at times, however, into that kind of casual empiricism that is the affliction of philosophers, legal theorists, and judges. “Gun owners are a disproportionately suspicious lot—as if their weapons infected them with extreme doses of mistrust.”<sup>67</sup> He provides plenty of anecdotes, but where is the hard evidence for that statement? Does gun ownership actually correlate with mistrust? He asserts that “Stand Your Ground laws clearly allow for altercations to become needlessly escalated.”<sup>68</sup> There are stories of shootings over movie theater texting and loud music, but is that a result of Stand Your Ground laws?<sup>69</sup> These bald assertions will doubtlessly rankle those the author may otherwise wish to persuade.

When DeBrabander *does* discuss the empirical literature, it comes across as merely reportage. John Lott says this; Ian Ayers and John Donohue say that.<sup>70</sup> This is better than making unsupported empirical claims, but it reveals a softness at the center of the book. If more guns do mean less crime, or if gun owners are equally or more politically engaged than non-gun owners, does DeBrabander’s point about the corrosive effect of guns on democracy have as much punch?

Perhaps more damaging to DeBrabander’s thesis are the occasional examples that confirm the suspicions he is attempting to debunk. The power of the NSA and extra-judicial killings concern both the political left and the political right. Futility of firearms against such threats may be an argument for not having them, but they feed just as easily into the libertarian narrative that the potential for excess in the war on terror demands more weaponized deterrence to government, not less.<sup>71</sup>

Finally, as with Waldman, DeBrabander calls for the revival of civic engagement and legal process as an antidote to gun rights rhetoric. The invitation is laudable, if conventional. But this is a conversation that only one side seems interested in having. As Waldman writes, “in the culture wars, one side is armed.”<sup>72</sup> One side is armed metaphorically, in that one side now can access the legal and rhetorical weapon of

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64. *Id.* at 231-34.

65. *Id.* at 231-34.

66. *Id.* at 234.

67. DEBRABANDER, *supra* note 2, at 46.

68. *Id.* at 86.

69. *Id.* at 82-83.

70. *Id.* at 150-151.

71. *Id.* at 30-32, 130-32.

72. WALDMAN, *supra* note 1, at 166.

*Heller*. But one side is also *literally* armed, in that firearms ownership is strongly correlated with Republican Party membership.<sup>73</sup> DeBrabander harps on the atomized individual sovereign, but that doesn't seem the danger. The danger is an armed minority that doesn't accept the results of any political process. If a controlling faction of one party doesn't believe in politics, if they have already "decided that portions of society cannot be negotiated with, and government can be negotiated with only by threat of force,"<sup>74</sup> then how can the kind of renewed civic engagement and commitment to the rule of law advanced by both Waldman and DeBrabander hope to succeed? The authors may not share the gun rights movement's love of firearms, but their assessment of our political culture seems just as bleak.

Ultimately, what unites these two books is a recognition that our national discourse over guns, the Second Amendment, crime, the Framers, and freedom, is epiphenomenal. The real discussion we should have is about fear.

All constitutions, in some respects, are monuments to fear. Thumb through the federal Constitution and you get a sense of what scared the founding generation: the political abuse of treason, general warrants, the unchecked judiciary, a national church. Pick up an easily-amended state constitution, and the anxiety spills from the page: immigration,<sup>75</sup> Sharia law,<sup>76</sup> pay-to-play.<sup>77</sup>

The Second Amendment too is about fear. Ask most Americans what the Second Amendment is for, and you will usually get the answer "self-defense." Self-defense is a resonant word. It's also a verbal torus: turned in upon itself, there's not much there to grip. From what are we to defend ourselves? Of whom are we to be afraid? The lack of an object for our fear is how gun rights ideology merges so easily with neoliberal ideology. Who is the government to tell you what to fear? How do they know? Why should we believe them? Everyone is a potential enemy; no one can be trusted.<sup>78</sup> Only by empowering everyone to police everyone else through whatever lethal force each thinks best can the society achieve an optimum amount of security. As my colleague Joseph Blocher and I have written, the deep belief of the neoliberal project is that the invisible hand will effortlessly distribute coercion in this "marketplace of violence," and everyone will be better off.<sup>79</sup>

But that faith in the invisible hand, as both authors recognize, is in conflict with the very notion of the social contract. The free marketplace of violence *is* the state of

73. *Id.* at 167; Rich Morin, *The Demographics and Politics of Gun-owning Households*, PEW RESEARCH CENTER (July 15, 2014), <http://www.pewresearch.org/fact-tank/2014/07/15/the-demographics-and-politics-of-gun-owning-households/> ("Republicans are twice as likely as Democrats to be members of a gun-owning household").

74. DEBRABANDER, *supra* note 2, at 170.

75. Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 659 (1998) (observing that state level "Blaine Amendments" were "a remnant of nineteenth-century religious bigotry promulgated by nativist political leaders who were alarmed by the growth of immigrant populations and who had a particular disdain for Catholics").

76. *See* Oklahoma State Question 755, H.J. Res. 1056, 52d Leg., 2d Sess. (Okla. 2010); *see also* *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012) (enjoining certification of the law).

77. *See* N.C. CONST. art. V, § 2(1) (taxation permitted for "public purposes only").

78. DEBRABANDER, *supra* note 2, at 22 (describing the facelessness of violence and fear).

79. Joseph Blocher & Darrell A.H. Miller, *What is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 302, 352-54 (2016).

nature, which is why we surrender some of our rights to achieve the security provided by politics and the rule of law. Furthermore, only the most inflexible libertarian believes that the government has *no* role in policing this marketplace of violence. There are those who may believe that it is their natural right to possess any kind of weapon, for any kind of confrontation, against any kind of insult to personal freedom. But not a single *Heller* justice was willing to take that step.

Plus, constitutions are not only monuments to fear, they are also machines designed to channel fear. As Adrian Vermeule has written, constitutions are, among other things, systems designed to manage risk.<sup>80</sup> If you fear factionalism will bring down the Republic, you make ambition counter ambition, to paraphrase Madison. If you worry about mob rule, you incorporate intermediary institutions, like state legislatures and the Electoral College, into the process of selecting federal officials.

The problem raised by Waldman and explored by DeBrabander, is what to do when the monumental function of a constitution begins to interfere with its mechanical function.<sup>81</sup> When, to use the terms of Sanford Levinson, the “Constitution of Conversation” (abstract and contested rights) begins to clog the gears of the “Constitution of Settlement” (governance structures).<sup>82</sup>

In other areas of constitutional law, constitutional norms and structures are often designed around a “precautionary approach.”<sup>83</sup> The world is full of “knave[s].”<sup>84</sup> Rights and institutions are arranged to assume the worst, and to minimize any harm that results once the worst happens.<sup>85</sup> In free speech cases, for example, courts take what Vincent Blasi labeled the “pathological perspective.”<sup>86</sup> Constitutional rules are “geared to preventing the worst-case scenario—abuses targeted at the speech of political minorities, dissenters, or opponents of the regime.”<sup>87</sup> The Court, practicing precautionary constitutionalism from a pathological perspective, then produces tests like that in *Brandenburg v. Ohio*, which states the government may punish inciting speech only when it is designed to and likely will produce imminent lawless action.<sup>88</sup>

80. ADRIAN VERMEULE, *THE CONSTITUTION OF RISK* 2 (2014).

81. *See id.* (noting that the “goods [of constitutionalism] may work at cross purposes to each other and, under certain conditions, trade off against one another”).

82. Sanford Levinson, *What are We to Do About Dysfunction? Reflections on Structural Constitutional Change and the Irrelevance of Clever Lanyering*, 94 B.U. L. REV. 1127, 1136 (2014). Levinson is not too optimistic about the operation of the “Constitution of Settlement” by itself, given the numerous veto gates and other democracy-frustrating structures it contains. *See id.*

83. VERMEULE, *supra* note 80, at 11 (maximin constitutionalism, a type of precautionary approach, treats “the worst as sure to happen” and “amounts to an infinite aversion to political risks”).

84. *See id.* at 30 (quoting David Hume, *Of the Independency of Parliament*, ESSAYS AND TREATISES ON SEVERAL SUBJECTS 37 (London, A. Millar 1764)).

85. *Id.* at 11 (maximin constitutionalism, a type of precautionary approach, “treats the worst as sure to happen” and “amounts to an infinite aversion to political risks”).

86. *Id.* at 19, 41 (discussing Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449-50 (1985)).

87. *Id.* at 41 (discussing Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449-50 (1985)).

88. VERMEULE, *supra* note 80, at 42.

But knaves don't just work for the state. And this is why, says Vermeule, the precautionary principle can lead to sub-optimal outcomes. There are knaves everywhere. Focusing precautions only on the ones in government can generate unaccounted risks in other areas, or "actually exacerbate[] the very risk that the precaution attempts to prevent."<sup>89</sup>

Both Waldman and DeBrabander see precautionary First Amendment cases like *Citizens United* as throwing one kind of spanner into the machinery of government.<sup>90</sup> By permitting seemingly unlimited money to go into the mechanisms that manage our fear, concentration of power into the hands of oligarchs and tyrants is more likely to occur. This in turn gives rise to more distrust of government institutions and more desire to amass weapons.<sup>91</sup>

But *Heller*'s Second Amendment right to keep and bear arms is itself a precautionary wrench grinding the gears. Like the First Amendment, the Second Amendment is a product of fear—fear of a government that will not protect because it is hostile, corrupted, or ineffective. And like Vermeule's point about the First Amendment, a "pathological perspective" to Second Amendment rights fails to account for risks in other areas or generates the risks it is designed to prevent. What Waldman and DeBrabander want judges and gun-rights advocates to acknowledge is that the "optimal level of the target risk is not zero . . . some degree of expected harm from the target risk is necessary to obtain other goods."<sup>92</sup> Prohibiting private guns near polling stations enhances the risk of government coercion or violence, but allowing private guns near polling stations threatens the free exercise of the franchise. Permitting only the government to own armored vehicles and killer robots increases the risk of government oppression, but permitting everyone to possess such weapons makes the government more likely to overreact to threats.<sup>93</sup>

What is necessary is a constitutional rule system that allows for the evaluation of all relevant risks in order to design "optimal precautions rather than maximal precautions."<sup>94</sup> Vermeule's perspective shows that our discussion about guns and gun rights after *Heller* is dangerously distorted. Government action creates costs, but so does government inaction. Regulating guns leads to risk, but so does leaving them unregulated. Either choice can be oppressive.<sup>95</sup> Although the politics of guns and gun rights may tend toward the Manichean and dystopian, there is no reason our Second Amendment doctrine must reflect those politics. For, while optimizing constitutionalism "is no panacea for the paranoid political style . . . [in] constitution making . . . it can hardly make things worse, and under imaginable conditions might even

89. *Id.* at 54, 42. Vermeule offers another two kinds of arguments against precautionary constitutionalism which I do not address here.

90. See WALDMAN, *supra* note 1, at 133, 173; DEBRABANDER, *supra* note 2 at 220-21.

91. See DEBRABANDER, *supra* note 2, at 220-21.

92. VERMEULE, *supra* note 80, at 58.

93. See generally *id.*; DEBRABANDER, *supra* note 2, at 211 (discussing over-reaction of state officials when everyone is armed).

94. VERMEULE, *supra* note 80, at 77.

95. *Cf. id.* at 60 ("[I]t can be just as oppressive to prevent government from operating as to hijack its positive operation for factional ends").

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make the process of constitution-making better.”<sup>96</sup> Good counsel for when the Supreme Court takes another Second Amendment case.

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96. *Id.* at 87.