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Guns, Democracy, and the Insurrectionist Idea

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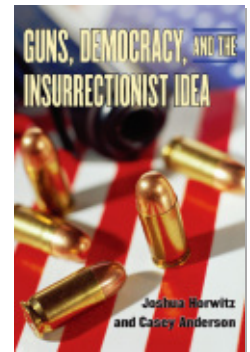
Published by University of Michigan Press

Horwitz, Joshua & Anderson, Casey.

Guns, Democracy, and the Insurrectionist Idea.

Ann Arbor: University of Michigan Press, 2009.

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CHAPTER NINE

DEMOCRACY AND THE MONOPOLY ON FORCE

Against the backdrop of the decision in *District of Columbia v. Heller*, the only Second Amendment case to reach the Supreme Court in seventy years, the presidential candidates in the 2008 election cycle competed against each other to burnish their gun rights bona fides. On the Republican side, a number of candidates explicitly endorsed the concept of an individual right to insurrection and made it clear that if they were to become president, they would take us back to a simpler and better time when the “people” held the federal government in check through force of arms (see chapter 1). Even more striking was the support expressed by the leading Democrats for an individual right to bear arms, although they were less specific about their understanding of how far such a right should extend or on what theoretical basis it should rest. Barack Obama, for example, endorsed the *Heller* decision, explaining, “I have always believed that the Second Amendment protects the right of individuals to bear arms.” He continued, “As President, I will uphold the constitutional rights of law-abiding gun-owners, hunters, and sportsmen,” but he was never specific about exactly what those rights entailed.¹ A careful look at the *Heller* decision reveals that those specifics are important because the scope of the right identified in the ruling goes well beyond protection from criminals or the ability to use guns for hunting.

Until the *Heller* decision, neither the Supreme Court nor the federal appellate courts had ever struck down a gun control statute on Second Amendment grounds.² In *Heller*, though, the court found that the District of Columbia's ban on handguns was unconstitutional because the Second Amendment protects the right of an individual to bear arms without regard to whether the gun owner is part of a well-regulated militia.³ The Court concluded, among other things, that the fear of government tyranny was part of the basis for an individual right to possess firearms.⁴ As we pointed out in the introduction, Justice Antonin Scalia's opinion for the majority states, "If . . . the Second Amendment right is no more than the right to keep and use weapons as a member of an organized militia . . . if, that is, the *organized* militia is the sole institutional beneficiary of the Second Amendment's guarantee—it does not assure the existence of a 'citizens' militia' as a safeguard against tyranny." Scalia insisted that the Second Amendment establishes a right to take up arms against the government even as he attempted to address the objections of the four dissenting justices by assuring them that individuals will not have access to sophisticated weaponry: "Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right."⁵ In other words, a rifle, pistol, or shotgun might not be a match for the military and police forces at the disposal of the government, but the Second Amendment gives every citizen a right to take his or her best shot, both literally and figuratively.

Under *Heller*, private individuals and groups seem to have at least a limited right to prepare for armed confrontation against the state, and the majority opinion suggests that under the Constitution, the threatened or actual use of force against the government may be appropriate in some circumstances. We take little comfort in Scalia's attempt to avoid the radical implications of his reasoning. Individuals with small arms and improvised explosives have been the mainstay of the resistance in Iraq and Afghanistan, and a religious sect that stockpiled a cache of firearms kept federal law enforcement agents at bay at the Branch Davidians' compound in Waco, Texas, for weeks. The D.C.

sniper episode illustrates how much damage one or two individuals can do with a single firearm. If even a tiny fraction of the U.S. population decided that the time to fight government tyranny had arrived, chaos would ensue.

Until the *Heller* decision, the Insurrectionist theory of gun rights had been expressly disavowed by the Supreme Court and other federal circuits. In *Presser v. Illinois* (1886), the Supreme Court found that no body, 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. 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.⁶

By decoupling the militia purpose from the Second Amendment and ascribing an individual right to resist tyranny, the Supreme Court has waded into dangerous waters. The logic of a right to prepare to take up arms against the government is that at some point, private individuals are entitled to take the next step and use violence to achieve political ends. The *Heller* decision, like most Insurrectionist writing, does not make it clear who gets to decide when armed resistance is justified or what criteria they should be expected to use for such a decision to enjoy legal or moral legitimacy. Insurrectionists like to refer to the right of “the people” to confront their government with force when officials acting in the name of the people overreach, but what looks like tyranny to some may look like effective government to others. As we have seen, some Americans feel that an attempt to ban the sale of assault weapons to civilians would by itself constitute a tyrannical act justifying violent resistance. Others believe that such a ban would constitute an entirely

reasonable and legitimate exercise of the state's power to protect the public from violent crime. If a law appears tyrannical to some but not to the majority, when does the minority have the right to take up arms against the government? *Heller* does not say, and the Insurrectionists have no good answer, either.

The *Heller* decision suggests that under the Constitution, the government is not entitled to maintain a monopoly on the legitimate use of violence. At best, this is a half-baked idea. At worst, it poses a threat to the foundation of our democracy. At the core of the *Heller* decision lies the kind of reasoning that was employed to justify the South's decision to secede from the Union and provoke the Civil War. In effect, the entire Civil War was a test of the Union's ability to exercise the most fundamental role of any government, vindicating the principle that democratic institutions cannot be overruled by violent dissenters, particularly when the dissenters seek to challenge the state's monopoly on the legitimate use of violence. Eminent political scientist Ezra Suleiman explains that when a government loses its monopoly on force, it ceases to be a state, and "its form of organization becomes indistinguishable from other types of organization." Similarly, where there is no state capable of enforcing the political and civil rights of its citizens, there can be no democracy.⁷ A state must be able to enforce its judicial or administrative rulings: 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) and is reverting to a pregovernmental society where might makes right and political equality is at best an abstract ideal. The *Heller* decision never grapples with the idea that a state must be able to enforce its will in the face of violent dissent or lose its claim to sovereignty.

The concept of a monopoly on legitimate force may sound inconsistent with the political traditions of a country steeped in stories of our own revolution, but it is the fundamental organizing principle of any political entity, including democratic states in general and the United States in particular. At the Virginia ratifying convention, James Madison, responding to Patrick Henry's complaint that the new Constitution gave too much power over the militia to Congress, stated, "There never was a government without force. What is the meaning of government? An institution to make people do their duty. A government leav-

ing it to a man to do his duty, or not, as he pleases, would be a new species of government, or rather no government at all."⁸

Madison prefigured Max Weber's famous definition, which 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." Weber identified a number of other features of a modern state that qualify its prerogative to a monopoly on force, noting that a 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 either permitted by the state or prescribed by it."⁹

Weber's Insurrectionist critics often skip over these limitations. Researcher 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.¹⁰

Herbert Wulf adds that "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 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."¹¹ As another scholar observes, "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."¹²

Robert A. 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."¹³ The monopoly of force is a crucial concept for defining a functional and healthy political state, democratic or otherwise. If the United States were to lose or give up its monopoly of force, it would cease to be a viable political entity, and our relatively comfortable lives would descend into chaos.

In defending their interpretation of the Second Amendment, Insurrectionist legal scholars assert that Weber's assessment of the minimum conditions needed for a viable state simply do not apply to the United States. This argument for American exceptionalism posits that what makes our country great is our refusal to surrender the option—and the capability—to challenge political decisions with armed violence. Sanford Levinson, who created a firestorm as the first credible legal academic to embrace an individual-rights view of the Second Amendment, also finds that the Weberian definition of statehood does not translate to America: "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."¹⁴ Instead, Levinson claims, Americans have adopted a more republican version of statehood in which "ordinary citizens participate in the process of law enforcement and defense of liberty rather than rely on professionalized peacekeepers, whether we call them standing armies or police."¹⁵ 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.¹⁶

Levinson seems to forget that the most important contributions to freedom in the United States stemmed directly from the ability to expand and mobilize both a federal bureaucracy and a standing army in the defense of democratic institutions and values. From General Washington to General Grant to General Patton, professional military forces have defended liberty and freedom in this country and in the case of World War II across the entire planet. The republican model in the Ar-

ticles of Confederation barely worked prior to 1787 and was substantially modified in the Constitution—and later by the Reconstruction amendments—in favor of a stronger central government with both the legal right and the practical capability to exercise power in the defense of individual rights. America has become a great economic nation because our armed forces are professionalized and can safeguard free commerce as well as political liberties.

As for the critique offered by Williams, the Weberian model is not a normative assessment of what makes a state morally praiseworthy or blameworthy but rather a description of what defines statehood—that is, the conditions that allow for the exercise of sovereignty. Weber did not create the model; he only observed that one element of a successful state is that it controls the legitimate use of violence. No one can deny that almost a century after Weber's observation, weak states have difficulty maintaining democratic institutions. Weber's insights are especially applicable to democracies such as the United States, where democratic mechanisms offer abundant opportunities to express dissenting views and work for political change through peaceful means, along with strong legal protections for minority rights. In other words, in the United States, the monopoly on force is unquestionably legitimate because it is accountable to the people. A state is not a democracy if the democratic process is undermined by armed factions that reject the application of the law to their actions as an illegitimate exercise of power. A putative right to challenge perceived tyranny with the use of private violence is untenable in our democratic system and is by definition extraconstitutional.

The U.S. Constitution is open to amendment, but it is not a suicide pact, and it does not contain an invitation for dissenters to use force as an alternative means of challenging the results of the democratic processes it established. This is a principle that all functioning democracies must maintain. Eminent jurist Roscoe Pound wrote 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."¹⁷

The proposition that a state must maintain a monopoly on force actually predates Weber and is founded in the concept of sovereignty. Basic international law requires that the state be "the sole executive and

legislative authority" in its territory.¹⁸ As longtime gun-debate observer Robert Spitzer, expressing astonishment that Williams fails to appreciate the need for a state 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."¹⁹

The origins of our legal system make this abundantly clear as well. As chapter 4 describes, Blackstone's "fifth auxiliary right" was not unlimited; the right consisted

of having arms for [the subject's] defense, suitable to their condition and degree, and such as are allowed by law. . . . and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.²⁰

Moreover, Blackstone expressly disavowed an Insurrectionist interpretation of this right. As Blackstone explained, a right of revolution would be

a doctrine productive of anarchy, and (in consequence) equally that to civil liberty as tyranny itself. For civil liberty, rightly understood, consists in protecting the rights of individuals by the united force of society: society cannot be maintained, and of course can exert no protection, without obedience to some sovereign power: and obedience is an empty name, if every individual has a right to decide how far he himself shall obey.²¹

John Goldberg explains that under Blackstone's understanding of sovereignty under the unwritten 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. . . . Any 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.'"²² In other words, taking up arms to

challenge the government is always extraconstitutional, and no country where private citizens retain the power to do so is a state. This view is entirely consistent with Weber. Moreover, as discussed in chapter 4, the founders believed that the residual natural law rights to withdraw support from a government belonged to the states, not to individuals. The Constitution is an attempt permanently to bond together the states and individuals. Attempts to dissolve that compact, except through valid legal process, must be met with enough force to protect the compact.

It is true, as Daniel Polsby and Don B. Kates Jr. remind us, that force can be and has been abused by dictators (who of course under the Weberian view lack legitimacy), but creating less powerful states or arming everyone in an attempt to prevent dictatorship is a formula for disaster. These ideas have been tried, and they have failed miserably. Of course, Polsby and Kates insist that the opposite is true, adopting tortured interpretations of history in an effort to demonstrate that a state monopoly on force leads to tyranny. Their most irresponsible and logically untenable claim is perhaps their attempt to blame Weber for the civil war in the Balkans:

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.²³

By its own terms, this interpretation directly undercuts their primary thesis, which is that arming private individuals is the best way to protect liberty. In a society run on the every-man-for-himself idea, there is no guarantee that civilians will be equally armed; there will always be inequality in this regard, either in the types of armaments or in the number of partisans. The real problem is that Yugoslavia, which was moving toward democracy, devolved into an ethnicity-based system of competing republics as the central government lost its monopoly on force. Ethnic rivalries subsequently exploded into a brutal civil war that ulti-

mately was ended by means of a massive foreign intervention that reestablished the monopoly of legitimate force and stopped the killing. Mary Kaldor, who observed the war in the Balkans firsthand 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, observes,

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.²⁴

Even if Polsby and Kates had correctly described the nature of the Balkan conflict, their argument about the potential for a state with a monopoly on the use of force to exercise its power to carry out genocide is a straw man. The monopoly on the legitimate use of force is necessary but not sufficient for a viable state, much less for a state that consistently protects the rights of minorities and maintains the formal and informal institutions of democratic accountability. Attempts to challenge the state's monopoly by arming civilians with enough firepower to counter the government, however, simply complicate the task of building these institutions. To take just one recent example, consider the problems faced by the United States in attempting to stabilize Afghanistan. As one scholar notes, "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."²⁵

Political scientists have documented the consequences when a government loses its monopoly on the use of force. "The 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 this analysis, is to rectify these deficits by establishing state authority, particularly the state monopoly of force."²⁶ Hannes Wimmer adds that "the '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."²⁷

The project of building a successful state is a difficult business, and the best prescription to avoid domestic conflict is to establish and continually reinforce democratic institutions and values, much as we have tried to do for more than two hundred years in the United States. Once the salutary benefits of a monopoly on force are lost, putting the genie back in the bottle becomes difficult, as our misadventures in the Middle East make abundantly clear. Even conservative columnist George Will links the initial failure in Iraq directly to Weber's analysis:

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.²⁸

Similarly, Wulf concluded in 2004 that "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."²⁹

This does not mean that totalitarian dictators who hold the monopoly on force are a good thing. They lack legitimacy, which Weber took care to emphasize as essential. In a democracy, however, the monopoly on force is legitimate because it is accountable to the people in direct and indirect ways, and that monopoly must be preserved in defense of these democratic—rather than violent—mechanisms of accountability. In fact, a consolidated democracy is clearly the best protection against internal dictatorship, and the creation and maintenance of liberal

democracies “prevent government by cruel and vicious autocrats.”³⁰ Countries with liberal democracies do not go to war with each other.³¹ In addition, globalization and the rise of stronger international organizations make it increasingly difficult for states to abuse their monopoly on the use of legitimate force.³² Threats to the monopoly on force currently held by the U.S. government are appropriately labeled “crime or terrorism.”³³ The United States has spent the past five years trying to stop foreign terrorists from undercutting its monopoly on force. It is bad public policy and misguided political theory to advocate recognition of a “right” that undercuts that monopoly. This does not mean that we should ignore or excuse abusive exercises of state-sanctioned coercive power; rather, it suggests that we should zealously protect our core democratic institutions from the Insurrectionists who are attempting to pull them apart.

Unfortunately, even the political Left seems to see the federal government as an ever-growing Leviathan. The presidency of George W. Bush was characterized by extremely aggressive assertions of executive authority outside any system of democratic checks and balances, alarming civil libertarians. Warrantless wiretapping, “extraordinary” extrajudicial renditions of terrorism suspects to countries that are known to use torture, and the indefinite detention of suspects at Guantánamo Bay in an effort to deny these prisoners access to the U.S. courts all seem to lend credence to the Insurrectionist claim that the threat of overreaching by a democratic government—our own government, in fact—is a clear and present danger.

These threats to democratic accountability and individual rights are grave, but the only realistic answer to overreaching by the executive branch is to undertake the difficult and often mundane work of politics, where the only bombardment comes in the form of radio, television, and direct-mail advertising campaigns and opposing sides square off with dueling press releases and white papers instead of pistols at twenty paces. Does anyone seriously believe that the abuses of the Bush administration can or should be resisted with armed force? The Left in the United States and Western Europe dabbled in the use of political violence to challenge official policy in the 1960s and 1970s, but the groups that used bombings, kidnappings, and armed robberies as political tools

succeeded only in feeding a backlash that progressives have yet to fully overcome even today. Meanwhile, the massive amount of armaments in private hands in the United States has allowed domestic antigovernment organizations to garner considerable force. For example, "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."³⁴

We are not suggesting that the United States ban the private possession of firearms, but our country should take seriously the threat that the government could lose the monopoly on force. Domestic terrorists do not need to be strong enough to topple our government to wreak havoc by assassinating government officials or forcing the government to choose between risking serious bloodshed and ignoring flagrant violations of the civil rights laws or other legal norms. This is not an unreasonable fear when most states still allow the sale of .50-caliber sniper rifles and high-capacity assault rifles without criminal background checks.

The need to maintain a monopoly of force does not mean that the government must disarm every citizen or prohibit armed self-defense. The government must, however, 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.³⁵ 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."³⁶ There has always been a strong presumption in the common law and in every U.S. state that reasonable self-defense represents a justified use of force. Moreover, private security firms are generally authorized by the state to augment individual self-defense.

Weber anticipated these developments and noted that the state might well choose to delegate the use of force—for example, by permitting parents to discipline their children or by authorizing military commanders to enforce discipline among their troops.³⁷ Weber's concern is

with a challenge to the authority of the state. It is a claim not about public health but rather about civic health. States that lose the ability to carry out and enforce decisions made through democratic processes are no longer states, much less democracies. That is unhealthy wherever it occurs. Eugene Volokh, a prolific advocate of a broad right for individuals to own and use firearms, agrees that the debate over the monopoly on force has nothing to do with whether private ownership of firearms for self-defense against crime should be permitted or encouraged: he sees Weber's position on the monopoly on force as "of no relevance to the question of private gun possession for self-defense."³⁸ We agree.

The plaintiffs in the *Heller* case argued that their concerns centered on establishing a right to gun possession for personal defense against common criminals, yet the Supreme Court—and to an even greater degree, the U.S. Court of Appeals for the District of Columbia Circuit—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. As we have shown, these are fundamentally different questions that cannot be lumped together. The uncritical and undifferentiated endorsement of a right to the private ownership of firearms has cleared the path for Insurrectionist ideologues to build on the *Heller* decision to establish a dangerously wrong-headed theory of the Second Amendment as the law of the land.