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A STRUCTURAL INTERPRETATION OF THE SECOND AMENDMENT: WHY *HELLER* IS (PROBABLY) WRONG ON ORIGINALIST GROUNDS

Richard A. Epstein[†]

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INTRODUCTION

This short essay offers a few diffident remarks on the Supreme Court's recent decision in *District of Columbia v. Heller*.[1] *Heller* breathed new life into the Second Amendment, which had received a back-of-the-hand treatment in the Supreme Court decision *United States v. Miller*. *Miller* upheld the conviction of the defendant for transporting a sawed-off double-barreled shotgun from Oklahoma to Arkansas.[2] *Heller* has obviously brought the issue of gun control to a constitutional boil. Its challenge was lodged by the perfect plaintiff, Dick Heller, who, as a member of the D.C. special police, had authorization to carry a gun while on duty.[3] He applied to the District of Columbia to keep one in his home for self-defense, but was denied under the stringent provisions of the District of Columbia Law.[4] His challenge did not have to establish that guns could be carried at any time in any place. Nor did it have to face the tricky question of whether the Second Amendment was binding on the states through the Fourteenth Amendment. What *Heller* did was to give rise to a nonstop interpretative battle between Justice Scalia, who struck the statute down, and Justice Stevens, who would have upheld it.[5] The close historical and textual analysis by both Justices took place within the originalist tradition.

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1. 128 S. Ct. 2783 (2008).
2. 307 U.S. 174, 175, 183 (1939).
3. *Heller*, 128 S. Ct. at 2788.
4. *Id. See also* D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001).
5. *See Heller*, 128 S. Ct. at 2821-22; *see also id.* at 2824 (Stevens, J., dissenting).

And that's where the trouble begins. It is a commonplace observation that attitudes toward the interpretation of particular legal texts depend on basic beliefs about the interpretation of language more generally. Let it be believed that ordinary discourse is chockfull of latent ambiguities and confusions, and it is easy to conclude that legal texts will fall prey to those common infirmities, which leaves courts a larger role in divining—or is it creating—their meaning. But let one take the opposite position, as I do, that stresses the powerful regularities and incredible efficiency of ordinary language. On this world view, the possibilities for accurate legal interpretation instantly become much brighter.

This view therefore makes responsible originalism more credible, yet ironically, it can also make originalism more difficult to execute. In the best of circumstances, the reliability and efficiency of ordinary language is dependent on a large set of tacit assumptions that make every word count in order to foster the efficient exchange of information. But the ability to execute this program is no better than the constitutional text with which the Justices have to work. The ideal interpretation of a flawed provision inherits its flaw. And few texts seem as flawed as the Second Amendment, which reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[6]

As the *Chicago Tribune* stated in its editorial on *Heller*, the draftsman of this Amendment was in sore need of an editor.[7] One can stare at the short provision a thousand times, and two questions remain elusive. First, how does its introductory clause relate to its principal provision? Second, given the regrettable use of the passive voice, just who is it that is bound by the Amendment? Grammatically, these provisions could be read in one of two disjointed ways. The first clause could be stated as some kind of normative verity which explains why the second clause is put into place. At this point, the introductory clause will impose no independent substantive restraint on the reach of the second clause. The second clause could be read to bind the federal government, the state governments, or both. A few crisp words could resolve both of these ambiguities. But in the face of textual silence, how should these two ambiguities be resolved?

Let us start with the introductory clause. Does its choice of words make any difference? Thus, suppose it said, "A healthy wildlife population, being necessary to the security of homes and farms, the right of

6. U.S. CONST. amend. II.
7. Editorial, *Repeal the Second Amendment*, CHI. TRIB., Jun. 27, 2008, at C-22.

the people to keep and bear Arms shall not be infringed."[8] The evident disjunction is that the two clauses have no relationship between them. But the Second Amendment coheres in part because there does seem to be a logical connection between the end stated in the first clause and the means chosen in the second. The decision of Justice Scalia to treat the phrase as entirely prefatory rests upon his appeal to general canons of statutory construction, which do not hone in on this particular case.[9] This critical move leaves us with two obvious questions. Why put it in at all? And once you take it out, is the fraction of the Second Amendment subject to the usual rule of interpretation which asks about the scope of the amendment on the one hand, or on the other hand, the possible state limitations on its extension? It is something of a tour-de-force to excise half of the explicit text of the Second Amendment, only to invite the introduction of an elaborate set of implied restrictions on the right to keep and bear arms.[10] All other things being equal, the alternative approach that gives weight to the prefatory clause and removes the stress on the implied conditions surely makes more sense.

The approach to our second question dovetails neatly with the first. The omitted subject from the passive voice leaves open the question of whether (and when) the Second Amendment binds the states. The English history on this question is always suggestive, but never decisive. England was a unitary system of governance without any federalism complications. As such it was always an imperfect precursor to the interpretation of the United States materials.[11] It may well be true that the Militia Clause was

8. "The Second Amendment would be nonsensical if it read, 'A well regulated Militia, being necessary to the security of a free State, the right of the people to petition for redress of grievances shall not be infringed.'" *Heller*, 128 S. Ct. at 2789. Justice Scalia also makes the same point about these internal connections when he writes, "[t]he right 'to carry arms in the militia for the purpose of killing game' is worthy of the mad hatter. Thus, these purposive qualifying phrases positively establish that 'to bear arms' is not limited to military use." *Id.* at 2796.

9. The Court further stated that

> apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. . . . Therefore, while we will begin our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose.

Id. at 2789-90.

10. *See infra* at 18.

11. Thus it is probably useful to discount the weight of the following sentence: "In a 1780 debate in the House of Lords, for example, Lord Richmond described an order to disarm private citizens (not militia members) as 'a violation of the constitutional right of Protestant subjects to keep and bear arms for their own defense.'" *Heller*, 128 S. Ct. at 2797 (citing 49 LONDON MAG. OR GENTLEMAN'S MONTHLY INTELLIGENCER 467, 467 (1780), *available at* http://babel.hathitrust.org/cgi/pt?id=39015021304061).

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sparked in part by the uneasiness felt in the United States by the decision to maintain a standing national army. But it is difficult to translate the English experience into the American federalist system where the state militias serve two overlapping functions: the protection of individual rights, and the maintenance of the correct balance between the state and federal government. In fact, I believe that the only way in which to get to the bottom of this controversy is to understand the federalism issues that are implicit in the Second Amendment, which in turn requires an examination of the larger structure for the regulation of the Militia in both Article I and Article II of the Constitution. Those issues received little or no attention in Justice Scalia's opinion and only somewhat greater weight in Justice Stevens' dissent. It is therefore necessary to read the Second Amendment in light of the Militia Clauses in the body of the Constitution, about which few people today either know or care. But some attention to those provisions seems appropriate as an effort to link the Bill of Rights to key provisions in the Constitution as ratified before the adoption of the Bill of Rights.

Accordingly, Part I of this article examines the Militia Clauses in the context of the original design of the Constitution, which was far more worried about the instability of union, the risks of invasion, and the disruption by internal violence than we are concerned with today. The second portion of the paper then explains how a proper understanding of the dual objectives of the militia answers the two questions posed above: what is the status of the prefatory clause, and who is bound by it?

I. THE SECOND AMENDMENT IN HISTORICAL CONTEXT

In dealing with the Second Amendment, it is critical to understand that the stability of the United States was by no means a sure thing in 1787, and that devices to keep the Union together were uppermost on the minds of the Framers. We should never forget, for example, that the first ten Federalist Papers, including The Federalist Number 10, were all devoted to the subject of union.[12] In that context, the regulation of the militia was a big deal. For the new nation in 1787, prospects did not look all that cheery. The nation was comprised of thirteen former colonies and a range of territories, but there were the British to the North, the French to the West in the Louisiana territory, and the Spanish in Florida to the South. Hostile Indian tribes were also located in these adjacent territories, and within the borders of the United States itself.

12. *See generally* THE FEDERALIST NOS. 1, 6-9 (Alexander Hamilton), NOS. 2-5 (John Jay), NO. 10 (James Madison).

The uneasiness towards our national prospect was evident in many places. Thus Article I, Section 10, Clause 3 states that, "No State shall, without the Consent of Congress, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."[13] The first inference that has to be drawn from this extraordinary provision is that the Constitution did not take away from the states the power to wage their own wars. The Congressional check applied in those cases where there was no immediate invasion or threat thereof, but the subtext is that if Congress does give the go-ahead, then a state is indeed free to engage in war, under processes established under its own constitution, which operate without limitation from the federal government. In addition, that consent is not necessary under conditions of necessity, as spelled out in the last clause.[14] There is little reason to think that this provision was meant to be justiciable, if only because *Marbury v. Madison* with all its ambiguities still lay in the future.[15] But even if this section left no role for the courts, its adoption was surely meant to establish a framework in which the Congress and the states acted. And if a state may be in a position that it has to wage a defensive war on its own initiative, its ability to have at its disposal a well-regulated militia seems to be beyond dispute.

A similar mood of anxiety is found in the Guaranty Clause, which reads: "The United States shall guarantee to every State in the Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."[16] Modern litigation over the Clause centers on its application to such matters as referenda[17] and reapportionment.[18] But the earliest, and unsatisfactory, exploration of the Clause arose out of Dorr's 1842 rebellion in Rhode Island, which actually resulted in the short-term displacement of the established government, which traced its own origins to a charter settlement within the state that dates from 1663.[19] The use of the term "United States" and the proposed interactions between the federal and state governments speak more to the crisis of the moment, and less to sorting out any difficulties that might arise with respect to, for example, property destruction that might have taken place during the period. Once again, it is

13. U.S. CONST. art. I, § 10, cl. 3.
14. *See id.*
15. *See generally* 5 U.S. (1 Cranch) 137 (1803).
16. U.S. CONST. art. IV, § 4.
17. *See* Pacific Steel Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912).
18. *See generally, e.g.*, Baker v. Carr, 369 U.S. 186 (1962).
19. *See generally* Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

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not hard to connect the dots. The fears of invasion and domestic violence are evident from the face of the Clause. That Clause makes it equally clear that states have the first line of responsibility of dealing with domestic violence.

It is equally clear that when the United States exercised its powers to prevent the invasion, it could depend on the state militias to help with the job. That conclusion is inescapable from the structure of the Militia Clauses that are contained in Articles I & II of the Constitution, which are remarkable because of the detailed set of interlocking arrangements that they delineate for the proper regulation of the militia. Once again it is useful to set these out. Thus Article I, Section 8 provides that:

> The Congress shall have Power . . . To provide for the calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.[20]

The last piece of the puzzle is found in Article II, Section 2, Clause 1: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . ."[21]

These provisions are perhaps the most detailed of any that are found in the Constitution, and they reflect the common sentiment of the time that a federal government with limited powers could be dependent on the militia for the execution of its duties.[22] The provision also reflects two dominant constitutional tropes. The first is that it creates a system of checks and balances at the federal level, such that the President does not have the untrammeled power to call the militia into federal service, but is in charge of their operation only when they are "called into the active service of the United States," where the use of the passive voice is no accident.[23] How they are called into active service, moreover, is not the business of the President to determine, for Article I clearly allocates that task to Congress. Congress in turn is subject to no evident limitation on the mechanism that it uses to call up the militia. Indeed it could act as a committee of the whole

20. U.S. CONST. art. I, § 8, cl. 1, 15-16.

21. U.S. CONST. art. II. § 2, cl. 1.

22. For my analysis of how this ties in with the role of the President as Commander in Chief, *see* Richard A. Epstein, *Executive Power, the Commander in Chief, and the Militia Clause*, 34 HOFSTRA L. REV. 317, 321-24 (2005).

23. U.S. CONST. art. II., § 2, cl. 1.

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to decide that question or, subject to guidelines, rely on the President to do so. But even here, in the interests of federalism, its powers are limited, so that there are only three purposes for which it may be called up, all of which relate to the "domestic Tranquility," words from the Preamble which take on new meaning in this constitutional context: executing the laws of the Union, suppressing insurrections, and domestic violence.[24]

The issue of regulation comes up also in the next provision, which contains a reasonably precise roadmap for the division of authority between the states and the federal government. The latter sets the "discipline" and the former controls the officers and the actual training. In establishing this conscious form of cooperative federalism, which has no parallel in any other provision of Article I, Section 8 has two obvious purposes. The uniform discipline means that the President can count on a coherent force when and if the militia is called into active service. But the separate training is an effective check on the power of the central government. Justice Stevens begins his dissent in *Heller* with this claim: "[The Second Amendment] was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States."[25] He is correct to note the implicit federalism concerns, but wrong in this context to overlook the extent to which the Congress and the President could rely on the state militias to discharge their own task. The relationship was ticklish precisely because it had both positive and negative aspects.

Set against this background, the phrase "well regulated Militia" starts to take on a significance that is not so easily dismissed. The case no longer looks like the wildlife example, even though the two have grammatically similar properties. The structural reason for the difference is that the "well regulated Militia" has a close relationship to detailed constitutional structures, which cannot be found in the wildlife, or indeed any other, example. At this point we have some reason to prefer the interpretation that links the protection of the right to keep and bear arms to the task at hand. The more probable implication is that the federal government faces no restrictions on gun regulation when its regulations are unrelated to the formation or operation of the militia.

Unfortunately, that observation does not quite settle the question of whether any form of federal regulation is suspect only if it attacks that connection. Indeed, one possible rendition is that all forms of regulation

24. U.S. CONST. pmbl.

25. *Heller*, 128 S. Ct. at 2822 (Stevens, J., dissenting).

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could well impede the formation of the militia, which is one reason why the Second Amendment covers "the people," which extends to everyone, including women, whether or not they are or ever will be members of the militia.[26] The argument is that the militia is so important that the federal government is now under a duty to steer a wide berth from any actions that would involve its regulation. That connection should be simply presumed.

II. THE FEDERALISM DIMENSION

This thumbnail history helps place the Second Amendment in context by tying it to the provisions found in the 1787 Constitution. Under this structural test, the special status of the District of Columbia cuts strongly against, not for, the application of the Second Amendment. The point here is that the militias are exclusively state operations, and the District of Columbia is not a state. At this point, there is no second tier of government whose operations have to be kept free of all forms of federal interference, because there is no federal militia whose independence needs to be preserved. If so, then the structural argument does not apply at all to this context so that the federal government can regulate to its heart's content, so long as the regulation deals only with the ownership or possession of guns in the District of Columbia. Disarming the states is not a risk in this context. Accordingly, the only kind of federal legislation that would be proscribed was not in issue in this case, which would be efforts to prevent citizens of the several states from bearing guns in their home territories if they also reside in the District of Columbia. But the extraterritorial reach would make this regulation suspect on the other grounds.

The ironies go deeper because they bear well on the next question on the gun rights agenda. Does the Second Amendment guarantee apply to restrictions against the states? Without the preamble, the Amendment looks like a general form of protection whose major weakness is that it is written in the passive voice, so that it is just unclear from the face of the text by whom the infringement cannot take place. Filling in the gaps is tricky business. The First Amendment, for example, begins with the words "Congress shall make no law . . . ."[27] The clear implication is that, standing alone, this clause is meant to apply to the federal government and only the federal government. That argument has profound implications with respect to the Establishment Clause, because it suggests that the Congress shall stand aside, leaving it for the states to establish whatever religion they choose, as a function of their autonomy within a federal

26. *See* U.S. CONST. amend II.
27. U.S. CONST. amend. I.

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union. There is therefore no obvious reason to read Congress out of this part of the clause, which suggests that the entire First Amendment is binding only on the federal government.

It is, however, far trickier to apply that logic to the Second Amendment, which does not mention who is bound by this prohibition. The same situation applies to the Takings Clause of the Fifth Amendment—"nor shall private property be taken for public use, without just compensation"—where it was held in *Barron v. Baltimore* that the Clause only applied to the federal government.[28] That conclusion arose only through construction, but its construction was heavily influenced by the historical pressures at the formation of the union. Chief Justice Marshall noted the powerful opposition to the creation of the federal government by those who saw in it an excessive encroachment upon the states.[29] The only explicit limitations on state governments are found in the provision of Article I, Section 10, and he was reluctant to read any further restrictions on the states, which could protect private property within their own boundaries from various depredations by their government under their own institutions, which indeed had been done on more than one occasion.[30] There is no reason why that same attitude should not apply to the Second Amendment. Indeed, there is good reason to think that the case is still stronger than this, given the detailed constitutional regulation of the cooperative venture between the federal and the state government. So before the advent of the Fourteenth Amendment, it is highly unlikely that the Second Amendment could have changed matters at all.

So the next question is whether some form of incorporation should bind through the Fourteenth Amendment. That question shall never receive a sound answer because of the Supreme Court's misguided decision in the *Slaughter-House Cases*, which read the Privileges or Immunities Clause of the Fourteenth Amendment out of the Constitution, by assuming that the privileges and immunities in question were only those rights—e.g., the right to petition the federal government—that individuals held in their capacity solely as citizens of the United States.[31] The Privileges or

28. 32 U.S. (7 Pet.) 243, 250-51 (1833); *see also* U.S. CONST. amend. V.

29. *Barron*, 32 U.S. (7 Pet.) at 248.

30. See, for example, *Gardner v. Vill. of Newburgh*, in which Chancellor Kent went so far as to imply a takings clause into the state constitution in order to control the improper diversion of water. 2 Johns. Ch. 162, 167 (N.Y. Ch. 1816).

31. *See* 83 U.S. (16 Wall.) 36, 55 (1872). For my critique of that case, see generally Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J. L. & LIBERTY 334 (2005); Richard A. Epstein, *Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J. L. & LIBERTY 1096 (2005).

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Immunities Clause did make reference to a tolerably clear body of rights that were enumerated in earlier sources, most notably the decision of Bushrod Washington in *Corfield v. Coryell*, which does not include the right to keep and bear arms—a point which, like everything else in this debate, is suggestive and not conclusive.[32] But with that avenue closed, all the attention switched to the Due Process Clause, which raises all sorts of difficulties of its own. The initial decision in *Chicago, Burlington & Quincy R.R. v. City of Chicago*, written by the first Justice Harlan, did not put the question in terms of incorporation.[33] Rather, the case simply explicated the meaning of the Due Process Clause of the Fourteenth Amendment and concluded that any system of rate regulation that short-changed the property owner was without due process of law because it was without just compensation.[34] When the provision was further generalized, the broader conception of liberty was directed toward economic liberty, as in *Allgeyer v. Louisiana*, where the definition chosen makes no reference to guns at all.[35] The standard principles of incorporation could be invoked, but they do not have much traction.

The resolution of the incorporation question therefore has to proceed by other means, and on this issue, the structural considerations referred to above seem to strongly argue against application of the Second Amendment against the states. As noted, the Militia Clause has to be read against a background presumption that the Constitution imposes serious limitations on the power of the federal government to limit the power of the state to organize and control its Militia. That point leads to an uncertain conclusion as to whether that purpose either limits the Clause to dealing

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32. *See* 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230).

33. *See generally* 166 U.S. 226 (1897).

34. The Court wrote that

> a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the *Fourteenth Amendment of the Constitution of the United States* . . . .

Id. at 241 (emphasis in original).

35. As stated in *Allgeyer*,

> [t]he 'liberty' mentioned in [the Fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to [be] free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

165 U.S. 578, 589 (1897).

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with the use of arms for purposes related to the operation of the militia, or whether it cuts so widely that it keeps the federal government from regulating at all. But the provision speaks with greater clarity on the federalism side of the question. Give the Militia Clause its broadest interpretation, and it should only apply to the federal government lest it undermine the power of the states to set their own laws in ways that they think work best in relationship to the federal government and in terms of the regulation of their internal affairs. I have already indicated that there is no reason to think that the clause should apply *at all* to the District of Columbia, where no form of gun regulation could upset the balance of federal and state power. By the same logic, the absolute and categorical ban on all federal regulation of state militias, broadly construed to apply to all people, should do nothing to limit the power of states to regulate firearms in whatever fashion they see fit. If the states think that restrictions on the ability of individuals to keep and bear arms are appropriate, let them do it. After all, they are fully competent to decide whether or not their regulation of the right to keep and bear arms will diminish their capacity to run their state militias. And it is highly doubtful that any state or local official would think that efforts to regulate street crime would impair the duty of states to maintain their relative independence.

There is a second advantage of this reading, which is that it makes it unnecessary to imply at great length, but with no little clarity, the kinds of police power exceptions that must be read into the Second Amendment if it applied to the states. It is no longer necessary to ask, as did Justice Scalia, what set of implied restrictions had to be read into the Second Amendment in order to make its provisions conformable with those of the other amendments in the Bill of Rights, all of whose freedoms are subject to some police power limitations, however phrased and applied. He thus notes that:

> nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[36]

He then continues, "that the sorts of weapons protected were those 'in common use at the time.'"[37] Rather, the conclusion that is more consistent with constitutional structure is that the federal government has no say on what happens at the state level at all.

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36. *Heller*, 128 S. Ct. at 2816-17.
37. *Id.* at 2817 (citing U.S. v. Miller, 307 U.S. 174, 179 (1939)).

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The strength of that conclusion depends on whether we apply an originalist conception of the Constitution all the way down. Stated otherwise, the question of federal and state relations as it applies to the Second Amendment has to make peace with the enormous (and unjustified) expansion of the Commerce Clause that started during the Progressive Era and culminated during the New Deal.[38] Today of course, there is little objection to a comprehensive federal system of gun regulation. Whatever the correct interpretation of *United States v. Lopez*, it is clear that the power of the federal government to regulate guns today is not limited to their interstate sales or shipments.[39] It certainly applies to a wide range of local uses, even if it does not cover the right to carry a gun within a thousand feet of a schoolyard.[40] But the earlier conception of the Commerce Clause would necessarily treat the keeping and bearing of arms as a distinctly local function that was beyond the power of the federal government to regulate. It follows therefore that any reading of the two Militia provisions contained in Article I comprises the sole federal authority over this matter under the original constitutional design. Justice Scalia notes (on a very close question) that the power of Congress under the Militia Clause covers not just all of those persons who were in the organized Militia, but all of those eligible males who could be called up into the Militia.[41] It follows, however, that the Congress has no alternative source of power that would allow it to impose general restrictions on the use of guns at the state level. The bottom line therefore appears to be this. The Second Amendment does not have any application to the District of Columbia, because there is a federal militia within the District. And it further follows that, at the time of the Second Amendment, Congress had no independent power to regulate the possession and use of firearms within the state, which was universally regarded as an exclusive state function.

If therefore this structural analysis is correct, *Heller* is not. The future litigation on this question, including the lawsuits that have already been filed to challenge state gun laws under *Heller,* should be dismissed on the ground that there is no plausible case for holding that any portion of the Fourteenth Amendment extends the application of the Second Amendment to the states. No one can be perfectly confident as to this or any other conclusion but it is ironic that nothing in Justice Scalia's analysis ties the application of the Second Amendment to the peculiar status of the District

38. *See generally, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942).
39. *See* 514 U.S. 549, 561-66 (1995).
40. *See id.* at 551-52, 561.
41. *Heller*, 128 S. Ct. at 2800.

of Columbia. Nor does his brief structural analysis of the Article I provisions deal with the federalism concerns.[42]

In making these points, I do not mean to take any position on the desirability of the state gun laws. The raging debate over whether it is more important to reduce the total number of guns, or to increase the number of guns in the hands of law-abiding citizens is a hard fought contest on which I take no position here. Before *Heller,* we could have said with some confidence this issue was one that had to be thrashed out in the states. Now the next round of litigation will deal with the incorporation issue on the one hand, and the reasonableness of various kinds of state gun regulations on the other—both constitutional dead ends. Somehow, it seems that through multiple wrong turns in the road, we have arrived at a place some 217 years after the adoption of the Bill of Rights that was not on the map of the original framers. It's business as usual.

42. *Id.* at 2802 (dealing only with the question of whether the Militia is all eligible members or those within the force).

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