

# TAKING GUN RIGHTS SERIOUSLY: THE INSURRECTIONIST IDEA AND ITS CONSEQUENCES

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INTRODUCTION.....	497
I. WHAT IS THE INSURRECTIONIST IDEA?.....	497
II. THE INSURRECTIONIST IDEA COMES OF AGE: <i>PARKER V. DISTRICT OF COLUMBIA</i> .....	498
III. SECOND AMENDMENT JURISPRUDENCE BEFORE THE RISE OF THE INSURRECTIONIST IDEA .....	500
IV. INSURRECTIONIST LOGIC: A STEP IN THE WRONG DIRECTION .....	502
V. WEBER AND THE STATE’S OBLIGATION TO MAINTAIN A MONOPOLY ON THE LEGITIMATE USE OF FORCE .....	504
VI. THE AMERICAN EXPERIENCE: A TEST CASE FOR A DECENTRALIZED MODEL OF THE LEGITIMATE USE OF FORCE? .....	505
VII. DECENTRALIZED CONTROL OVER THE USE OF FORCE FOR POLITICAL ENDS: SOME HISTORICAL EXAMPLES .....	509
VIII. A STATE MONOPOLY ON LEGITIMATE FORCE: AN ESSENTIAL BUILDING BLOCK FOR DEMOCRATIC GOVERNMENT .....	511
CONCLUSION: WHAT A MONOPOLY ON FORCE MEANS TODAY.....	514

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## INTRODUCTION

Americans have different reasons for—and attach different meanings to—gun ownership. Some use guns for hunting and other recreational activities such as target-shooting or collecting. Others acquire guns to protect themselves or their families from crime. In recent years, major gun rights groups have been increasingly aggressive in asserting the proposition that private ownership of firearms is a vital check against government overreaching, and that Americans should think of armed violence as a legitimate form of political activism in a democracy. Distrust of—and outright hostility toward—government power has become a cornerstone of gun rights advocacy, and leading gun rights organizations routinely urge their members to prepare to resist their government with force of arms.<sup>1</sup> Recent public opinion research shows that many gun owners have accepted this message (a message we call the “Insurrectionist idea”) and see resistance to government as a compelling reason for owning a gun and opposing efforts to regulate the private ownership of firearms.<sup>2</sup>

## I. WHAT IS THE INSURRECTIONIST IDEA?

The core of the Insurrectionist idea is the proposition that unrestricted access to guns of every kind is essential to the defense of freedom. Insurrectionist ideology holds that government, even in its most democratically accountable forms, is inevitably the enemy of freedom, and condemns any and all gun regulation as a government plot to monitor gun ownership (presumably to lay the groundwork for confiscation in the event of a political crisis).<sup>3</sup> One of the leading Insurrectionist theorists, David Kopel, vividly sums up the Insurrectionist case against gun registration:

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<sup>1</sup> Wayne LaPierre, the top executive at the NRA, says, “[T]he people have the right . . . to take whatever measures necessary, including force, to abolish oppressive government.” WAYNE LAPIERRE, *GUNS, CRIME, & FREEDOM* 7 (1994).

<sup>2</sup> Lake Research Partners, Missouri statewide survey conducted for the American Hunters and Shooters Association, Aug. 2006.

<sup>3</sup> WAYNE LAPIERRE, *THE GLOBAL WAR ON YOUR GUNS: INSIDE THE U.N. PLANS TO DESTROY THE BILL OF RIGHTS* 127 (2006). See generally Daniel Polsby & Don B. Kates, Jr., *Of Holocausts and Gun Control*, 75 WASH. U. L.Q. 1237, 1240 (1997) (describing Nazi gun control methods).

[I]t is improper to require that people possessing constitutionally protected objects register themselves with the government, especially when the benefits of registration are so trivial. The Supreme Court has ruled that the First Amendment prohibits the government from registering purchasers of newspapers and magazines, even of foreign Communist propaganda. The same principle should apply to the Second Amendment: *the tools of political dissent should be privately owned and unregistered*.<sup>4</sup>

Nelson Lund, one of the leading Insurrectionists in academia, posits that the Constitution establishes an individual right to bear arms to protect against federal tyranny. “An armed populace—even if it could not serve to deter tyranny as effectively as a legal prohibition against federal standing armies—would still constitute a highly significant obstacle to the most serious kinds of governmental oppression.”<sup>5</sup> Lund believes that the government, state or federal, is prohibited from limiting civilian access to almost any kind of weapons, including “grenades and bazookas,” and that laws banning assault weapon or the carrying of concealed weapons are subject to the same “strict scrutiny” applied to limitations on speech under the First Amendment.<sup>6</sup>

## II. THE INSURRECTIONIST IDEA COMES OF AGE: *PARKER V. DISTRICT OF COLUMBIA*

Insurrectionist ideology has recently found its way into at least one federal court’s jurisprudence, marking its ascendance from a crackpot notion embraced only by reactionaries and conspiracy theorists to a limitation of constitutional dimensions on a democratic government’s ability to enforce its own laws. In March 2007, the U.S. Court of Appeals for the District of Columbia Circuit did something in the case of *Parker v. District of Columbia* that no other federal appellate court has ever done: it found a gun-control statute unconstitutional on Second Amendment grounds by, among other things, explicitly reading an Insurrectionary purpose into the U.S. Constitution.<sup>7</sup> The

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<sup>4</sup> David B. Kopel, *Trust the People: The Case Against Gun Control*, POLICY ANALYSIS, July 11, 1988, at 25 (emphasis added).

<sup>5</sup> Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 GA. L. REV. 1, 31 (1996).

<sup>6</sup> *Id.* at 46, 70-73.

<sup>7</sup> *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007), *cert. granted sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 645 (U.S. Nov. 20,

*Parker* decision is a distinct break from past Second Amendment jurisprudence.<sup>8</sup> The court found that the militia purpose, recognized by all other courts as the basis of the Second Amendment, is but one among a laundry list of other uses of arms protected by the Second Amendment, including hunting, self-defense, and protection from the “depredations of a tyrannical government.”<sup>9</sup> This justification was explicitly urged by the leading gun rights organization, the National Rifle Association (NRA). In its amicus brief to the D.C. Circuit in the *Parker* case, the NRA argued that “[a] civilian population that is protected from the threat of disarmament contributes to ‘the security of a free state’ . . . [T]he very existence of an armed citizenry will tend to discourage would-be tyrants from attempting to use paid troops to ‘pacify’ the population.”<sup>10</sup>

The District of Columbia successfully petitioned for a writ of certiorari to the U.S. Supreme Court.<sup>11</sup> In their Supreme Court brief, Respondents argued that the Second Amendment guarantees rights premised on the theory that “should[] our Nation someday suffer tyranny again, preservation of the right to keep and bear arms would enhance the people’s ability to act as militia in the manner practiced by the Framers.”<sup>12</sup> An adoption of this Insurrectionist logic by the Supreme Court would gravely imperil our democracy by establishing a constitutional right for private citizens to prepare for violent confrontation with the government, to decide when a law or government action

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2007) (No. 07-290).

<sup>8</sup> See *United States v. Miller*, 307 U.S. 174 (1939) (interpreting the right to bear arms in connection with the need for a militia). It is not surprising that the *Parker* case emanated from the D.C. Circuit. During the presidency of George W. Bush, the D.C. Circuit has been packed with reactionary, conservative judges. The District of Columbia does not have voting rights in Congress and therefore does not have senators who can place holds on judicial nominations that are completely unacceptable to their constituents. See People For the American Way, “Far Right Dream Judge” Janice Roger Brown Joins Lineup of Extremist Appeals Court Nominees, Aug. 8, 2003, <http://www.pfaw.org/pfaw/general/default.aspx?oid=11894>.

<sup>9</sup> *Parker*, 478 F.3d at 395.

<sup>10</sup> Brief for NRA Civil Rights Defense Fund as Amicus Curiae in Support of Appellants Seeking Reversal at 10, *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007) (No. 04-7041), available at [http://www.gurapossessky.com/news/parker/documents/nra\\_amicus.pdf](http://www.gurapossessky.com/news/parker/documents/nra_amicus.pdf).

<sup>11</sup> *Parker*, 478 F.3d 370 (D.C. Cir. 2007), cert. granted sub nom. *Heller*, 128 S. Ct. 645.

<sup>12</sup> Respondent’s Brief at 32, *District of Columbia v. Heller*, 128 S. Ct. 645, No. 07-290 (U.S. Feb. 4, 2008).

is tyrannical, and to “act as militia” entirely outside the authority of any instrumentality of the state or federal governments. This idea is no less than the endorsement of preparations to commit treason, and, taken to its logical conclusion, justifies the use of violence accountable to no democratic institution. The legitimization – and romanticization – of this approach to political dissent is a recipe for the destruction of democratic mechanisms for the resolution of controversies. In its most extreme form, it is a recipe for civil war.

### III. SECOND AMENDMENT JURISPRUDENCE BEFORE THE RISE OF THE INSURRECTIONIST IDEA

So far, the D.C. Circuit is alone in finding an Insurrectionary purpose in the Second Amendment. Among the other federal courts of appeals, a few circuits have adopted what is known as the collective-rights model,<sup>13</sup> which holds that the Second Amendment is concerned with a balance between federal and state power and protects only the ability of the states to arm their own militias, free of federal interference.<sup>14</sup> The Fifth Circuit has embraced the view that the Second Amendment protects an individual’s right to own guns (while declining to strike down the challenged statute), holding that the preamble only defines the purpose of the right but does not limit the right to those that serve in the militia.<sup>15</sup> An intermediate position, the “sophisticated” collective rights model<sup>16</sup> accepted by most circuits and seemingly by the Supreme Court, to the limited extent that it has addressed the issue at all, is that the Second Amendment protects individuals only to the extent that their possession of a weapon is related to service

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<sup>13</sup> See *Parker*, 478 F.3d at 404, n.4 (Henderson, J., dissenting) (summarizing the position of “[n]ine of our sister circuits,” including the First, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, which have adopted the collective-rights model). The Second Circuit Court of Appeals has never taken a position on the nature of the right established by the Second Amendment. *Id.* at 381. The Fifth Circuit was alone, until *Parker*, in finding an individual right. *United States v. Emerson*, 270 F.3d 203, 264 (5th Cir. 2001).

<sup>14</sup> *United States v. Miller*, 307 U.S. 174, 178-79 (1939).

<sup>15</sup> *Emerson*, 270 F.3d at 233.

<sup>16</sup> See Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L. J. 995, 1003 (1995) (reviewing JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGIN OF AN ANGLO-AMERICAN RIGHT* (1995)) (coining the term “sophisticated collective rights”).

in a state-sponsored militia, such as the National Guard.<sup>17</sup> In fact, the Supreme Court has never struck down a gun-control statute as unconstitutional on Second Amendment grounds, and neither had a federal appellate court until *Parker*.<sup>18</sup> Moreover, the Insurrectionist purpose has already been expressly disavowed by the Supreme Court and other federal circuits.<sup>19</sup> In *Presser v. Illinois*, the Supreme Court found that nobody, other than the officially-organized Illinois militia, could bear arms and organize itself militarily, concluding that a group of German nationalist organizations had no right to assemble with their rifles.<sup>20</sup> The Court specifically rejected the idea that there was a right to prepare for armed insurrection against the government:

Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law . . . The constitution and laws of the United States will be searched in vain for any support to the view that these rights are privileges and immunities of citizens of the United States independent of some specific legislation on the subject.<sup>21</sup>

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<sup>17</sup> Stuart Banner, *Second Amendment So Far*, 117 HARV. L. REV. 898, 905 (2004) (reviewing DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* (2003)). Though the term itself is of recent vintage, for a sampling of cases upholding the “sophisticated rights model”, see *Gillespie v. City of Indianapolis*, 185 F.3d 693, 711 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265, 1273-4 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Hale*, 978 F.2d 1016, 1019-20 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942).

<sup>18</sup> *Parker*, 478 F.3d at 395.

<sup>19</sup> *Presser v. Illinois*, 116 U.S. 252, 267 (1886); *Vietnamese Fishermen’s Ass’n v. Knights of Ku Klux Klan*, 543 F. Supp. 198, 210 (S.D. Tex. 1982) (“In short, the *Second Amendment* does not imply any general constitutional right for individuals to bear arms and form private armies.”); *Oakes*, 564 F.2d at 387-88 (10th Cir. 1977) (“To apply the [Second] [A]mendment so as to guarantee appellant’s right to keep an unregistered firearm which has not been shown to have any connection to the militia . . . would be unjustifiable in terms of either logic or policy. This lack of justification is even more apparent when applied to appellant’s membership in ‘Posse Comitatus,’ an apparently *nongovernmental* organization.”) (emphasis added); see also Andy Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U.L. REV. 57, 70 (1995).

<sup>20</sup> *Presser*, 116 U.S. at 267.

<sup>21</sup> *Id.* The Supreme Court in *Presser* also reiterated its earlier holding in *United States v. Cruikshank*, that the Second Amendment only applies to federal action and has never been incorporated against the state. *Id.* at 264-65; *United States v. Cruikshank*, 92 U.S. 542, 553 (1875). As of this writing this is still the interpretation of the Court. Therefore, state actions on gun regulations

## IV. INSURRECTIONIST LOGIC: A STEP IN THE WRONG DIRECTION

Many commentators have observed that through the Constitution's militia clauses, the founders intended to establish the role of the militia as a force to be used to put down insurrection against the government.<sup>22</sup> It would be a gross perversion of the intent of the Framers to invoke the Second Amendment as a basis for empowering those same militias to wage war against the very institutions they were intended to protect.<sup>23</sup>

By decoupling the militia purpose from the Second Amendment and ascribing an individual right to resist tyranny, the D.C. Circuit is wading into dangerous waters. The inescapable conclusion of *District of Columbia v. Heller's* right to prepare to take up arms against the government is that at some point, preparation can lawfully turn into action at the discretion of individuals accountable to no authority other than their own sense of just cause for the use of violence. The court makes no provision for how to regulate this right to insurrection, nor can it. If the state cannot control how arms are distributed, then the state loses control over how they are used. The D.C. Circuit's opinion in *Heller* does not explain who decides when the government is in fact tyrannical. This question is too important to simply glide past, because tyranny to some may look like effective government to others.<sup>24</sup> For example, some anti-

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are only limited by their state constitutions. As a general rule, state keep-and-bear-arms provisions are interpreted to allow extensive firearm regulations. See Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 687-88 (2007) (explaining that although the Second Amendment protects an individual right, the right is still subject to narrow regulations); see also, e.g., *Quilici v. Village of Morton Grove*, 695 F.2d 261, 271 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983) (expressing again the narrow regulation on the right to bear arms).

<sup>22</sup> Herz, *supra* note 19, at 70-71; GARY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT 212 (1999); Paul Finkelman, "A Well Regulated Militia": *The Second Amendment in Historical Perspective*, in THE SECOND AMENDMENT IN LAW AND HISTORY: HISTORIANS AND CONSTITUTIONAL SCHOLARS ON THE RIGHT TO BEAR ARMS 117, 134-37 (Carl T. Bogus ed., 2000).

<sup>23</sup> WILLS, *supra* note 22.

<sup>24</sup> For a general discussion of the unconstitutional nature of using force against established government, see *Luther v. Borden*, 48 U.S. 1, 45 (1849) ("And, unquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government."). This understanding was reaffirmed in *Texas v. White*,

government activists sincerely believe that the federal income tax amounts to confiscation of private property in a manner not authorized by the Constitution, and others argue that a ban on the civilian ownership of semi-automatic assault weapons by itself amounts to government tyranny,<sup>25</sup> while other citizens believe income taxes and assault weapon bans are entirely reasonable measures in an advanced industrial democracy.<sup>26</sup>

If an objectionable law is tyrannical to some, but not to the majority, doesn't the minority have the right to take up arms against the government? That is the kind of thinking that brought us the Civil War. If Lincoln had not forcefully responded by finding the insurrection illegal and spent five years putting down the rebellion by force, our democratic system would not have survived. In effect, the entire Civil War was an effort to prove that the Union was capable of exercising the most fundamental role of any government: maintaining democratic order by exercising a monopoly on the legitimate use of violence. The eminent political scientist Ezra Suleiman has noted that when the government loses its monopoly on force it ceases to be a state and "[i]ts form of organization becomes indistinguishable from other types of organization."<sup>27</sup> Similarly, where there is no state capable of enforcing the political and civil rights of its citizens, there can be no democracy.<sup>28</sup> A state must be able to enforce its judicial and administrative decisions: if it is outgunned by individuals or factions, it is not functioning as a democratic state (in fact it is not functioning as a state at all).

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74 U.S. 700, 726 (1869) ("The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.").

<sup>25</sup> Herz, *supra* note 19, at 58; Kristen Senz, *Couple Won't Appeal Tax Evasion*, MANCHESTER UNION LEADER, May 19, 2007, at A-1 (describing the beliefs of tax protesters Ed and Elaine Brown); Lund, *supra* note 5, at 33-34 ("The Second Amendment, however, was intended to ensure that even if the government neglected or perverted the militia, it could not go even further in eliminating obstacles to tyranny by disarming the people from whom the militia must be drawn.") "This does not imply, however, that courts should uphold the [assault weapons ban] regulation. As the Supreme Court has recognized in the analogous area of the First Amendment, leaving legislatures free to engage in whimsical infringements on fundamental rights prepares the way for more serious assaults on individual liberty." *Id.* at 71.

<sup>26</sup> Herz, *supra* note 19, at 152 (explaining that a ban on "highly lethal" assault rifles is simply a matter of safety).

<sup>27</sup> EZRA SULEIMAN, DISMANTLING DEMOCRATIC STATES 24 (2003).

<sup>28</sup> *Id.* at 36.

What is left is a return to a form of pre-governmental society where might makes right and political equality is at best an abstract ideal. The *Heller* decision is a direct challenge to the government's monopoly on legitimate force.

#### V. WEBER AND THE STATE'S OBLIGATION TO MAINTAIN A MONOPOLY ON THE LEGITIMATE USE OF FORCE

The concept that a monopoly on legitimate force is necessary for government to function may sound heretical in a country steeped in stories of our own revolutionary founding, but it is the fundamental organizing principle of any political entity, including a democracy like the United States. Max Weber's famous definition states: "A compulsory political association with continuous organization . . . will be called a 'state' if and in so far as its administrative staff successfully upholds a claim to the *monopoly* of the *legitimate* use of physical force in the enforcement of its order."<sup>29</sup> Weber also wrote that the state must "possess an administrative and legal order subject to change by legislation" and that "the use of force is regarded as legitimate only so far as it is permitted by the state or prescribed by it."<sup>30</sup>

These additional characteristics identified by Weber are often skipped over by his Insurrectionist critics. Harry Redner explains that:

Weber is careful, however, to qualify and nuance this crude realism, for although the expropriation of the means of violence is necessary for the formation of the state, he clearly does not regard it as sufficient. Unlike some contemporary authors . . . Weber does not propound a militaristic theory of state formation; this is underlined by his linking the idea of a monopoly of the means of violence with the concept of legitimacy.<sup>31</sup>

Herbert Wulf adds:

The specific characteristic of the state, according to Weber, is that it can successfully claim the legitimate physical violence in a given territory and that it is the only organization that is lawfully allowed to use force. The importance of legitimacy in exercising the monopoly of force needs to be recognized and can

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<sup>29</sup> MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 154 (Talcot Parsons ed., A.M. Henderson & Talcott Parsons, trans., The Free Press 1968) (1947).

<sup>30</sup> *Id.* at 156.

<sup>31</sup> Harry Redner, *Beyond Marx-Weber: A Diversified and International Approach to the State*, 38 POL. STUD. 638, 640 (1990).

be based on three principles: on the authority of traditional rules, on charismatic authority and on the legality of agreed rules. In the modern state of today the political leadership is accountable for exercising legitimate physical violence and it is based on good governance.<sup>32</sup>

Of course, “the use of force is not the sole and not even the normal means for the modern state ‘to realize its orders’; it is only the *ultima ratio* if all other means are not effective. The crucial point for Weber was the fact that the state cannot be defined by its ‘ends’ because there are almost no ends that states did not try to realize in the course of history.”<sup>33</sup> Robert Dahl summarizes: “The state, remember, is a unique association whose government possesses an extraordinary capacity for obtaining compliance with its rules by (among other means) force, coercion, and violence.”<sup>34</sup> We still may not like the sound of the term *monopoly of force* but it is a crucial concept for defining a functional and healthy political state – and this is just as true of a functional and healthy democracy as a state organized under any other form of government. If the United States were ever to lose or give up its monopoly of force it would cease to be a viable political entity and the protections for individual liberty contained in our constitution would be worth no more than the paper they are printed on.

#### VI. THE AMERICAN EXPERIENCE: A TEST CASE FOR A DECENTRALIZED MODEL OF THE LEGITIMATE USE OF FORCE?

In the last twenty years, however, a group of lawyers and legal academics have challenged this view and assert, in defense of their interpretation of the Second Amendment, that the rules of state building do not apply to the United States. They argue that the health of American democracy depends on the ability of individuals to deter the state from overreaching.<sup>35</sup> Sanford

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<sup>32</sup> Herbert Wulf, *The Bumpy Road to Re-establish a Monopoly of Violence 3*, available at <http://www.lse.ac.uk/Depts/global/Publications/HumanSecurityReport/Wulfdraft.pdf>.

<sup>33</sup> Hannes Wimmer, *State's Monopoly on Legitimate Violence: Violence in History and in the Contemporary World Society as Challenges to the State* at ¶ 2 (2003), available at <http://homepage.univie.ac.at/johann.wimmer/Wimmer-AkadWiss.pdf>.

<sup>34</sup> ROBERT A DAHL, ON DEMOCRACY 44 (1998).

<sup>35</sup> DAVID C. WILLIAMS, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC 5 (2003); Lund, *supra* note 5, at 57-58; Polsby & Kates, Jr., *supra* note 3, at 1241-42.

Levinson, who created a firestorm as the first credible legal academic to embrace an individual rights view of the Second Amendment, also found that the Weberian definition of statehood does not translate to America.<sup>36</sup> He writes that “It is a profoundly statist definition, the product of a specifically German tradition of the (strong) state rather than of a strikingly different American political tradition that is fundamentally mistrustful of state power and vigilant about maintaining ultimate power, including the power of arms, in the populace.”<sup>37</sup> Instead, Levinson claims Americans have adopted a more republican version of statehood where “ordinary citizens participate in the process of law enforcement and defense of liberty rather than rely[ing] on professionalized peacekeepers, whether we call them standing armies or police.”<sup>38</sup> David Williams claims that a reading of the Second Amendment that does not recognize its revolutionary potential is based on the Weberian “myth” and is thus inaccurate.<sup>39</sup>

Levinson forgets that the most important contributions to freedom ever made in the history of our country came from the ability to expand and mobilize both a federal bureaucracy and a standing army. From Washington to Grant to Patton, professional military leaders who were accountable to democratic institutions saved liberty and freedom in this country and in the case of the Second World War, for the entire planet. The decentralized model barely worked prior to 1787 and was drastically modified in our own Constitution. America has become a great economic nation because our armed forces are professionalized and can safeguard commerce worldwide. As for Williams, he may not like the Weberian definition of statehood, but it is not a normative judgment about what makes a good or just form of government: it is what defines the modern state. Levinson and Williams can romanticize the potential for decentralized, extra-constitutional checks on government power, but our strong yet democratic state allowed us to thread the needle between anarchy and totalitarianism. The idea that armed individuals prepared to confront the federal government with violence in defense of their personal

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<sup>36</sup> See generally Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

<sup>37</sup> *Id.* at 650.

<sup>38</sup> *Id.* at 650-51.

<sup>39</sup> WILLIAMS, *supra* note 35, at 5.

conception of liberty does a disservice to two hundred years of American history and owes more to the political philosophy of Timothy McVeigh than to Thomas Jefferson.

Again, it is worth emphasizing that the Weberian model is simply descriptive of how strong states are organized. Weber did not recommend the model as a matter of preference; he observed that one element of a successful state is that it controls the “legitimate use of violence.”<sup>40</sup> Almost a century after Weber made this observation, no one can deny that weak states have difficulty maintaining democratic institutions. A state is not a democracy if armed factions can operate in defiance of the rule of law.

Today in the United States, strong legal protections are in place to safeguard minority rights.<sup>41</sup> Meaningful and non-violent mechanisms are available to resolve grievances and disputes between individuals and the state.<sup>42</sup> Where these tools exist, the resort to private arms in opposition to government decisions is by definition anti-democratic and outside the Constitution. After all, the Constitution is not a suicide pact. It is open to amendment and change, but it does not authorize private citizens to take up arms to overthrow its institutions. This is a principle that all functioning democracies must maintain. The eminent jurist Roscoe Pound found that “a legal right of the citizen to wage war on the government is something that cannot be admitted . . . [because it] would defeat the whole Bill of Rights.”<sup>43</sup> And longtime gun-debate observer Robert Spitzer, expressing astonishment that David Williams did not understand the need for a state’s monopoly on force, wrote: “Not only does this notion sit at the epicenter of the modern nation state, it spans the writings of Hobbes and Locke . . . and traces back to Aristotle and even before.”<sup>44</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> *See, e.g.*, U.S. CONST. amend. XIV, § 1 (granting equal protection of the laws to all persons in the United States); 42 U.S.C. §§ 1971 (equal voting rights), 1981 (equal protection of the law without respect to race), 2000a (equal access to public accommodations without respect to race), 2000e (equal access to employment opportunities without respect to race), 3601 (stating policy goal of providing fair housing throughout the country within constitutional limitations) (2000).

<sup>42</sup> *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (resolving the segregation dispute through the court system).

<sup>43</sup> ROSCOE POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 90-91 (1957).

<sup>44</sup> Robert J. Spitzer, Book Review, 14 L. & POL. BOOK REV. 284 (2004),

Basic international law requires that the state be “the sole executive and legislative authority” in its territory.<sup>45</sup> The origins of our own legal system makes this abundantly clear as well. While the Insurrectionists are fond of quoting Blackstone’s fifth auxiliary right as the predecessor of the Second Amendment,<sup>46</sup> researcher John Goldberg explains that under Blackstone’s understanding of sovereignty under the English Constitution,

it was impossible for a body of law actually to confer on citizens a legal right to revolt, for any such conferral would be a dissolution of government that would render the law no longer a law . . . . [A]ny such change would be ‘at once an entire dissolution of the bands of government; and the people would be reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power.’<sup>47</sup>

In other words, the decision of an individual or private group to take up arms to challenge the government is always extra-constitutional, and it cannot be justified by reference to the Constitution itself. Moreover, as James Madison made clear in *Federalist 46*, the founders believed that the residual natural law rights to withdraw support from a government belonged to the states, not to individuals.<sup>48</sup> The American Constitution is an

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available at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/Williams404.htm> (reviewing WILLIAMS, *supra* note 35; see also Robert J. Spitzer, *Don't Know Much About History, Politics, or Theory: A Comment*, 73 *FORDHAM L. REV.* 721, 721-30 (2004)).

<sup>45</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 71 (6th ed. 2003).

<sup>46</sup> See, e.g., JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 130, 134-35 (1994) (arguing the Bill of Rights was based on the British Model which, according to Blackstone, gave people the right to bear arms); Lund, *supra* note 5, at 12-14; Polsby & Kates, *supra* note 3, at 1269 n. 101; Respondent’s Brief at 20, *District of Columbia v. Heller*, 128 S. Ct. 645 (U.S. Feb. 4, 2008) (No. 07-290).

<sup>47</sup> John Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 *YALE L. J.* 524, 557 (2005) (quoting William Blackstone).

<sup>48</sup> *THE FEDERALIST* NO. 46, at 299 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In response to the fear that a standing army could be used by the federal government to usurp the powers of the state, Madison wrote, in a line often quoted that: “[t]o these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties. . . .” *Id.* But to get the full meaning you need to read the full quote. Madison finishes the sentence: “. . . and united and conducted by governments possessing their affections and confidence.” *Id.* Moreover, he makes it obvious that before there is a resort to violence, states would open correspondence with one another, and “[p]lans of resistance would be concerted,” and “[o]ne spirit would animate and conduct the whole.” *Id.* at 298. *Federalist 46* is not an argument for the idea that

attempt to permanently bond the states and individuals together. Attempts to dissolve that compact, except through valid legal process, must be met with enough force to protect the compact.

#### VII. DECENTRALIZED CONTROL OVER THE USE OF FORCE FOR POLITICAL ENDS: SOME HISTORICAL EXAMPLES

Daniel Polsby and Don Kates, in their article, *Of Holocausts and Gun Control*,<sup>49</sup> correctly remind us that force can and has been abused by dictators, (who of course under the Weberian definition are not legitimate), but they are wrong in believing that the creation of less powerful states or a citizenry armed to the teeth and prepared to use their arms to challenge government decisions they do not like will help to build a more democratic system. As a state-building tool, these ideas have been tried and failed miserably. In support of their argument that the monopoly on force leads to genocide, Polsby and Kates make a number of wild claims, but none more irresponsible than blaming Weber for the civil war in the Balkans. They write,

Josip Broz Tito, who ruled that part of the world for thirty five years until his death in 1980, was an enthusiastic practitioner of Max Weber's idea of the state. . . . When old Yugoslavia came unstuck in the late 1980s, its armies and equipment - the most formidable in the region - devolved to the former nation's ethnic constituents. Because the Yugoslavian army had been mostly Serbian, the Serbians inherited enough munitions to face down the United States.<sup>50</sup>

By its own terms, this argument undercuts the claim that arming individuals best protects liberty. In a society based on the idea of every-man-for-himself, there is no guarantee that civilians will be equally armed; in fact, inequality in this regard is inevitable, either in the types of armaments or, of course, in the number of partisans aligned with the competing sides. The real problem is that Yugoslavia, which was moving toward democracy, devolved from a federal system to an ethnicity-based system of republics, and the central government lost the

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individuals with guns are the guarantors of liberty; it affirms that even if the Constitution fails, the individual state is the political unit to which people must adhere, and the well regulated militia, with all its regulatory authority, is still the only vehicle available for armed response.

<sup>49</sup> Polsby & Kates, *supra* note 3.

<sup>50</sup> *Id.* at 1273-74.

monopoly on force.<sup>51</sup> Once that happened, ethnic rivalries were exploited to create a volatile situation that unleashed a brutal civil war and ultimately required massive foreign intervention to re-establish the monopoly of legitimate force and stop the killing.<sup>52</sup> Mary Kaldor, who watched the war in the Balkans first-hand, and is now a professor and director of the Centre for the Study of Global Governance at the London School of Economics and Political Science, observed:

What happened in Yugoslavia was the disintegration of the state both at a federal level and, in the case of Croatia and Bosnia-Herzegovina, at a republican level. If we define the state in the Weberian sense as the organization which 'successfully upholds the monopoly of legitimate organized violence', then it is possible to trace, first, the collapse of legitimacy and, second, the collapse of the monopoly of organized violence.<sup>53</sup>

In other words, Polsby and Kates have it exactly backwards. The monopoly on the legitimate use of force is one requirement of a successful state. It is not the only requirement, but without it, no country can flourish. Threatening that monopoly by arming civilians with enough firepower to counter the government has been tried and has failed, with disastrous results all over the world. One need only look at the conditions in Afghanistan after the collapse of the legitimate government. As one scholar noted, "Afghanistan has been characterized since the beginning of the 1990s as a country in a 'Hobbesian state of nature' which paved the way for the infamous Taliban regime; this country represents one of the cases of a total disintegration of the state and where therefore the monopoly of legitimate violence, that might have existed before, has broken down completely."<sup>54</sup>

Political scientists have documented the disastrous results when governments lose their monopoly on force. As Wulf has written,

[t]he erosion of states and the failure of domestic politics, leading to endemic state weakness and collapse, are conceived by a great number of social scientists as the central cause for war, armed violence and conflict. State collapses give rise to and sustain conflicts, prolong wars and complicate or prevent peace building. The Democratic Republic of Congo and Somalia are used as the classic examples. The most appropriate measure, according to

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<sup>51</sup> MARY KALDOR, *NEW AND OLD WARS* 38-39 (2007).

<sup>52</sup> *Id.* at 47-48, 60, 64-65, 69.

<sup>53</sup> *Id.* at 37.

<sup>54</sup> Wimmer, *supra* note 33, at 3.

this analysis, is to rectify these deficits by establishing state authority, particularly the state monopoly of force.<sup>55</sup>

Wimmer adds that “[t]he ‘failure of the state’ is accompanied by the loss of control over and fragmentation of the instruments of physical coercion or a privatization of violence by so-called warlords which leads by necessity to indiscriminate killings of large numbers of the civilian population, the destruction of property and infrastructure. . . .”<sup>56</sup>

#### VIII. A STATE MONOPOLY ON LEGITIMATE FORCE: AN ESSENTIAL BUILDING BLOCK FOR DEMOCRATIC GOVERNMENT

Building states is very difficult business and the best prescription for avoiding domestic conflict is to maintain a strong democratic state, much as we have tried to do over the last hundred years in the United States. Once the salutary benefits of a monopoly on force are lost, the genie is not easily put back in the bottle. Our misadventures in the Middle East make this abundantly clear. Conservative columnist George Will links the failure in Iraq directly to Weber’s famous observation:

Almost three years after the invasion, it is still not certain whether, or in what sense, Iraq is a nation. And after two elections and a referendum on its constitution, Iraq barely has a government. A defining attribute of a government is that it has a monopoly on the legitimate exercise of violence. That attribute is incompatible with the existence of private militias of the sort that maraud in Iraq.<sup>57</sup>

As Wulf concludes, “The present situation in Iraq illustrates that even the most powerful military nation of the world runs into difficulties in trying to re-establish the monopoly of violence.”<sup>58</sup>

This does not mean that totalitarian dictators who hold the monopoly on force are a good thing. They lack legitimacy, which has always been a key part of Weber’s definition.<sup>59</sup> In a democracy, however, the monopoly on force is legitimate precisely because it is under the control of democratic institutions such as an elected executive and an independent judiciary, and that

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<sup>55</sup> Wulf, *supra* note 32, at 7-8.

<sup>56</sup> Wimmer, *supra* note 33, at 10.

<sup>57</sup> George F. Will, *Rhetoric of Unreality: Where is Iraq After Nearly 3 Years of War?*, WASH. POST, Mar. 2, 2006, at A21.

<sup>58</sup> Wulf, *supra* note 32, at 16.

<sup>59</sup> WEBER, *supra* note 29, at 154.

monopoly must be preserved in defense of these institutions. In fact, it is quite clear that a consolidated democracy is the best protection against internal dictatorship, and that the creation and maintenance of liberal democracies “prevent government by cruel and vicious autocrats.”<sup>60</sup> Countries with liberal democracies do not go to war with each other.<sup>61</sup> Additionally, globalization and the rise of stronger international organizations will also make it increasingly difficult for states to abuse their monopoly on the use of legitimate force.<sup>62</sup> Threats to the monopoly of force currently held by the U.S. government are appropriately labeled as “crime or terrorism.”<sup>63</sup> The United States has spent the last five years trying to stop foreign terrorists from undercutting the monopoly of force. It is bad public policy and dangerous to democracy to assist them, or anybody else, including domestic terrorists, by suddenly finding a right that undercuts that monopoly. This does not mean that we should forget that non-democratic states can abuse their monopoly of force; rather, it suggests that we zealously protect our core democratic institutions from the Insurrectionists who are attempting to pull them apart.

While the conventional wisdom always seems to hold that the government is an ever-growing Leviathan that threatens to smother individual freedom, especially in the presidency of George W. Bush, it is important to note that the government’s monopoly on force has eroded in the last several decades. First, we have allowed much of our defense apparatus, including the waging of war, to be privatized. Private firms like Blackwater have considerable private armies at their disposal and, as the recent incident has uncovered, are sometimes accountable to no law.<sup>64</sup> “[D]uring the second Gulf war of 1992 the ratio of private

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<sup>60</sup> DAHL, *supra* note 34, at 46.

<sup>61</sup> KALDOR, *supra* note 51, at 3; *see also* Michael W. Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151, 1156 (1986) (examining the social-science finding that governments founded on individual liberty exercise peaceful restraint in foreign policy).

<sup>62</sup> Anna Leander, *Globalisation and the State Monopoly on the Legitimate Use of Force*, 7 POL. SCI. PUBL’N. 13 (2004), *available at* [http://www.sdu.dk/~media/Files/Om\\_SDU/Institutter/Statskundskab/Skriftserie/04ANL7%20pdf.ashx](http://www.sdu.dk/~media/Files/Om_SDU/Institutter/Statskundskab/Skriftserie/04ANL7%20pdf.ashx).

<sup>63</sup> *Id.* at 8.

<sup>64</sup> *See* KALDOR, *supra* note 51, at 100-01 (describing different types of foreign mercenaries); Michael Walzer, *Mercenary Impulse: Is There an Ethics That Justifies Blackwater?*, THE NEW REPUBLIC, Mar. 12, 2008, *available at* <http://www.tnr.com/politics/story.html?id=a498d530-e959-4f1e-8432-8851075ac657> (discussing the hiring of mercenaries like Blackwater); James Risen & David Johnson, *Justice Dept. Cites Obstacles in Blackwater Case*, N.Y.

contractors to soldiers was estimated at 1-to-60, it had grown to 1-to-10 in Bosnia, 1-to-2 in Kosovo and it is estimated to have been even higher during the latest Iraq war. The change is impressive . . . .”<sup>65</sup> Indeed, “the 1990s will stand out as the decade in which arms production was returned to the market, after three-quarters of a century in which it was largely conducted at the behest of the nation-state.”<sup>66</sup> In fact, the “[r]e-privatization of war is a challenge to the legitimate state monopoly of violence and a trend counteracting the historical development which evolved during the emergence of the nation-state over several hundred years in Europe.”<sup>67</sup>

Additionally, the massive amounts of private armaments in the United States have allowed domestic anti-government organization to garner considerable power. For instance, Wimmer has noted that

the Patriot anti-government movement, barely noticed before the bombing of a federal building in Oklahoma City in 1995, represents the greatest threat of ‘domestic terrorism’ to the United States, because of its paramilitary nature accumulating huge amounts of arms and because of their belief in the necessity and even desirability of war as a means of realizing national or racial destiny.<sup>68</sup>

European countries that often have the burden of failed states on their doorstep have taken serious steps to eliminate the risk of losing the monopoly of force.

Whereas the European state had been quite successful in its history in forbidding the (private) ownership of weapons or to carry arms (openly), that is, in its attempt to disarm its populations, in the United States exactly this has not been the case, and that is the reason why one could say: there is a significant deficit in the modernity of statehood in that country concerning one of the essentials of modern statehood, namely the enforcement of the monopoly on legitimate violence.<sup>69</sup>

We are not suggesting that the United States ban the private possession of firearms or take on a European model of

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TIMES, Jan. 16, 2008, available at <http://www.nytimes.com/2008/01/16/washington/16blackwater.html?partner=rssnyt&emc=rss> (describing the legal difficulties in prosecuting Blackwater).

<sup>65</sup> Leander, *supra* note 62, at 15.

<sup>66</sup> *Id.*

<sup>67</sup> Wulf, *supra* note 32, at 5.

<sup>68</sup> Wimmer, *supra* note 33, at 14.

<sup>69</sup> *Id.* at 13.

weapons control, but our country should take seriously the threat that the government could lose the monopoly on force. This is not an unreasonable fear when most states still allow the sale of .50-caliber sniper rifles and AK-47 assault rifles.<sup>70</sup>

#### CONCLUSION: WHAT A MONOPOLY ON FORCE MEANS TODAY

A monopoly of force does not mean that the government should disarm every citizen or prohibit armed self-defense, but the government must prevent the accumulation of arms for insurrectionary purposes or of arms especially suited for war. The monopoly on force simply means that a government must have enough strength to enforce its own laws.<sup>71</sup> Robert Spitzer points out that nothing about the government's legitimate use of force "precludes justifiable personal use of force, such as in the case of self defense[,] or the questioning of government authority."<sup>72</sup> On his blog, staunch pro-gun Professor Eugene Volokh makes the point that the classical Weberian view of a monopoly on the legitimate use of force tells us little about self-defense, especially in the United States.<sup>73</sup> There has always been a strong American presumption that reasonable self-defense is justifiable. Moreover, there are plenty of private security guards and firms that are authorized by the state to augment individual self-defense.

Weber prefigured these concerns and explained that in many instances the state delegates the use of force, for instance, to a

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<sup>70</sup> California is the only state with a comprehensive ban on .50 caliber rifles. CAL. PENAL CODE §§ 12280, 12282, 12286-12287 (West 2008). Five states and the District of Columbia ban assault rifles. CAL. PENAL CODE §§ 12275-12290 (West 2008); CONN. GEN. STAT. §§ 53-202a-53-202o (2008); D.C. CODE §§ 7-2501.01(10), (12), 7-2502.01, 7-2502.02, 7-2551.01, 7-2551.02 (2008); MASS. GEN. LAWS ch. 140 §§ 121,122,123,131,131m (2008); N.J. STAT. ANN. §§ 2C:39-1w, 2C:39-5, 2C:58-5, 2C:58-12, 2C:58-13 (West 2007); N.Y. PENAL LAW §§ 265.00(22), 265.02(7), 265.10 (McKinney 2008). Two states and the District of Columbia require universal background checks on all firearm purchases: CAL. PENAL CODE §§ 12072(d), 12082 (2008); D.C. CODE §§ 7-2502.01,7-2502.03,7-2501.01,7-2505.02 (2008); R.I. GEN. LAWS §§ 11-47-35 – 11-47-35.02 (2007). For a comprehensive view of state and federal gun laws, see Legal Community Against Gun Violence, *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws*, [http://www.lcav.org/library/reports\\_analyses/regulating\\_guns.asp](http://www.lcav.org/library/reports_analyses/regulating_guns.asp) (last visited Mar. 23, 2008).

<sup>71</sup> DAHL, *supra* note 34, at 41.

<sup>72</sup> Spitzer, *supra* note 44, at 723.

<sup>73</sup> Eugene Volokh, The Volokh Conspiracy – Monopoly On the Use of Force, <http://volokh.com/posts/1177088441.shtml> (Apr. 20, 2007).

parent to discipline a child, or to the military to enforce discipline among its troops.<sup>74</sup> Weber's concern is with a challenge to the authority of the state, and it is not a public health claim, but an argument concerning civic health. States that lose the ability to carry out democratic actions lose their status as states, which is unhealthy wherever it occurs. While many people disagree with Eugene Volokh, a staunch defender of an expanded right to bear arms, on a variety of issues related to gun rights, his blog remarks on Weber are a reminder that the monopoly on force is not a call to ban the private ownership of guns. As he puts it, "[m]y point is simply that this Weber quote [regarding the monopoly on force] is of no relevance to the question of private gun possession for self-defense."<sup>75</sup> We agree, and we believe the debate over gun control should center on the values and pragmatic considerations underlying the use of firearms for self-defense and recreation, rather than overheated claims about the purported need to arm citizens against their government.

The plaintiffs in the *Heller* case originally argued that their concern was gun possession for personal defense, yet the court of appeals went well beyond that issue, finding that the Second Amendment protects guns for personal protection as well as for taking on the government, should it become tyrannical.<sup>76</sup> As we have shown, these are radically different questions, and should the Supreme Court take such a broad-brush approach, it will create a dangerous precedent that will embolden domestic terrorists who already feel that the government is tyrannical, and who may read such a decision as a license to act on their violent and anti-democratic impulses.

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<sup>74</sup> WEBER, *supra* note 29, at 154, 156.

<sup>75</sup> Volokh, *supra* note 73.

<sup>76</sup> Parker v. District of Columbia, 478 F.3d 370, 383, 390, 395 (D.C. Cir. 2007), *cert. granted sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (U.S. Nov. 20, 2007) (No 07-290).