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The Case for Repealing the Second Amendment? The Historical Barriers to Constitutional Change

Repeal the Second Amendment: The Case for a Safer America. By Allan J. Lichtman (New York, St. Martin's Press, 2019) 328 pp. $25.99

The controversy surrounding the Second Amendment—"the right of the people to keep and bear arms"—is, to a large extent, historical in nature, redolent of other matters in this country's legal and constitutional past. But the historical analogies that might support the Amendment's repeal have their limits, especially when examined within a broader context and subjected to the scrutiny of other disciplinary perspectives.

The broader context and disciplinary perspective that the issue requires concern the amending process itself. Legal historians occupy a unique position in this regard. Their status in the debate about repeal of the Second Amendment, however, is less one of privilege than one of obligation, demanding that they venture into interdisciplinary territory to confront unavoidable problems at the intersection of theory and practice, of constitutional law and popular constitutionalism. Despite lingering criticisms of partisan "law office history," scholars of interdisciplinary law and history have looked inward to acknowledge their own missteps and outward to present fruitful interventions in the debate over firearms.[1] This review essay,

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1 For a reflective and productive criticism within the legal academy, see Martin S. Flaherty, "History 'Lite' in Modern American Constitutionalism," *Columbia Law Review*, XCV (1995), 523–590. The historians who have acknowledged the problem of partisan, results-driven "law office history" and heeded its warnings include Laura Kalman, "Border Patrol: Reflections on the Turn to History in Legal Scholarship," *Fordham Law Review,* LXVI (1997), 87–124); Saul Cornell, "*Heller,* New Originalism, and Law Office History: 'Meet the New Boss, Same as the

through an analysis of Lichtman's *Repeal the Second Amendment* and other works, endorses interdisciplinary scholars in their attempt to illuminate the political, legal, and constitutional dimensions—as well as the perils—of undertaking the arduous amending process permitted by Article V of the Constitution. Such a process would require the enactment of a Twentieth-Eighth Amendment ratified by thirty-eight states.[2]

Lichtman, widely cited as "political prophet" for his successful prediction of the nine presidential elections before 2020, has turned his attention toward the future of the Second Amendment.[3] He stops short of an outright prediction of the amendment's demise, but he offers an optimistic "path to repeal": "By shedding light on how America's gun lobby—led by the NRA [National Rifle Association]—has distorted the long-settled meaning of the amendment to block gun control and safety laws and pad gun industry profits, as well as by examining the repeal of the Prohibition Amendment, I prove that Americans can and must rid themselves of a counterproductive amendment that puts our lives at risk" (8).

The first twelve chapters of *Repeal the Second Amendment* recapitulate the familiar history of how "[t]he NRA hijacked the Second Amendment" (8), turning the historical understanding of a collective or states' rights guarantee of a "well-regulated Militia" into an exalted individual right that has produced the world's highest firearms fatality rate without achieving the amendment's stated goal of assuring "the security of a free State."[4] As gun-rights activists rewrote

Old Boss,'" *UCLA Law Review,* LVI (2009), 1095–1126. Robert J. Spitzer, *Saving the Constitution from Lawyers: How Legal Training and Law Reviews Distort Constitutional Meaning* (New York, 2008), implores lawyers to abandon their advocacy-based law-school training to make greater use of social-science methodologies.

2 For excellent studies of the amending process, see Richard B. Bernstein and Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* (New York, 1993); David E. Kyvig, *Explicit and Authentic Acts: Amending the U. S. Constitution: With a New Afterword* (Lawrence, 2016; orig. pub. 1996).

3 Lichtman based his predictions on a seismic forecasting model in *Predicting the Next President: The Keys to the White House, 1996: A Surefire Guide to Predicting the Next President* (Lanham, 1996). For his reputation as a "political prophet," see the widespread online coverage as interest in the 2020 election grew—for example, *Salon,* available at https://www.salon.com/2020/03/27/political-prophet-allan-lichtman-trump-is-more-likely-to-lose-because-of-coronavirus/. Lichtman's prediction of Al Gore's election in 2000 was based on Gore winning the popular vote.

4 U.S. Constitution, Amendment II: "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." The work of Cornell, especially *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (New York, 2006), provides the most comprehensive study of the

history to proclaim a "Standard Model" protecting an individual, personal right to "keep and bear arms," Cornell summarized the majority opinion of historians that "[t]he growing support for the Standard Model among legal scholars contrasts with the cool reaction among early American historians."[5] Notwithstanding a robust dissent of serious scholarship, his verdict in 1999 remains correct that "the dominant trends in recent historiography point in the opposite direction."[6]

What sets Lichtman's book apart from others, however, are his final two chapters, with their confident assertion of the possibility and efficacy of repealing the amendment. He likens the repeal effort to other national goals once thought impossible, such as the repeal of Prohibition or landing a man on the moon. To be sure, he acknowledges the difficulties of a repeal campaign, but he insists "that like the moon voyage it can be done." "Repeal will take a concerted effort from Americans who are well briefed on the true history of the Second Amendment and the calamity of gun violence today" (13).

Yet, as convincingly as Lichtman demonstrates the need to revoke today's twisted version of a constitutionally protected—and dysfunctional—"right of the people to keep and bear arms" (the "must" repeal argument), the lessons of history and the cautionary perspective of other disciplines may not sustain his optimism (the "can" repeal argument). We would do well to begin with Supreme

legal context of the origins of the Amendment. For the most recent notable studies that establish the historical "collective" militia from colonial times to the present, see H. Richard Uviller and William G. Merkel (eds.), *The Militia and the Right to Bear Arms: or, How the Second Amendment Fell Silent* (Durham, 2002); Adam Winkler, *Gun Fight: The Battle Over the Right to Bear Arms in America* (New York, 2011); Michael Waldman, *The Second Amendment: A Biography* (New York, 2014); Patrick J. Charles, *Armed in America: A History of Gun Rights from Colonial Militias to Concealed Carry* (Amherst, New York, 2018).

5 Carl T. Bogus, "The History and Politics of Second Amendment Scholarship," *Chicago-Kent Law Review*, LXXVI (2000), 5, brings to light that a student note in 1960 was the first law review to challenge the traditional militia or collective right and argue an individual right unconnected to militia service. Spitzer, "Lost and Found: Researching the Second Amendment," *ibid.,* 349–401, points out "the array of errors and omissions" in the 1960 note and subsequent exaggerated claims that "the individualist view was the prevalent view until recent critics started saying otherwise" (363), and provides a chronological list of law-journal articles on either side of the question (384–401). Nevertheless, Glenn Harland Reynolds conferred the term "Standard Model" on a contested individual-right interpretation in "A Critical Guide to the Second Amendment," *Tennessee Law Review,* LXII (1995), 463.

6 Cornell, "Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory," *Constitutional Commentary*, XVI (1999), 221–222.

Court Justice William Brennan's "five-finger speech" to his clerks about how constitutional law is made: Holding up the fingers of one hand, he would simply say, "Five votes. Five votes can do anything around here."[7] So, too, can the vote of thirteen states—representing as little as 10 percent of the nation's population—block any Constitutional amendment. The most recently adopted amendment, the Twenty-Seventh (dealing with Congressional pay raises), achieved the necessary thirty-eight states in 1992, but it had languished for more than two centuries, short of the required votes initially required for passage when proposed as part of the Bill of Rights in 1789.[8] Obtaining thirty-eight votes for a repeal of the Second might not take so long, but overcoming thirteen rejections by conservative rural states would be nearly insurmountable.

Few would object to the purpose of the Twenty-Seventh Amendment, but its unique history raises general questions about the ratification process that go to the root of our democratic political philosophy. Discussing what Lessig called "the (what ought to be) questionable status of the Twenty-Seventh Amendment," leading scholars have pondered the "contemporaneity issue" (as defined by the Supreme Court in 1921)—the democratic principle that ratification be "sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period."[9] Without any textual provision to guide it, the Court turned to a

7 Nat Hentoff relates this anecdote in his *New Yorker* profile of Brennan, "The Constitutionalist," 12 March 1990, available at https://www.newyorker.com/magazine/1990/03/12/the-constitutionalist.

8 U. S. Constitution, Amendment XXVII: "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."

9 Lawrence Lessig, "Fidelity in Transition," *Texas Law Review*, LXXI (1993), 1168, n.14; *Dillon v. Gloss,* 256 U.S. 368 (1921), 374–375. Sanford Levinson, "Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment," *Constitutional Commentary,* XI (1994), writes of an inescapable "legal-academic equivalent of the 'Heisenberg effect'" (113). See Walter Dellinger, "The Legitimacy of Constitutional Change: Rethinking the Amendment Process," *Harvard Law Review*, XCVII (1983), 386–432. Dellinger, former acting United States Solicitor General and head of the federal Office of Legal Counsel, now a professor of law, questions the validity of Congressional "control that culminates in a largely discretionary and ad hoc determination by the Congress that happens to be sitting when thirty-eight purported ratifications have been received. This approach is without basis in the text or the history of Article V and without precedent in the earlier judicial interpretations of that provision, and it undercuts one of the fundamental goals of an amendment process" (387). For the "host of unresolved difficulties" left by the ratification of the Twenty-Seventh Amendment, see Bernstein, "The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment," *Fordham Law Review*, LXI (1992), 497–557.

constitutional treatise to explain the implied requirement "that an alteration of the Constitution proposed to-day has relation to the sentiment and the felt needs of to-day, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress."[10] As American politics becomes more sharply polarized, future conflict about the ratification process may not be settled so easily, and a contentious question of constitutional legitimacy is sure to worsen it. Although the present support for gun rights in the Supreme Court gives little confidence in the judicial fate of a contested repeal of the Second Amendment, such issues may never reach the Court. As "political questions," they are nonjusticiable, relegated solely to Congress, a dubious ally of the cause.[11]

If an unexceptionable tweaking of Congressional compensation can prompt serious academic debate, a proposal to revoke part of the Bill of Rights can be expected to generate a much more intense and committed reaction. In today's politically fraught climate, in which Americans are flocking to buy guns and ammunition, recent Supreme Court decisions removing limits to campaign financing could open the process to a well-funded and massive campaign of "ruthlessly negative advertising," playing on voters' fears and resentments and offering arguments against ratification of a Twenty-Eighth Amendment.[12] The substance of the repeal amendment alone would generate considerable heated conflict; if any doubt about the validity of its ratification were added to the debate, its very legitimacy would be open to challenge.[13]

10 James A. Jameson, *A Treatise on Constitutional Conventions* (Chicago, 1887), III § 585. Jameson may have had in mind that a proposed Thirteenth Amendment, the so-called Corwin Amendment protecting slavery, still awaited (as it does today) ratification after Congress sent it to the states two days before Abraham Lincoln's inauguration and received the assent of five states by 1863. Though rendered moot (but remaining dormant) by the abolitionist Thirteenth Amendment, it is today little more than an embarrassing historical curiosity and warning about the potential mischief lurking in the vagaries of the amending process.

11 Dellinger, "Legitimacy," 387.

12 *Citizens United v. Federal Election Commission,* 558 U.S. 310 (2010); *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014); Levinson, "What Are We to Do about Dysfunction? Reflections on Structural Change and the Irrelevance of Clever Lawyering," *Boston University Law Review*, XCIV (2014), 1130.

13 Such a strategy was used against the Fourteenth Amendment, which opponents viewed as an illegitimate product of federal military coercion during Reconstruction and thus an unconstitutional basis for the civil-rights legislation of the 1960s. See David Lawrence, "There is no 'Fourteenth Amendment'!" *US News and World Report,* 27 Sept. 1957, available at https://www.constitution.org/14ll/no14th.htm.

Lichtman cites Turley's reference to Story's treatise on Constitutional law, in which Story endorsed the amending process to remove Constitutional provisions that have "become wholly unsuited to the circumstances of the nation" (227).[14] Both Lichtman and Turley, however, omit Story's further comment, which throws the difficulty of repealing the Second Amendment into sharper relief. At the time of Story's observations, no amendment had been ratified since the Twelfth in 1804, which adjusted the Presidential electoral process to accommodate the unexpected role of political parties. Story viewed amendments as "the real effective instrument to control and adjust the movements of the machinery, when out of order, or in danger of self-destruction"—precisely the electoral crisis that had led to the swiftest adoption of an amendment in the nation's history, a mere 189 days from proposal to ratification. Of the need for amendments he had no doubt: "Upon this subject, little need be said to persuade us, at once, of its utility and importance." But he qualified his endorsement of the amending process: "The only question is, whether [an amendment] is so arranged, as to accomplish its objects in the safest mode; safest for the stability of the government; and safest for the rights and liberties of the people."[15]

All successful amendments since the Eighteenth (Prohibition) have been "instrument[s] to control and adjust the machinery" of government. By contrast, repeal of the Second would involve removing a constitutional right that many people perceive to be as fundamental and sacred as those guaranteed by the First Amendment, especially in the fourteen "sagebrush states" historically hostile to the expansion of federal authority, which can be presumed to oppose repeal.[16] Suspicion of government has run deep in rural America, beginning with the American Revolution and continuing

14 Joseph Story, *Commentaries on the Constitution of the United States* (Boston, 1833), III, §1821 ("circumstances"). For Jonathan Turley, see "Repealing the Second Amendment isn't easy but it's what March for Our Lives students need," available at https://www.usatoday.com/story/opinion/2018/03/28/repealing-second-amendment-march-our-lives-students/463644002/.

15 Story, *Commentaries*, III, §1821 ("utility"), §1822 ("machinery"), §1833 ("liberties").

16 For a discussion of the fourteen "sagebrush states"—Alaska, Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming—with regard to the problems caused by the guaranteed equality of representation in the Senate, see William N. Eskridge "The One Senator, One Vote Clause," *Constitutional Commentary*, XII (1995), 159–162.

into the Reagan Revolution with its inaugural credo that "government is not the solution to our problem; government is the problem."[17]

The American tradition of opposition to government meddling in personal affairs is deeply intertwined with support for the Second Amendment. Thus, it offers a reading of the repeal of the Eighteenth Amendment, whose history casts doubt on its relevance to repeal of the Second, pointing instead to enduring and powerful cultural obstacles against it. The time between Congress' proposal of the Eighteenth Amendment and its ratification by the states was less than nine months, and its repeal, after barely fourteen years, was only 288 days from proposal to ratification. Careful deliberation had not prevailed in either case. The rapidity of establishing Prohibition testifies to nationalistic fears about war and an influx of immigrants perceived to threaten the American way of life. Though willing to overlook the expansion of federal authority in wartime, Americans came to regret federal enforcement of Prohibition once those fears abated. As Kyvig showed, pro-repeal businessmen and professionals capitalized on deep-rooted anti-government suspicion about "the progressive notion of using federal power to reshape social patterns and individual behavior."[18]

After the repeal of Prohibition in 1933, this anti-government alliance opposed other expansions of federal power, moving easily from the Association Against the Prohibition Amendment to the Liberty League. The shared territory of this political culture might suggest a more relevant analogy that subverts the logic of those who look to legal history as a support for the repeal of the Second Amendment. It equates historical resistance to the federal government's prohibition of alcohol consumption with the current resistance to any heavy-handed attempt by Washington to remove the right to carry arms.

Another analogy—the failure to ratify the Equal Rights Amendment (ERA)—offers more discouraging parallels with any plan to repeal the Second Amendment. Drafted in 1923 but repeatedly blocked in the House of Representatives, the ERA finally won Congressional approval in 1972. After the swift ratification by thirty of the required thirty-eight states, however, opponents stopped it short of the

17 Ronald Reagan, First Inaugural Address, January 20, 1981, Project Avalon, available at https://avalon.yale.edu/20th_century/reagan1.asp.

18 Kyvig, *Repealing National Prohibition* (Kent, 2000; orig. pub. 1979), 198.

three-fourths majority by raising the specter of same-sex marriage, same-sex bathrooms, and women conscripted into military combat. Notwithstanding the ultimate acceptance of all these issues by broad swaths of the American people, the amending process stalled, and the ERA remains unratified. Despite a three-year extension of the Amendment's original seven-year deadline for ratification, women's equality remains an unfinished project, the inequality that it sought to eliminate in 1972 now taking the form of such discriminatory realities as wage disparities. By the time Virginia belatedly ratified in 2018—after expiration of the extended deadline—five states had rescinded their ratification.

In 2019, a joint declaration of Congress eliminated any deadline for ratification, but that action did not settle the issue of whether such extensions were legitimate. Sociologist and legal scholar Juli Suk looked ahead toward the problems of interpreting the language of the 1972 proposal: "If ratified in the coming year, how should we construe the meaning of a constitutional amendment introduced almost a century ago and adopted half a century before full ratification?"[19] Doubts came even from the ERA's staunchest supporters, leading Justice Ruth Bader Ginsburg, an early and consistent advocate, to concede defeat and recommend starting the process over. "There's too much controversy about latecomers," she admitted, adding that "a number of states have withdrawn their ratification. So if you count a latecomer on the plus side, how can you disregard states that said 'we've changed our minds?'"[20]

Whatever else the ERA's failure illustrates, it reveals the legal and constitutional barriers that make reliance on the Article V amending process a dubious route to progress, especially at a time of bitter culture war. Nevertheless, as Hartley's recent study has shown, the "failed" ERA has left us with a lesson about alternative paths to progress, demonstrating "the political advantage that amendment adherents can gain when they propose and champion constitutional amendments."[21]

19 Brennan Center for Justice, "The Equal Rights Amendment Explained," available at https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained.

20 Jacob Guzman, "Did Ruth Bader Ginsburg Just Kill the Equal Rights Amendment?" *The Hill,* 12 Feb. 2020, available at https://thehill.com/changing-america/respect/equality/482744-ginsburg-says-process-to-ratify-equal-rights-amendment.

21 Roger C. Hartley, *How Failed Attempts to Amend the Constitution Mobilize Political Change* (Nashville, 2017), 6.

For the sake of analysis, let us assume that a sufficient number of states would vote to repeal the Second Amendment, as they did the Eighteenth. "What could be sounder than getting rid of Prohibition?" asks Tribe by way of comparison. Prohibition by amendment, he writes, "is nearly everyone's prime example of a constitutionally dumb idea." Retaining the Second Amendment with its present guarantee of an individual right "to keep and bear arms" might qualify as an even dumber idea, but repeal is not without its problems. We might apply to a proposed Twenty-Eighth Amendment what Tribe cautions about the Twenty-First: "The problem wasn't the idea, but its implementation." He counsels that "in constitutional matters, as in others, the devil is in the details. So one must look closely at the details before signing on to the whole package."[22] In repealing the Eighteenth Amendment, Congressional drafters confronted the nation's deep historical disagreement about the line between state and federal authority. Their efforts led them to include a clause that produced confusion and an unstable body of jurisprudence that drew the Commerce Clause and the First Amendment into the fray.[23] Although early court decisions furthered their intent, writes Hamm, "there is no record that they envisioned any of the later rulings on the meaning of their amendment."[24] Would the same complications emerge regarding firearms under a Twenty-Eighth Amendment? The ramifications of such a provision over firearms require careful analysis.

Lichtman is too good a historian to omit any mention of the NRA's success in "the linking of gun rights to cultural restoration" (134), but the lessons that historians have learned from his other work would provide nuance and an added dimension lacking in *Repeal*.[25] Lichtman makes only glancing reference to the force of cultural and

22 Lawrence H. Tribe, "How to Violate the Constitution without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment," *Constitutional Commentary*, XII (1995), 217–218.

23 U. S. Constitution, Amendment XXI, §2: "The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

24 For a detailed analysis of the resulting unanticipated constitutional conflicts, see Richard F. Hamm, "Short Euphorias Followed by Long Hangovers: Unintended Consequences of the Eighteenth and Twenty-First Amendments," in Kyvig (ed.), *Unintended Consequences of Constitutional Amendment* (Athens, 2000), 164–199 (quotation at 187).

25 See Lichtman, *White Protestant Nation: The Rise of the American Conservative Movement* (New York, 2008); *idem*, *The Embattled Vote in America: From the Founding to the Present* (Cambridge, Mass., 2018).

identity politics in *Repeal,* however, leaving largely unexamined the power of a political culture that remains emotionally attached to the amendment. How and why does attachment to gun rights overcome the mountains of evidence about the tragic costs of gun violence that Lichtman capably and confidently presents as assuring repeal? Why do so many Americans prefer the gun-rights version of "large mythic stories addressed primarily to the citizenry as a whole and designed to explain to them their fundamental civic morality"?[26]

Those who argue logically for the confiscation of firearms based on the copious evidence that Lichtman offers for gun regulation create a "slippery slope"; they also send new members to the NRA and funds to its political activism. Emotional attachment to a "mythic" national narrative sustains a counterintuitive but hard-headed calculation of fundraising. As a former NRA lobbyist explained the strategy, "[N]othing keeps the fund-raising machine whirring more effectively than convincing the faithful that they're a pro-gun David facing an invincible anti-gun Goliath." As Winkler explains, "The NRA thrived over the years thanks to crisis-driven fund-raising appeals warning members that the government was coming to take their guns."[27] Efforts to repeal the Second Amendment would assuredly evoke the same fears, despite Lichtman's denial that his proposed post-repeal program of firearms regulation "would confiscate firearms or stop Americans from using guns in hunting, sports shooting, antique collecting, or legitimate self-defense" (4).

Social-science studies of an increasingly polarized electorate energized by single-issue politics suggest that emotionally charged issues possess enormous motivational power; "substantial partisan and issue alignment has occurred within the resourceful and powerful group of rich Americans" who oppose limitations on gun rights. The results are "reflected in lobbying, campaign finance, and at the ballot."[28] Notably, the extraordinary strategy of ratifying the Twenty-First Amendment by state conventions rather than legislatures was undertaken to overcome the reluctance of state law makers to defy lobbyists. Whether the same conditions would apply in the case of a Twenty-Eighth Amendment is an open question.

26 David C. Williams, *The Mythic Meaning of the Second Amendment: Taming Political Violence in a Constitutional Republic* (New Haven, 2003), 4–5.

27 Winkler, *Gunfight,* 57–58.

28 Delia Baldassare and Andrew Gellman, "Partisans without Constraint: Political Polarization and Trends in American Public Opinion," *American Journal of Sociology*, CXXXIV (2008), 441–443.

Further study of the cultural politics surrounding the Second Amendment issue must pursue questions about the psychology of political motivation and how choices are made.[29] Faith in the deliberative rationality of the electorate and reliance on "a new campaign of education based on the true history of the Second Amendment and how it contributes to needless deaths and injuries from violence today" would not be sufficient (228). Acording to Kahan and Braman, "Guns, historians and sociologists tell us, are not just 'weapons, [or] pieces of sporting equipment'; they are also symbols 'positively or negatively associated with Daniel Boone, the Civil War, the elemental lifestyles [of] the frontier, war in general, crime, masculinity in the abstract, adventure, civic responsibility or irresponsibility, [and] slavery or freedom."[30]

Kahan and Braman's multidisciplinary research agenda is important in explaining the political pull of firearms.[31] Warning against the "futility of consequentialism," Kahan and Braman report that "numerous studies have found that neither actual crime rates, perceived crime rates, prior victimization, nor fear of victimization strongly correlates with public opinion toward gun control."[32] Rather, they conclude, "As the cultural theory of risk itself illustrates, what individuals accept as truth cannot be divorced from the values and practices that define their cultural identities."[33] As Slotkin has amply demonstrated over the years, the darker side of these values and practices is evident in a long literary tradition.[34] Coincidentally

29 For a study of the strategic options for deploying persuasive heuristics against "slippery slope" gun-rights arguments, see Eugene Volokh, "The Mechanisms of the Slippery Slope," *Harvard Law Review*, CXVI (2003), 1026–1137, esp. 1127–1137.

30 Kahan and Donald Braman, "More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions," *University of Pennsylvania Law Review*, CLI (2003), 1291.

31 Braman holds a Ph.D. in anthropology. Kahan is widely known for his work in the Cultural Cognition Project, which its website (http://culturalcognition.net) describes as studying "the tendency of individuals to conform their beliefs about disputed matters of fact (e.g., whether humans are causing global warming; whether the death penalty deters murder; whether gun control makes society more safe or less) to values that define their cultural identities. Project members are using the methods of various disciplines—including social psychology, anthropology, communications, and political science—to chart the impact of this phenomenon and to identify the mechanisms through which it operates. The Project also has an explicit normative objective: to identify processes of democratic decision making by which society can resolve culturally grounded differences in belief in a manner that is both congenial to persons of diverse cultural outlooks and consistent with sound public policymaking."

32 Kahan and Braman, "More Statistics," 1312-1313.

33 *Ibid.,* 1320

34 Among Slotkins' more pertinent works are *Regeneration through Violence: The Mythology of*

or not, Samuel Colt began serious work on inventing a repeating revolver not long after Nat Turner's slave rebellion.[35] Even if the audience that cheered NRA president Charlton Heston's tirade against the threat to an "America . . . where you [can] be white without feeling guilty [and] own a gun without shame" was not necessarily representative of the NRA's entire membership, much less gun owners generally, Heston's rhetoric suggests that repeal would have to overcome a motivated and stubborn die-hard minority.[36]

Repeal insists that gun control "wins only by becoming as bold and uncompromising as the gun lobby." It rejects the strategy of moderates who profess formulaic loyalty to the Second Amendment but seek compromise to achieve "piecemeal" reforms on the state level. Such incremental changes "cannot substitute for a comprehensive national gun control program that would follow from a successful repeal strategy . . . and is the only sure antidote for America's gun violence epidemic" (176–177). Kahan and Braman, however, warn that such a strategy would be self-defeating if it were to reinforce the anti-elitist resentment among many supporters of gun rights who dismiss it as condescending.[37] Their research indicates that gaining the upper hand in the debate about firearms regulation in a polarized nation requires acknowledging the cultural values at stake. "Armed with a pertinent expressive idiom, those who favor compromise and accommodation will finally stand a fighting chance to defeat those who insist that everyone see only their vision of America."[38]

Lichtman is surely correct that a Bill of Rights without the Second Amendment as interpreted today would certainly be superior to the present version and that a comprehensive national gun-control

the American Frontier (Middletown, Conn., 1973); *The Myth of the Frontier in the Age of Industrialization* (New York, 1985); *Gunfighter Nation: The Myth of the Frontier in Twentieth-Century* (New York, 1992).

35 Lichtman cites Slotkin, "Equalizers: The Cult of the Colt in American Culture," in Harcourt, *Guns, Crime, and Punishment*, 60.

36 Kahan, "Econometrics," 48.

37 Don B. Kates, Henry E. Schaffer, John K. Lattimer, George B. Murray, and Edwin H. Cassem, "Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?" *Tennessee Law,* LXXII (1995), 522: Gun advocates can summarily dismiss inconvenient empirical evidence and criticize the authors who cite it as elitists who produce a "'sagecraft' literature in which partisan academic 'sages' prostitute scholarship, systematically inventing, misinterpreting, selecting, or otherwise manipulating data to validate preordained political conclusions."

38 Kahan and Braman, "Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate," *Emory Law Journal*, LV (2006), 607.

program, as outlined in *Repeal*, would certainly make America safer. But the history of Constitutional amendments is littered with unintended consequences.[39] The book's final two chapters skirt the problem by not specifying exactly how a repeal amendment should be worded. A Twenty-Eighth Amendment would hardly be certain to make a radically clean break with the nation's recent past by simply declaring that the Second Amendment is "hereby repealed." The Twenty-First Amendment used that very language, but wrangling over federalism was not the only problem. If Congress sought to replace "the right of the people to keep and bear arms" with language more conducive to a safer society, what would it be, and how could it pass political muster without confounding existing constitutional rights or encouraging statutes that were effectively to nullify its purpose? The ill-fated 1994 ban on assault weapons remains a cautionary tale of good intentions producing what Winkler describes as "a triumph of symbolism over substance."[40]

Banner posed the fundamental questions long before the Supreme Court incorporated the individual-right doctrine against the states: "What exactly will the doctrine look like? What kinds of regulation will be unconstitutional? Which guns? Which people? Which situations?" Even a blanket repeal cannot avoid these questions, which are sure to be raised once state regulation is challenged on grounds other than "the right to keep and bear arms." After years of teaching constitutional law, Banner can state with authority, "This is lawyerly detail, and well below the level of most of the debate thus far, but it is detail that may be important one day."[41]

39 For Prohibition in particular, see Hamm, "Short Euphorias," 164–199.

40 For how gun manufacturers succeeded in evading the intent of the law by making minor design changes in the weapons, see Winkler, *Gunfight*, 38–39.

41 Stuart Banner, "The Second Amendment, So Far," *Harvard Law Review*, CXVII (2004), 907.