



ADAM WINKLER  
PROFESSOR OF LAW

SCHOOL OF LAW  
BOX 951476  
LOS ANGELES, CALIFORNIA 90095-1476  
Phone: (310) 794-4099  
email: winkler@law.ucla.edu

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American Society for Legal History  
Attn: Program Committee

**Re: 2009 Conference Panel Proposal**

Dear members of the Program Committee:

Please consider this panel proposal for the 2009 Conference.

The proposed panel is entitled, "*D.C. v. Heller* and the Uses of History." The papers will consider how the Supreme Court employed historical argument in the recent landmark case of *D.C. v. Heller* to support its decision to recognize an individual's right to bear arms in the Second Amendment. The papers will examine and the originalist methodology used by the Court, analyze the limitations of *Heller*'s historical discussion, and offer critiques of the decision from the perspective of professional historians. The papers will also explore the differences between lawyer's history and historian's history and discuss the implications of these differences for the judicial craft.

I will to serve as the chair/moderator of the panel, which will have three papers and one commentator. The paper presenters will be Jack Rakove, David Konig, and Stephen Halbrook. The commentator will be Joyce Lee Malcolm. All of the presenters and the commentator have written extensively about the history of the Second Amendment and the right to bear arms.

Please find the paper abstracts and contact information below and the c.v.'s of all participants in separate documents accompanying this submission.

Thank you for your consideration.

Best wishes,

A handwritten signature in black ink that reads "Adam Winkler". The signature is fluid and cursive.

Adam Winkler

### Paper Abstracts

David T. Konig, *Once More Unto the Breach (or Breech?): The Asymmetries of Lawyer-Historian Debate*

The United States Supreme Court made heavy use of historical argument in its *District of Columbia v. Heller*, a case that for the first time saw the Court overturn a local gun control law as violating the Second Amendment's "right of the people to keep and bear arms." The weight of opinion by academic historians leans heavily against the way that the Court's majority opinion reasoned and declared that the "original public meaning" of the Amendment was to guarantee an individual right to own and carry firearms. Nevertheless, lawyers and legal academics who support an individual right maintain that there now exists a "standard model" of historical interpretation that supports that opinion. That interpretation won acceptance by the Supreme Court in its recent decision in *Heller*. This paper examines how and why this came to be. It begins by briefly revisiting the two basic reasons: (1) disagreement over which sources to privilege, and (2) recognition that courts must sacrifice nuance to produce the clarity and finality that resolves conflict. The paper then examines how the debate over gun rights has introduced a new dimension in the long-standing cleavage between law and history: namely, that lawyers and historians – even historians acting as advocates – operate under very different canons of interpretation, ethics, and liability. A well developed body of rules has developed for professional conduct in both professions, but these (e.g. the witness advocate rule) are often honored only in the breach. Even when honored (e.g., immunity for expert witnesses), they allow lawyer advocates to present and to publish arguments that would never pass muster with advocate-historians.

Jack Rakove, *The Poverty of Public Meaning: Some Thoughts on D.C. v. Heller*

Two kinds of originalist arguments figured prominently in the Supreme Court's decision in *Heller*. The dissent, written by Justice Stevens, closely focused on the constitutional debates of the late 1780s and the drafting of the Second Amendment. By contrast, Justice Scalia's opinion for the majority said little about the legislative history of the amendment, and instead emphasized the original public meaning of the language used in the provision. Scalia's approach is now the dominant variant of originalism. This paper will examine and critique public meaning originalism from the perspective of a trained historian—a vantage point that reveals the radical deficiencies in Justice Scalia's approach to history.

Stephen P. Halbrook, *Reconstruction, the Second Amendment, and the Heller Decision*

This paper will focus on the use of Reconstruction history as an interpretative tool in *D.C. v. Heller* and the significance thereof for extending *Heller* to the States and localities. According to the Supreme Court's opinion, "In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves." Yet, having taken place 75 years after the Second Amendment's ratification, the Reconstruction debates were not seen by the Court as providing as much insight as the earlier sources. Nonetheless, this later period contains strong support for the *Heller* holding, as epitomized by the Freedmen's Bureau Act of 1866, which guaranteed the right to "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . estate, . . . including the constitutional right to bear arms." Passed by more than two-thirds of the same Congress that proposed the Fourteenth Amendment, these words never appeared in a

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Supreme Court opinion until *Heller*. In addition to buttressing the Court's holding that the Second Amendment protects the individual right to keep and bear arms for self defense and other lawful purposes, the Reconstruction experience and related case law – particularly *United States v. Cruikshank* (1876) – set the stage for the Court's suggestion that the arms right may be incorporated into the Fourteenth Amendment so as to protect the right from State infringement.

Contact Information

Jack Rakove  
Department of History  
Lane History Corner 117  
Stanford University  
Stanford CA 94305-2024  
(650) 723-4514  
Email: rakove@stanford.edu

David Konig  
Department of History  
Washington University  
(314) 935-5459  
FAX: (314) 935-4399  
Email: konig@wustl.edu

Stephen P. Halbrook  
3925 Chain Bridge Road, Suite 403  
Fairfax, VA 22030  
Tel. (703) 352-7276  
Email: protell@aol.com

Joyce Lee Malcolm  
George Mason University School of Law  
3301 Fairfax Drive  
Arlington, VA 22201  
703-993-1950  
Email: jmalcolm@gmu.edu

Adam Winkler  
UCLA School of Law  
405 Hilgard Avenue  
Los Angeles CA 90095  
(310) 794-4099  
Email: winkler@law.ucla.edu

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