

*THE DISTRICT OF COLUMBIA V. HELLER* AND ANTONIN SCALIA'S  
PERVERSE SENSE OF ORIGINALISM

by  
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*This Essay weighs Justice Scalia's Heller opinion in the balance, and finds it wanting. Rather than being a garden variety case of originalism manqué, i.e. an effort to pin point a single original understanding when in fact meaning was hotly contested at the time constitutional text was created, Heller emerges as an act of (self?)-deception or conscious fraud. Few of the historical assumptions that underlie Justice Scalia's analysis withstand scrutiny. The majority holding—that the Second Amendment was originally understood to protect the right to possess any commonly held weapon for purposes unrelated to militia service such as self-defense and hunting—requires misreading, misunderstanding, or ignoring the bulk of relevant evidence such as the debates on the pending Amendment in the House of Representatives and the common meaning accorded bearing arms in newspapers and pamphlets of the day. Rather than using historical source material to inform his analysis, Justice Scalia operates with the faith-based assumption that the framers must have intended to protect a private right to gun possession, and then manipulates outlying evidence to dress up his claim in ill-fitting pseudo academic garb. In the process he demonstrates conclusively that the originalist methodology he trumpeted in A Matter of Interpretation as the surest remedy against judicial injection of subjective values into constitutional adjudication is in fact nothing more than a hollow sham.*

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“I am not so naive (nor do I think our forbears were) as to be unaware that judges in a real sense ‘make’ law. But they make it *as judges make it*, which is to say *as though* they were ‘finding’ it.” Scalia, J., concurring, in *James B. Beam Distilling Co. v. Georgia*.<sup>1</sup>

“[E]ven though the Justice is not naive enough . . . to be unaware that judges in a real sense ‘make’ law, he suggests that judges (in an unreal sense, I suppose) should never concede that they do and must claim that they do no more than discover it, hence suggesting that there are citizens who are naive enough to believe them.” White, J., concurring in *James B. Beam Distilling Co. v. Georgia*.<sup>2</sup>

## I. HELLER AND THE SECOND AMENDMENT RIGHT TO ARMS

For many years following the Supreme Court’s 1939 decision in *United States v. Miller*, academics and federal appeals courts alike adhered consistently to the opinion that the Second Amendment to the United States Constitution did not protect possession of firearms unrelated to service in the lawfully established militia.<sup>3</sup> But in the 1980s and ‘90s, a phalanx of gun rights advocates, single-topic academics, and contrarian and clever constitutional theorists, including Sanford Levinson, Akhil Amar, Laurence Tribe and Randy Barnett, emerged to challenge the old understanding on originalist grounds related to both the Second and Fourteenth Amendments.<sup>4</sup> Claims and appeals challenging gun control laws under the newly emerging individual reading of the Second Amendment increased apace. The once dominant view of the militia-focused right prevailed in Judge Reinhardt’s opinion for the Ninth Circuit in *Silveira v. Lockyer* in 2003, but the self-proclaimed standard model favoring a purely private right to arms won out in the Fifth Circuit’s *Emerson* opinion in 2002 and in the D.C. Circuit’s *Parker* decision

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<sup>1</sup> 501 U.S. 529, 549 (1991).

<sup>2</sup> *Id.* at 546.

<sup>3</sup> *United States v. Miller*, 307 U.S. 174, 178 (1939); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 711 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942). *See also* Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI-KENT L. REV. 349 (2000) (cataloguing and classifying law review pieces on the Second Amendment through 2000).

<sup>4</sup> *See* Spitzer, *supra* note 3 (cataloguing and classifying law review pieces on the Second Amendment); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 643 (1989); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 216–23 (1998); LAURENCE H. TRIBE, *1 AMERICAN CONSTITUTIONAL LAW* 47–70 (3d ed. 2000); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1141–42 (1996); Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237 (2004).

in 2007.<sup>5</sup> In June 2008, the United States Supreme Court resolved the split in the circuits and endorsed a private rights reading of the Second Amendment by upholding the D.C. Circuit's decision *sub nomine* *District of Columbia v. Heller*.<sup>6</sup> Writing for five justices on a sharply divided Court, Justice Scalia based his decision on fidelity to the alleged original public understanding of the Second Amendment over sharply worded dissents by Justices Stevens and Breyer.

There may be sound reasons for recognizing a federal constitutional right to own firearms for private purposes wholly unconnected to militia service. Two potentially convincing rationales spring readily to mind: in the United States, a majority of the population probably favors such a right, and a majority of the population understands that right to be rooted in constitutional text and tradition.<sup>7</sup> But in writing for a majority of the Supreme Court in *Heller*, Justice Scalia did not openly embrace popular constitutionalism (although he has done so before, most famously in his dissent in *Lawrence v. Texas*).<sup>8</sup> Instead, he claimed to rely on textualism and originalism, and, in the process, produced a decidedly

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<sup>5</sup> See *Silveira v. Lockyer*, 312 F.3d 1052, 1060–61 (9th Cir. 2003); *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001); *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007), *aff'd sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

<sup>6</sup> 128 S. Ct. 2783, 2822–23 (2008), *aff'g* *Parker*, 478 F.3d 370.

<sup>7</sup> JAMES B. JACOBS, CAN GUN CONTROL WORK? 38–43, 52–53 (2002) (studying public opinion regarding gun rights). Over the last decade, popular constitutionalism essentially rejecting the teachings of *Cooper v. Aaron*, 358 U.S. 1 (1958) and the cultish following of *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803) in favor of the Jeffersonian belief that the living demos is the ultimate arbitrator of constitutional values, has been embraced by several leading constitutional theorists. See Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553 (2003); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 9–12 (1999); Jeremy Waldron, Essay, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (going even further, and arguing that judicial enforcement of constitutional rights against the policy choices of representative legislatures is entirely illegitimate in a healthy, functional democratic society). Waldron hints strongly that the American preference for judicial rights enforcement is idiosyncratic and insular, but given the fact that the German-speaking countries, post-Soviet states, and all of Southern Europe including, as of this summer, France, have also embraced judicial rights enforcement, Waldron's claim appears exaggerated. Alain Salles, *Les nouveaux droits du citoyen La saisine du juge constitutionnel*, LE MONDE, July 23, 2008, available at [http://www.lemonde.fr/cgi-bin/ACHATS/acheter.cgi?offre=ARCHIVES&type\\_item=ART\\_ARCH\\_30\]&cobjet\\_id=1044876&cdef=ARC-TRK-NC\\_01](http://www.lemonde.fr/cgi-bin/ACHATS/acheter.cgi?offre=ARCHIVES&type_item=ART_ARCH_30]&cobjet_id=1044876&cdef=ARC-TRK-NC_01) (France amends Constitution to adopt constitutional complaint procedure for judicial review by *Conseil Constitutionnel* of existing, prior enacted legislation); NORMAN DORSEN ET AL., COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 99–211 (2003) (describing and analyzing procedures of constitutional review in a wide variety of states).

<sup>8</sup> See *Lawrence v. Texas*, 539 U.S. 558, 594–598 (2003) (Scalia, J., dissenting) (arguing that the textually unspecified right to same sex intimacy recognized by the majority was not deeply rooted in American history and tradition, and therefore not a legitimate basis for judicial invalidation of a statutory prohibition).

disingenuous and unprincipled opinion. From the standpoint of an academically trained historian, Justice Scalia's reasoning in *Heller* is objectively untenable in that it privileges the current Court's fixation with libertarian individualism over the framers' civic republican focus on the organized militia as a preferred alternative to a dangerous standing army and military establishment.<sup>9</sup> But leading academic specialists of founding era constitutional thought, such as Jack Rakove and Saul Cornell, are hardly alone in condemning Justice Scalia's decision in *Heller*.<sup>10</sup> The majority opinion in *Heller* has also been savaged as results-oriented historical fiction by Judges Harvie Wilkinson and Richard Posner, two of the nation's foremost conservative jurists, who in other contexts are entirely sympathetic to claims premised on gun rights, autonomy, and self-defense.<sup>11</sup> Indeed, Judge Wilkinson has gone so far as to liken *Heller* to *Roe v. Wade*, the famous abortion decision long held in contempt by conservative thinkers skeptical of judge-made law and judicial veto of democratically-sanctioned criminal statutes where no constitutional text demands judicial intervention.<sup>12</sup>

In *Heller*, Justice Scalia contorted the original public understanding of the Second Amendment's textual command into something neither the framers nor ratifiers would have recognized as their own handiwork. The contested text proclaims, "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."<sup>13</sup> According to Justice Scalia and the *Heller* majority, the language about the militia and the State is prefatory and non-operative, while the plain meaning of the operational text respecting the right to bear arms, as understood at the time of its creation, is that the Constitution protects a personal right to carry commonly held weapons for purposes of confrontation.<sup>14</sup> The historical record proves otherwise. Not only was discussion of the right to bear arms almost invariably linked to discussion of the virtues of the militia and the dangers of standing armies in the late eighteenth century, but the

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<sup>9</sup> See generally H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002) (describing in great detail the classical republican conceptual framework that animated founding era discourse on the right to arms).

<sup>10</sup> See Q&A: *Jack Rakove on Heller and History*, NEW YORK TIMES TOPIC BLOG, June 26, 2008, <http://topics.blogs.nytimes.com/2008/06/26/qa-jack-rakove-on-heller-and-history/>; Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625 (2008).

<sup>11</sup> J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. (forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1265118](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265118); Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, THE NEW REPUBLIC, Aug. 27 2008, at 32-35, available at <http://www.tnr.com/booksarts/story.html?id=d2f38db8-3c8a-477e-bd0a-5bd56de0e7c0&p=1>.

<sup>12</sup> Wilkinson, *supra* note 11, at 1; see also Cass. R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 254-55 (2008).

<sup>13</sup> U.S. CONST. amend. II.

<sup>14</sup> *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008).

“operative” phrase *bear arms* carried an overwhelmingly martial meaning. Twelve members of the House of Representatives spoke when the Amendment was under consideration in 1789; all discussed militia- and military-related issues, principally conscientious objection. Not one mentioned private self-defense, hunting, or gun collecting.<sup>15</sup> Senate debates were not recorded until 1796, but an electronic search of the Library of Congress database containing all extant official records of the Continental and U.S. Congresses between 1775 and 1791 reveals forty-one additional uses of the phrase “bear arms” or “bearing arms” in contexts other than discussion of the proposed Bill of Rights. In all but four instances the use is unambiguously military and collective.<sup>16</sup> Similarly, as reported by careful historical scholar Nathan Kozuskanich, an electronic search of Charles Evans’s *American Bibliography*, a comprehensive collection of surviving books and pamphlets in the colonies and United States from 1690 to 1800, yields 210 hits for *bearing arms* and its cognates other than those contained in reprints of the Bill of Rights and other government papers.<sup>17</sup> According to Kozuskanich, 202 of these 210 uses (96.2%) are unambiguously military and collective, not private.<sup>18</sup> The same search on *Early American Newspapers*, a database of over 120 American newspapers from 1690 to 1800, yields 143 hits, all but three of which (97.9%) Kozuskanich describes as clearly related to rendering military service or performing militia duty.<sup>19</sup> In ignoring this record, cited by several amici,<sup>20</sup> Justice Scalia thus elevated what was in the late eighteenth century a decidedly eccentric and outlying meaning

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<sup>15</sup> 1 ANNALS OF CONGRESS 749–752, 766–767 (Joseph Gales ed., 1834); UVILLER & MERKEL, *supra* note 9, at 97–103 (discussing some of the debate on the conscientious objector clause and the purpose of the amendment as militia-based protection against standing armies).

<sup>16</sup> Nathaniel Kozuskanich, *Originalism, History and the Second Amendment: What Did Bearing Arms Really Mean to the Founders*, 10 U. PA. J. CONST. L. 413, 416 (2008) (a preliminary form of the argument which will appear in *Journal of the Early Republic*). Kozuskanich, an assistant professor in history at Ohio State, was inspired in part by David Yassky, a law professor turned Brooklyn politician, whose article *The Second Amendment: Structure, History and Constitutional Change*, 99 MICH. L. REV. 588, 618 (2000), counted and analyzed surviving uses of “bear arms” in the leading electronic database of early Congressional debates. All the numbers here are from the Kozuskanich tabulations.

<sup>17</sup> Nathaniel Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms*, J. Early Rep. (forthcoming) (manuscript at 2, on file with author) (containing a systematic tabulation and classification of all surviving uses of “bear arms” and related constructs).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Brief of Amici Curiae Jack N. Rakove et al. in support of Petitioners at 9–13, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 157183 [hereinafter *Historians’ Brief*]; Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., et al. in support of Petitioners at 4–5, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 157194 [hereinafter *Linguists’ Brief*].

(*bearing arms* as carrying weapons for non-military purposes) to the summit of constitutional orthodoxy.<sup>21</sup>

The decision's historically unsupportable appeal to interpretive fidelity marks a significant victory for results-oriented jurisprudence even as it points to the shallowness of originalist claims to neutrality. It also lays bare interesting philosophical tensions between the intent-based originalism that animates the Stevens and Breyer dissents, and the original public understanding method of originalism expounded by Justice Scalia in his 1997 manifesto *A Matter of Interpretation*, and applied to telling effect in the majority's *Heller* opinion. The older intent-focused version of originalism, long associated with Edwin Meese and Robert Bork, focuses on justifying judicial invalidation of democratically enacted legislation by invocation of the higher authority of constitutional compact.<sup>22</sup> Justices Stevens and Breyer in their dissents look to the original intent of the framers and ratifiers of the Amendment and find strong evidence of concern with militia-related questions, little evidence of concern with private self-defense, and vote to let the D.C. handgun ban stand as they saw no constitutional warrant for judicial intervention.<sup>23</sup> In contrast, Justice Scalia no longer seems concerned with the question of the validity *vel non* of legislating negatively, i.e., vetoing legislation from the bench. His version of plain meaning originalism is

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<sup>21</sup> Scalia justifies this move in two fashions: first, by strained and exaggerated readings of the relatively small number of late eighteenth-century utterances that might plausibly support his interpretation, and second, by invoking numerous nineteenth-century examples that are in some instances consistent with his interpretation of the right. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2791–94, 2804–12 (2008). The latter actually demonstrate that popular conceptions of the right to arms were changing in the nineteenth century, rather than that the right was understood as individualistic and privatistic at the time the Bill of Rights was ratified. See SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA passim* (2006).

<sup>22</sup> Edwin Meese III, *Interpreting the Constitution*, in *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* 13 (Jack N. Rakove ed., 1990); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990). Indeed, this argument is as old as judicial review itself, and was famously advanced by Chief Justice Marshall in *Marbury*, 5 U.S. (1 Cranch) 137 (1803), and again in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The logic is perhaps less compelling today than in Marshall's time. Marshall reasoned that the ratifying supermajority acted directly, and their authority trumped that of mere representative agents elected to make statutes. But those who voted to ratify the Constitution are long since dead. The ratifiers of 1787–88 (original seven articles), or 1789–91 (Bill of Rights), or 1866–68 (Fourteenth Amendment) were never appointed agents by members of the now existing polity of the United States. The best that could be said respecting their authority and the binding character of their actions is that they have been implicitly ratified after the fact by those now living. But those now living have expressly (not implicitly) voted into office legislative agents, and it is hardly self-evident that their commission carries lower authority than the Supreme Court's self-proclaimed power to strike down legislation in the name of a Constitution that nowhere expressly conveys that power.

<sup>23</sup> *Heller*, 128 S. Ct. at 2824–31, 2847 (Stevens, J., dissenting); see also Cornell, *supra* note 10, at 626.

focused only on ensuring that when judicial invalidation of legislation occurs, it proceeds according to neutral—not subjective—principles.<sup>24</sup> However, plain meaning textualism could achieve this goal only if the constitutional text admitted but one single meaning when it was created; as *Heller* painfully illustrates, even in the rare instances when this is true, clever results-oriented jurists are quite capable of ignoring the overwhelming weight of the evidence in order to justify striking down legislation based on a constitutional understanding that did not exist when the constitutional text was ratified.<sup>25</sup>

Rather than original meaning, the Court's embrace of an individual right to own guns for purely private purposes reflects the larger symbolic significance of the right to arms in popular constitutional culture during later periods of American history and in our own times, and the long range tendency of that evolving popular culture to affect the jurisprudence of the Court, principally by influencing the politics of appointment.<sup>26</sup> The image of the gun as a central icon of American liberty taps into a powerful national obsession mythologizing the revolutionary generation as supposed originators of libertarian norms few of the framers actually would have recognized as their own.<sup>27</sup> That mythology clearly swayed the all important "swing voter" Justice Kennedy in *Heller*, who at least four times during oral argument interjected at seemingly irrelevant occasions words to the effect that: *surely the framers must have had frontiersmen in mind, and must have wished to constitutionalize their need for guns to defend themselves against animals and Indians.*<sup>28</sup> Nothing

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<sup>24</sup> ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 14–15, 23–29, 37–41, 44–47 (Amy Gutmann ed., 1997) (discussing the need for a science of statutory interpretation, textualism, and canons of construction in interpreting the Constitution and the dangers of lacking guiding principles in judicial review); *Heller*, 128 S. Ct. at 2788–90 (discussing constitutional interpretation and the Second Amendment).

<sup>25</sup> See critiques of Scalia's textualism in Cornell, *supra* note 10, at 625; Sunstein, *supra* note 12, at 247–48; Wilkinson, *supra* note 11, at 13–24; Posner, *supra* note 11, at 32–35.

<sup>26</sup> See generally DAVID C. WILLIAMS, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC (2003); CORNELL, *supra* note 22; William G. Merkel, *A Cultural Turn: Reflections on Recent Legal and Historical Writing on the Second Amendment*, 17 STAN. L. & POL'Y REV. 671, 672 (2006) (all of these discuss the changing cultural significance of gun ownership through the course of American history). On popular political preferences and Supreme Court appointments, see LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS (2005); JOHN MASSARO, SUPREMELY POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS (1990); LORI J. OWENS, ORIGINAL INTENT AND THE STRUGGLE FOR THE SUPREME COURT: THE POLITICS OF JUDICIAL APPOINTMENTS (2005).

<sup>27</sup> On the symbolic significance of guns and gun ownership in American history, see WILLIAMS, *supra* note 26 and CORNELL, *supra* note 21. On the attitudes of the founding generation towards guns, see CORNELL, *supra* note 21, at 13–18.

<sup>28</sup> Transcript of Oral Argument at 8, *District of Columbia v. Heller*, 128 S. Ct. 2783 (No. 07-290) (where Kennedy asks, "It [the Second Amendment] had nothing to do with the concern of the remote settler to defend himself and his family against

in the case file or historical record supports Kennedy's assumption. But in *Heller*, he voted with his colleagues Scalia, Thomas, Alito, and Chief Justice Roberts to recognize a private right to guns for defense against burglars, other humans, and animal threats.

The eight speaking justices' historically-inflected readings of the Second Amendment revealed during oral argument in *Heller* make fascinating studies. In the case of the five justices who voted for a private right to arms, they highlight the inevitable failure of originalism to live up to its neutral pretensions. And yet *Heller* is no garden variety case of originalism *manqué*. Typically, originalism fails because there was no single agreed or dominant understanding of constitutional text at the time of its creation. Generally, there were two or more mainstream understandings of constitutional principles reflected in the newly-created constitutional text, and the judicial act of recovering and applying the meaning of that text requires judges faithfully committed to originalism to choose from among those meanings at play when the language came into being.<sup>29</sup> In such cases, originalism cannot elevate constitutional judging above the contentious plane of politics because the meaning of the constitutional text was hotly, bitterly, and ideologically contested at the time it was created. But the question of whether the Second Amendment protects a right to weapons possession outside the context of service in the lawfully-established militia does not present this type of

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hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that?"); *id.* at 30 (where Kennedy asks Solicitor General Clement, "So in your view this amendment has nothing to do with the right of people living in the wilderness to protect themselves, despite maybe an attempt by the Federal Government, which is what the Second Amendment applies to, to take away their weapons?"); *id.* at 30-31 (where Kennedy states, "I agree that *Miller* is consistent with what you've just said, but it seems to me *Miller* . . . is just insufficient to subscribe—to describe the interests that must have been foremost in the framers' minds when they were concerned about guns being taken away from the people who needed them for their defense.") (emphasis added); *id.* at 57-58 (where Kennedy asks Mr. Gura, "I'm—I want to know whether or not, in your view, the operative clause of the amendment protects, or was designed to protect in an earlier time, the settler in the wilderness and his right to have a gun against some conceivable Federal enactment which would prohibit him from having any guns?").

<sup>29</sup> The fallacy that constitutional meaning was noncontentious in the Revolutionary and early national period cannot withstand serious reflection about the bitter partisan struggles over constitutional meaning that did so much to define the politics of the times. See e.g., JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 7-8 (1996) (discussing the disputes over meaning of the proposed text at the Convention); 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION (Bernhard Bailyn ed., 1993) (discussing disputes between Federalists and Anti-Federalists over the Constitution's meaning during the ratification struggle); STANLY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM *passim* (1993) (discussing disputes between Jefferson's Democratic-Republicans and Hamilton's Federalists during the 1790s regarding the Constitution's application); LANCE BANNING, THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY *passim* (1978) (also discussing the battle between the Democratic-Republicans and the Federalists over constitutional interpretation).

dilemma for a selector of judicial options. The documentary record is clear, and opinion among historians (as opposed to litigators, polemicists, and belletrists) specializing in late eighteenth-century American political thought is overwhelmingly against Scalia: debates surrounding the future Second Amendment focused on one concern, and one concern only—the desire to ensure the preservation of the local militia as the preferred option to a politically dangerous standing army, and for that purpose, and that purpose only, to preserve the right of individuals to remain armed so that they could fulfill their civic duty in that militia.<sup>30</sup>

In short, the Second Amendment presents the rare case where originalism, honestly and faithfully applied, could afford an unambiguous answer. The proposers, drafters, and ratifiers of the constitutional right to arms were not at all concerned with rights to gun possession for purposes such as self-defense or hunting.<sup>31</sup> This result, of course, is unacceptable to gun enthusiasts inside and outside the Court. Equally unacceptable, from their perspective, is abandonment of the obsession with foundation mythology that has dovetailed with originalism since its beginnings as a reaction against the Warren Court's novel project of taking seriously the textual commands of Equal Protection and of the Fourth, Fifth, and Sixth Amendments. The problem then becomes

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<sup>30</sup> Among scholars who have written on the Second Amendment, historians specializing in late eighteenth-century American political thought who reject Scalia's reading include Saul Cornell, David Konig, Paul Finkelman, myself, Peter Onuf, Jack Rakove, and Robert Shalhope. Those who come closer to Scalia's interpretation are Robert Churchill, perhaps James Henretta, and the eccentric Leonard Levy, who came to the issue only in retirement. See *Historians' Brief*, *supra* note 20, signed by Jack N. Rakove, Saul Cornell, David T. Konig, William J. Novak, and Lois G. Schwoerer, which dismantles the private rights reading of the Second Amendment. The brief was also signed by—among others—Fred Anderson, Carol Berkin, R. Don Higginbotham, Stanley N. Katz, Pauline Maier, Peter S. Onuf, Robert Shalhope, John Shy and Alan Taylor, each a noted specialist in late eighteenth century U.S. political history. Monographs and articles critical of the private rights reading of the Second Amendment written or co-authored by specialists in late eighteenth century U.S. political thought include: CORNELL, *supra* note 21; Paul Finkelman, "A Well-Regulated Militia": *The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195 (2000); David Thomas Konig, *Arms and the Man: What Did the Right to "Keep" Arms Mean in the Early Republic*, 25 LAW & HIST. REV. 177 n.1 (2007); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000); and UVILLER & MERKEL, *supra* note 9. But for arguments consistent with Scalia's view written by scholars with historical credentials focused on late eighteenth century North America, see Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 143 (2007); James A. Henretta, *Collective Responsibilities, Private Arms, and State Regulations: Toward The Original Understanding* 73 FORDHAM L. REV. 529 (2004); and LEONARD LEVY, *ORIGINS OF THE BILL OF RIGHTS* 133–149 (Yale University Press 2001) (1999).

<sup>31</sup> This point is self-evident not just to historians critical of originalism premised on fallacious historical assertions, but to Judges Posner and Wilkinson as well. See Posner, *supra* note 11, at 32; Wilkinson, *supra* note 11, at 3–4; see also Sunstein, *supra* note 12, at 255–56.

squaring the commands of policy preference (broad access to guns) and jurisprudential theory (historical fidelity). There are only two obvious solutions to this problem, both of which members of the *Heller* majority embraced quite eagerly. The first is elevation of outlying, eccentric, discredited, and largely ignored voices from the founding period regarding private self-defense into a privileged position as evidence of mainstream understanding. The second tack, which is either more cautious or more outrageous than the first depending on the brazenness of the justice in question, is to assume on faith that there must have existed a consensus in favor of a constitutional right to guns for private purposes, and that the existence of this assumption need not be proved. This course, it should be plain, blends quite readily into self-deception, deception of the public, and ultimately—to embrace the label applied by Chief Justice Burger to the NRA’s now completed project of re-conceptualizing the right to arms—outright fraud.<sup>32</sup>

## II. ORAL ARGUMENT

Oral argument in *Heller* took place on March 18, 2008, running an hour and thirty-seven minutes.<sup>33</sup> The justices heard from Walter Dellinger on behalf of the District of Columbia, Solicitor General Paul Clement as amicus nominally supporting the District, and Alan Gura for the respondent, Dick Heller, the only one of six original plaintiffs held to have standing and granted relief in *Parker*.<sup>34</sup> The comments of the four speaking justices who together with Justice Thomas formed a majority in favor of a private right to arms are analyzed in the following paragraphs.

Chief Justice Roberts’s questioning was not dogmatically originalist, but he drew heavily on history, and assumptions about history, as he

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<sup>32</sup> In a PBS television interview in 1991 marking the two hundredth anniversary of ratification of the Bill of Rights, Burger commented: “If I were writing the Bill of Rights now there wouldn’t be any such thing as the Second Amendment . . . This has been the subject of one of the greatest pieces of fraud, I repeat the word ‘fraud,’ on the American public by special interest groups that I have ever seen in my lifetime. Now just look at those words. There are only three lines to that amendment. A well regulated militia—if the militia, which was going to be the state army, was going to be well regulated, why shouldn’t 16 and 17 and 18 or any other age persons be regulated in the use of arms the way an automobile is regulated? It’s got to be registered, that you can’t just deal with at will. . . . I don’t want to get sued for slander, but I repeat that they [the NRA] . . . have had far too much influence on the Congress of the United States than as a citizen I would like to see—and I am a gun man. I have guns. I have been a hunter ever since I was a boy.” *MacNeil/Lehrer NewsHour: Interview by Charlayne Hunter-Gault with Warren Burger* (PBS television broadcast, Dec. 16, 1991) (Monday transcript # 4226), available at <http://www.lexisnexis.com> (News Library, NewsHour with Jim Lehrer File) (quoted in UVILLER & MERKEL, *supra* note 9, at 13).

<sup>33</sup> Transcript, *supra* note 28, at 1, 91 (stating argument began at 10:06 a.m. and ended at 11:43 a.m.).

<sup>34</sup> *Id.* at 3, 28, 48; *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007), *aff’d sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

sought to clarify the litigants' positions. The Chief Justice left no doubt that he believes private firearms possession falls within the constitutional guarantee, even if the weapons in question have no direct relation to militia service or militia preparedness.<sup>35</sup> Interestingly, the Chief Justice also expressed hostility to expanding the judicially created construct of tiered scrutiny to areas not already burdened thereby, and urged that the right to arms is subject to reasonable regulation.<sup>36</sup> In considering whether any restrictions on gun possession might be constitutionally permissible (and hinting that they were to Blackstone, and hence continue to be today), Roberts made clear his skepticism of the District's total ban on possession of handguns but suggested strongly that a total ban on machine-guns (as exists under federal law) is reasonable (dodging the argument that automatic rifles clearly have a far closer relation to service in the lawfully established militia than do handguns).<sup>37</sup> He also pressed respondent on the question of what restrictions and regulations would be reasonable (suggesting that lineal descendants of those existing in 1791 would be), with respondent urging that the right extends only to weapons commonly in civilian use (a point that resonated in particular with Justice Scalia).<sup>38</sup> During petitioner's rebuttal, the Chief Justice expressed strong concern that requiring cumbersome trigger locks might vitiate the right to self-defense.<sup>39</sup>

Justice Scalia, eventual author of the majority opinion, left little doubt that the Second Amendment right to arms should trigger strict scrutiny. Scalia believes that militia service is only one (and perhaps not even the most important) purpose behind the Second Amendment. With multiple colleagues on the bench (perhaps including even *Heller* dissenters) he assumes that even though no member of Congress discussed self-defense while the constitutional right to arms was under debate, the desire to protect private self-defense must have been

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<sup>35</sup> Transcript, *supra* note 28, at 12 (showing Chief Justice Roberts's disbelief that the Second Amendment right would belong solely to the militia and not be in the militia clause itself); *id.* at 54 (discussing whether a conscientious objector has a potential right under the Second Amendment to hunt deer); *id.* at 85 (asking whether it makes sense to make a distinction between handguns and rifles for self-defense purposes).

<sup>36</sup> *Id.* at 44.

<sup>37</sup> *Id.* at 23 (discussing how if a ban on machine-guns comes to the court they may find it reasonable); *id.* at 46 (where Chief Justice Roberts asked about distinguishing a ban on machine-guns); *id.* at 61 (where Roberts asks, "Is there any parallel at the time that the amendment was adopted to the machine gun?" In response, Mr. Gura says, "[I]t's hard to imagine how a machine gun could be a 'lineal descendent,' to use the D.C. Circuit's wording, of anything that existed back in 1791, if we want to look to the framing era.>").

<sup>38</sup> *Id.* at 71 (asking whether the modern trigger lock provisions are similar to the gunpowder storage restrictions in place at the time of the Second Amendment's drafting); *id.* at 76 (asking whether age limits would be reasonable); *id.* at 77 (asking whether reasonableness should be determined in light of restrictions in place at the time of the Second Amendment's adoption).

<sup>39</sup> *Id.* at 82–85.

prominent if not paramount in the minds of the ratifiers. But there is little evidence to support this inference, and while Scalia refers to “three states” petitioning in favor of a private right to arms, apart from the New Hampshire’s Ratification Report, there are only two dissenting instruments that bolster Scalia’s claim: that of the Minority of the Pennsylvania Ratifying Convention and a failed western Massachusetts proposal to amend that state’s constitution.<sup>40</sup> While Scalia assumes that self-defense is an important purpose behind the Second Amendment, he urged inconsistently that only individually held firearms that are in common use and might be useful respecting militia preparedness fall within the terms of the Amendment. Thus, automatic weapons, even if standard issue in the National Guard, fall outside the Amendment because they are not in common private use.

Confused as it is, Justice Scalia’s understanding of the Second Amendment is inextricably entwined with his famous sense of historical fantasy. That said, Justice Scalia’s understanding of the Second Amendment is in no sense a product of the “originalism” he advocated as an academic before he came to the Bench or in his manifesto *A Matter of Interpretation*.<sup>41</sup> In his classical mode, Justice Scalia favored judicial restraint and deference to legislatures. Constitutional text, he argued, needed to be narrowly construed according to its original understanding in order to forestall legislating from the Bench.<sup>42</sup> In the context of the Second Amendment, however, Justice Scalia embraces a wide, latitudinarian vision of the right to arms decoupled from the militia predicate of the constitutional text. He takes as an article of faith that the Second Amendment was inspired by a desire to protect the right of private self-defense, even though this represents a strained reading of the text unsupported by the documentary record. Relying heavily on Joyce Lee Malcolm’s *To Keep and Bear Arms: The Origins of an Anglo-American Right*, a book endorsed by virtually no commentators holding Ph.D.s in American history,<sup>43</sup> Scalia made numerous historical assertions during oral arguments, all of which turn out to be false, and many of which would be of very dubious relevance even if true. These include:

1. The militia that resisted the British was not state controlled. (In truth, the militia units on the revolutionary side refused to answer to royal governors, but they were very much creatures of statutory law passed by the colonial legislatures going back to the period of first settlement.)<sup>44</sup>

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<sup>40</sup> District of Columbia v. Heller, 128 S. Ct. 2783, 2803–4 (2008).

<sup>41</sup> SCALIA, *supra* note 24.

<sup>42</sup> See RALPH A. ROSSUM, ANTONIN SCALIA’S JURISPRUDENCE: TEXT AND TRADITION 5 (University Press of Kansas 2006).

<sup>43</sup> JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994); but see Lois G. Schworer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27, 28 (2000) (critiquing Malcolm’s thesis).

<sup>44</sup> Transcript, *supra* note 28, at 7. Populists attempted to challenge elites for control of the state militia during the revolutionary period, but the militia system

2. Well-regulated meant well trained, rather than subject to rules and regulations. (A quick look at the *Oxford English Dictionary* reveals that, rather unsurprisingly and contra Malcolm, in the eighteenth century, regulated actually meant regulated, much as it does today. It did not mean trained.)<sup>45</sup>
3. Blackstone thought a private right to arms was rooted in natural law and was thus immune from Parliamentary control. (He thought nothing of the kind.)<sup>46</sup>
4. The framers revered Blackstone. (In truth, many of them detested Blackstone's high Tory politics and his departures from Coke's Whiggish view of the law. It is perhaps worth remembering—or instructing those not in the know—that as an M.P., Blackstone voted to use the most forceful measures to suppress North American grievances about Parliamentary tax policy. He was no friend to America, and no libertarian.)<sup>47</sup>
5. Joseph Story thought the Second Amendment was a personal guarantee unrelated to the militia. (This is patently false and can only be explained on grounds of obstinate ignorance or deliberate falsehood. Story's discussion of the Second Amendment in his *Commentaries* is focused exclusively on the militia dependency of the right, and the perils confronting the right on account of rising apathy respecting militia duty.)<sup>48</sup>

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remained under the control of state legislatures. *See, e.g.*, Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WM. & MARY Q. 39, 43 (1998); MICHAEL A. McDONNELL, *THE POLITICS OF WAR: RACE, CLASS, AND CONFLICT IN REVOLUTIONARY VIRGINIA* 37 (2007).

<sup>45</sup> Transcript, *supra* note 28, at 26; 13 THE OXFORD ENGLISH DICTIONARY 524 (2d ed. 1989) (defining “regulated” as, “Governed by rule, properly controlled or directed, adjusted to some standard, etc.” and stating that it is also frequently combined with “well” to form “well-regulated.”). The OED offers the following examples of eighteenth and early nineteenth century usage: “a1704 T. BROWN *Satire Antients* Wks. 1730 I. 16 These [verses]. .had regulated forms, that is regular dances and musick. 1766 *Compl. Farmer* s.v. *Surveying*, Then may you measure all the whole chains by your regulated chain. a1790 ADAM SMITH *W.N.* v. i. III. i. (Bohn) II. 253 When those companies. . are obliged to admit any person, properly qualified, . . . they are called regulated companies. 1828 SPEARMAN *Brit. Gunner* (ed. 2) 336 They are fired with a regulated charge of powder and shot. 1848 ALISON *Hist. Europe* ii. §23 I. 121 Regulated freedom is the greatest blessing in life.” It then offers the following obsolete usage: “b. Of troops: Properly disciplined. *Obs. rare*<sup>1</sup>. 1690 *Lond. Gaz.* No. 2568/3 We hear likewise that the French are in a great Allarm in Dauphine and Bresse, not having at present 1500 Men of regulated Troops on that side.” *Id.* Note that Justice Scalia did not pursue the point that well-regulated means well trained rather than subject to rule in the written opinion.

<sup>46</sup> Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI-KENT L. REV. 237, 252 (2000).

<sup>47</sup> Transcript, *supra* note 28, at 8; Stanley N. Katz, *Introduction to WILLIAM BLACKSTONE*, 1 COMMENTARIES ON THE LAWS OF ENGLAND xii (Univ. of Chicago Press 1979) (1765).

<sup>48</sup> Transcript, *supra* note 28, at 8–9; JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 265 (1856) (“[T]hough . . . the importance of a

6. The federal government could disband the state militia by failing to arm them, a position that Kennedy, Roberts, and Alito also embrace. (Presumably, the purpose of the assertion is to show that the Amendment could not possibly concern a state right as opposed to a private right, seeing as Congress had plenary authority to abolish the militia by disarming them. But this claim is certainly false—John Marshall and James Madison made clear at the Virginia Ratifying Convention that the states retained concurrent authority to arm the militia and were perfectly at liberty to arm their units to the extent the federal government neglected to do so.<sup>49</sup> The states did just that, until the militia began to disappear in the decades after the War of 1812.)<sup>50</sup>
7. Scalia insisted on at least two occasions during oral argument that legislation disarming Highlanders and Catholics in 18<sup>th</sup> century Britain spoke of arms, meaning that arms means any weapons, not just weapons in military service. (As David Konig has elucidated in great detail, Parliament’s concern was very much to suppress disloyal militia, particularly after the two Jacobite risings of 1715 and 1745.)<sup>51</sup>
8. Scalia argues also that any weapon in common use is protected by the Second Amendment, in part because, in 1791 when the Amendment was ratified, Americans were expected to bring their own arms to militia muster. (But this position is impossible to square with the Militia Act of 1792, which required all privates enrolled in the militia to acquire either a regulation musket or rifle meeting particular standards, implying that other weapons were irrelevant for purposes of militia preparedness.)<sup>52</sup>

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well-regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt, and thus gradually undermine all the protection intended by this clause of our National Bill of Rights.”)

<sup>49</sup> Transcript, *supra* note 28, at 11; UVILLER & MERKEL, *supra* note 9, at 85; 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, 382–83, 421 (photo. reprint 1941) (Jonathan Elliot, ed., 2d ed., 1891) [hereinafter ELLIOT DEBATES].

<sup>50</sup> William G. Merkel, Comment, *Mandatory Gun Ownership, the Militia Census of 1806, and Background Assumptions Concerning the Early American Right to Arms: A Cautious Response to Robert Churchill*, 25 LAW & HIST. REV. 187, 189–90 (2007).

<sup>51</sup> Transcript, *supra* note 28, at 17–18, 37–38; David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of “the Right of the People to Keep and Bear Arms,”* 22 LAW & HIST. REV. 119, 128 (2004).

<sup>52</sup> Transcript, *supra* note 28, at 21–22, 45, 47; Militia Act of 1792, ch. 33, § 1, 1 Stat. 271, 271, *repealed by* Militia Act of 1903 (Dick Act), ch. 196, 32 Stat. 775; UVILLER & MERKEL, *supra* note 9, at 126–127, 143, 280 n.28.

In short, no justice made more patently false historical claims during oral argument in *Heller* than the Court's self-anointed originalist savior. But Justice Scalia had plenty of support. Justice Alito, for his part, expressed skepticism that the purpose of the Second Amendment was to prevent disarmament of the militia. The basis for Alito's incredulity was his assumption that Congress has plenary power to disarm the militia. As explained above, and as elucidated in more detail by James Madison and John Marshall at the Virginia Convention, this objection carries little weight, given the concurrent authority of the states to arm the militia absent Congressional attention to its responsibility to arm.<sup>53</sup> For Justice Alito, but not for the framers, clearly the real purpose of the Second Amendment is to secure the right of self-defense in the home, and here the D.C. statute becomes highly problematic, given that it prohibits handguns and requires rifles and shotguns to be kept locked or unloaded, making them impractical tools for repelling home invaders.<sup>54</sup>

The fourth member of the *Heller* majority, Justice Thomas, has famously declined to speak on the bench in well over two years, and true to form, did not speak during oral arguments. Indeed, Thomas was the only member of the Court not to speak in *Heller*. Justice Thomas's views on the Second Amendment are, however, no mystery. They were suggested in his concurrence in *Printz v. United States*, the case striking down provisions of the Brady handgun control act on anti-commandeering grounds under the Tenth Amendment.<sup>55</sup> There, Justice Thomas endorsed a private rights reading of the Second Amendment and cited the standard canon of tendentious literature that does the same.<sup>56</sup> (It is perhaps worth noting that *Printz* itself cannot be squared with foundation era practice. The Federal Militia Census, first conducted in 1802 and then fully implemented in 1806, was carried out by state militia officials who were ordered, i.e. commandeered, by President Jefferson to go door to door in their districts and count militia-eligible residents and guns in every household).<sup>57</sup>

The final vote needed to create a majority in favor of a historically-rooted private right to arms came from Justice Kennedy. The Court's so-called "swing voter" made clear during oral argument in *Heller* that he

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<sup>53</sup> ELLIOT DEBATES, *supra* note 49, at 382–83, 421.

<sup>54</sup> Transcript, *supra* note 28, at 24 (where Alito asks, "But even if you have—even if you have a rifle or a shotgun in your home, doesn't the code prevent you from loading it and unlocking it except when it's being used for lawful, recreational purposes within the District of Columbia? So even if you have the gun, under this code provision it doesn't seem as if you could use it for the defense of your home."); *id.* at 41–42 (asking how any outright ban can be upheld under any standard of review if the Second Amendment in part protects an individual right to self-defense); *id.* at 85 (asking whether the D.C. council considered self-defense when it enacted the provision at issue).

<sup>55</sup> *Printz v. United States*, 521 U.S. 898, 936 (1997) (Thomas, J., concurring).

<sup>56</sup> *Id.* at 937–39 (Thomas, J., concurring).

<sup>57</sup> Merkel, *supra* note 50, at 188–92, *cf. Printz*, 521 U.S. at 898 (Scalia opinion for the Court, announcing anti-commandeering principle).

viewed the two clauses of the Second Amendment as logically independent, meaning that the right to arms exists independently of the constitutional preference for the militia. For Kennedy, the heart of the matter is that the “operative clause” (in contrast, one supposes, to “inoperative clause” on which the “operative clause” is syntactically dependent) relates to something other than the militia, namely “the concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that[.]”<sup>58</sup> This concern becomes a hobbyhorse for Kennedy, who returns repeatedly during oral arguments to the issue of a right to arms in rural, western settings, and frequently pleads that the framers of the Amendment must have been concerned to protect frontiersmen against federal disarmament. Even more than in the case of Justice Scalia, Justice Kennedy’s history is a matter of faith rather than study or fact, and Kennedy offers no evidence whatsoever to bolster the view that he urged on the petitioner. In oral argument with Alan Gura, counsel for Heller, and Solicitor General Clement, Kennedy urged that *United States v. Miller* was “deficient” because it fails to address “the interests that must have been foremost in the framers’ minds when they were concerned about guns being taken away from the people who needed them for their defense.”<sup>59</sup> Again, this is the language of faith, not empirical history. Kennedy would not “allow[] the militia clause to make no sense out of the operative clause.”<sup>60</sup> Since the Second Amendment for Kennedy is about the rights of homeowners and western rustics, the fact that automatic weapons are useful to the National Guard is irrelevant—they are outside the terms of the Second Amendment because the Second Amendment must be about hunting and home defense, and because, after all, that must be what the framers were really concerned with, even if they said otherwise in the clause that Kennedy labels “inoperative.”<sup>61</sup> Justice Kennedy also raised the issue of the English Bill of Rights of 1689 (implying that he, like Scalia, has fallen under the thrall of Malcolm’s odd and error-prone book on the same subject). Kennedy implies that the English Bill of Rights recognized a right independent of militia service, and that the U.S. Bill of Rights therefore likely does the same.<sup>62</sup> He did not mention that the English Bill of Rights concerned liberties against the Crown not against the legislature, and that the 1689 right to arms was expressly subject to law (meaning statute) and limited by class and religion.<sup>63</sup>

Kennedy’s vote brought the number of justices in favor of a non-militia linked right to five, meaning Justice Scalia, clearly the most

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<sup>58</sup> Transcript, *supra* note 28, at 8.

<sup>59</sup> *Id.* at 30–31, 61–62.

<sup>60</sup> *Id.* at 62.

<sup>61</sup> *Id.* at 8 (where Kennedy labels the second clause of the Amendment the “operative clause,” implying that the introductory clause is somehow “inoperative”).

<sup>62</sup> Schwoerer, *supra* note 43, at 57.

<sup>63</sup> LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 74 (1981).

enthused and invested in the project, had his majority. But it left open at least three questions (apart from incorporation, not before the Court in a claim arising out of the District): what would become of the *Miller* precedent, what limitations would the right tolerate, and what level of scrutiny would the right trigger? On this last issue at least, Justice Scalia lacked a majority, for the Chief Justice had been clear in oral argument that he did not favor strict scrutiny in this context or indeed in any other where precedent did not already command its application. Justice Kennedy had signaled his desire to overturn *Miller*, but the Court ultimately chose to reread that precedent creatively instead of casting it aside as bad law. Perhaps Kennedy's greater intellectual honesty respecting the teaching of *Miller* made him unsuited to write for the five justice majority. But in any case, for reasons that are not self-evident to outsiders, Chief Justice Roberts elected Antonin Scalia to write for the Court, assuring in the process that originalism (and commitment to the desired result) rather than pragmatism would drive the opinion. As he wrote for the five justice majority, Justice Scalia felt compelled not only to define at least the initial scope of the private right to gun possession and to answer provisionally the question about what restrictions that right could bear, but also to engage the vigorous dissenters.<sup>64</sup> As he made clear in oral argument, Justice Stevens supported the view that the right to arms was originally understood as militia-dependent, a view shared by Justices Ginsburg, Souter, and Breyer—the latter of whom was particularly struck by the founding-era right's peaceful co-existence alongside numerous city and town regulations severely restricting gun possession, even in states with constitutional provisions analogous to the federal Second Amendment.<sup>65</sup>

### III. THE SCALIA OPINION

Justice Scalia begins his analysis of the Second Amendment right in *Heller* with a pivotal *ipse dixit* assertion: "The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause."<sup>66</sup> This is a crucial step for Justice Scalia as it allows him to uncouple the right to arms from the militia. The late Professor Uviller and I made a different argument in our book, *The Militia and the Right to Arms*, where we relied on syntax, the debates in the first Congress, and historical context to make the claim that the two parts of the Amendment were logically and linguistically dependent.<sup>67</sup> Our position is shared by amicus Historians and Professors of Linguistics.<sup>68</sup> While Scalia cites no authority for his proposition that the Second Amendment's militia language is merely prefatory, that argument was prefigured by

<sup>64</sup> District of Columbia v. Heller, 128 S. Ct. 2783, 2795–97 (2008).

<sup>65</sup> Transcript, *supra* note 28, at 54, 56, 63–64.

<sup>66</sup> *Heller*, 128 S. Ct. at 2789.

<sup>67</sup> UVILLER & MERKEL, *supra* note 9, at 148–59.

<sup>68</sup> Historians' Brief, *supra* note 20, *passim*; Linguists' Brief, *supra* note 20, at 5–14.

Eugene Volokh in an influential article called *The Commonplace Second Amendment*.<sup>69</sup> There, Professor Volokh concedes that the structure of the Second Amendment (linking the right to arms to a purpose clause) was unique in the federal Bill of Rights, but then points out that purpose clauses occurred more commonly in state constitutions and bills of rights.<sup>70</sup> Volokh argues further that purpose clauses did not determine the meaning of the rights to which they attached, and this assertion becomes a major premise in Scalia's exegesis of the Second Amendment right.<sup>71</sup> Volokh's claim is essentially anachronistic. While several nineteenth-century treatises on interpretation support his devaluation of prefaces or prologues, orthodox late eighteenth-century learning, reflected by Blackstone among others, was that prefaces and prologues were pivotal to ascertaining meaning, and indeed that purpose clauses were largely outcome determinative respecting textual interpretation.<sup>72</sup> Thus, Scalia's devaluation of the militia clause, calculated as it is to lead to the result he prefers, is arbitrary and unfounded.

Justice Scalia's next move is to urge the importance of the phrase "right of the people" in support of his case for a right unrelated to service in the militia. Of course, the identity of those holding the right does not determine the nature of the right, and it is hardly as obvious, as Justice Scalia assumes, that a right of the people must be privatistic in character rather than civic in scope. Indeed, the powers of the people retained in the Tenth Amendment are certainly collective in character, the unenumerated rights reserved to the people by the Ninth Amendment could just as well be corporate and civic as wholly private (democratic self-governance comes to mind, as does freedom of association), and the First Amendment right of the people to assemble and petition Congress for redress of grievances would be nonsensical if conceived of as atomistic as opposed to corporate and civic in nature. The Preamble speaks of the people coming together to form a more perfect union, not coming apart to create more perfect anarchy. Article I, Section 2 says, "the People of the several States" shall choose the members of the House of Representatives.<sup>73</sup> This act is both collective and private in character, although voting in the founding era was not always done privately and

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<sup>69</sup> Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

<sup>70</sup> *Id.* at 793–95, 802. It should be noted that Volokh uses the term "justification clause" instead of "purpose clause."

<sup>71</sup> *Id.* at 801–807; *Heller*, 128 S. Ct. at 2788–90.

<sup>72</sup> Cornell, *supra* note 10, at 632–35. It is interesting to note that the two treatises Scalia cites to support subordinating purpose clauses were published in 1871 and 1874, eighty some years after ratification. *Heller*, 128 S. Ct. at 2789 (citing FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES: THEIR RULES OF CONSTRUCTION, AND THE PROPER BOUNDARIES OF LEGISLATION AND OF JUDICIAL INTERPRETATION 268–269 (Platt Potter ed., 1871) and THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 42–45 (John Norton Pomeroy ed., 2d ed. 1874)).

<sup>73</sup> U.S. CONST. art. I, § 2, cl. 1.

secretly as it is today.<sup>74</sup> That statement respecting elections to the House of Representatives is the only use of the term people in the original seven articles (apart from the Preamble), and the framers thereafter abandoned this locution in favor of “person” or “persons,” terms they used no fewer than nineteen times in Article I through VII when they wanted to describe acts performed individually or list purely personal disabilities, liberties, and responsibilities.

Building on his *a priori* assumption that the Second Amendment's militia language is subordinate and his strained reading of right of the people to mean a private, personal right, Justice Scalia next moves to interpreting the phrase “keep and bear arms.” Justice Scalia's willful blindness respecting the obvious and overwhelmingly military connotation of bear arms was discussed in some detail in the first section of this Essay. In the written opinion, he cites two prominent late eighteenth-century dictionary entries that seem to favor his construction, but as amicus Professors of Linguistics demonstrated in a far more exhaustive survey of dictionaries of the times, *bearing arms* most commonly was defined with clear military resonance and illustrated by quotations military in character throughout the eighteenth century.<sup>75</sup> Justice Scalia also lays great stock in the fact that the word “keep,” standing alone, does not convey a collective or military meaning. However as Justice Stevens reminds us in his dissent, the Second Amendment does not speak of a right to keep arms but rather “the right of the people to keep and bear Arms.”<sup>76</sup> The text describes one right, coupled syntactically to the militia and to the security of a free State, and that right is to “keep and bear Arms”—not own guns and carry weapons. Justice Scalia and fellow travelers in the original public meaning school abhor consideration of historical context,<sup>77</sup> but canons of legal interpretation in the late eighteenth century stressed the importance of focusing on the evil a law was designed to remedy.<sup>78</sup> In the case of the Second Amendment, there is no doubt that the evil in question was disarmament of the citizen militia, leading inevitably to over-reliance on a dangerous standing army.<sup>79</sup> Since the civic right to arms aims at preserving the citizen militia against disarmament, it is self-evident that the right must extend to protecting possession of arms to be carried in militia duty as well as to the actual carrying of those weapons when called

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<sup>74</sup> RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA, 1740–1790*, at 110–114 (1982).

<sup>75</sup> Linguists' Brief, *supra* note 20, at 4; 1 *THE OXFORD ENGLISH DICTIONARY* 634 (2nd ed. 1989) (defining “to bear arms” as, “to serve as a soldier, do military service, fight,” and citing numerous eighteenth-century references using this phrase in military contexts).

<sup>76</sup> *Heller*, 128 S. Ct. at 2824–31 (Stevens, J., dissenting).

<sup>77</sup> SCALIA, *supra* note 24, at 16–18, 29–37 (condemning the use of legislative intent and legislative history).

<sup>78</sup> H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 894–902 (1985).

<sup>79</sup> See UVILLER & MERKEL, *supra* note 9, at 2–3.

to service. Disarmament of the militia, when attempted and achieved by British authorities during the Revolutionary period, targeted the arms used by militiamen both when they were kept in private homes and stored in public arsenals.<sup>80</sup> The concern for keeping arms was therefore as closely tied to preservation of the militia as was concern for bearing arms. In short, Justice Scalia places far more weight on the word “keep” than it will bear in any but the most abstract and a-contextual analysis.

Having opted to ignore context in the interest of theoretical purity (original public meaning devotees insist on this ploy),<sup>81</sup> treat “the right of the people to keep and bear Arms” as two distinct entitlements, and discount the military implications of bearing arms, Justice Scalia did not settle for redefining *arms bearing* to mean carrying weapons for any purpose (which would at least be supported by some outlying and eccentric uses) but instead seized on the arbitrary and largely unfounded construct of carrying weapons for confrontation as the new meaning of the pivotal “operative” phrase of the Second Amendment. To be fair, Scalia’s assertion is not entirely *ipse dixit*. It is Ginsburg’s *dixit*, having originated in a dissenting opinion by Justice Ginsburg in *Muscarello v. United States* in 1998, a case in which the justices addressed the meaning of a federal statute proscribing heightened penalties for crimes committed while a person “carries a firearm.”<sup>82</sup> There, Justice Ginsburg was concerned about sparing a convicted criminal who had not actually brandished or employed a gun during the course of the crime from enhanced sentencing requirements.<sup>83</sup> She was clearly not interested in defining the scope of the constitutional right to arms possession. And even if she were, Justice Scalia is on very shaky originalist grounds when the only authority he cites in support of his newly hatched interpretation of the meaning of bearing arms in the Second Amendment—passed in 1789 and ratified in 1791—is a somewhat ill-thought aside of a dissenting Supreme Court justice regarding an unrelated matter uttered in 1998. Is

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<sup>80</sup> CORNELL, *supra* note 21, at 14.

<sup>81</sup> *Heller*, 128 S. Ct. at 2788 (stating “In interpreting this text [the Second Amendment], we are guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning’ . . . . Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.” (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931), alteration in original)); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620–21 (1999) (quoting Robert Bork and Antonin Scalia saying that original meaning can only be determined through the meaning of the words in the statute or Constitution).

<sup>82</sup> *Heller*, 128 S. Ct. at 2793 (where Scalia quotes Ginsburg’s dissent in *Muscarello v. United States* saying, “[s]urely a most familiar meaning is, as the Constitution’s Second Amendment . . . indicate[s]: ‘wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.’”) (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

<sup>83</sup> *Muscarello*, 524 U.S. at 139–150 (Ginsburg, J., dissenting).

this originalism based on neutral principles?<sup>84</sup> Machine-like law finding, in the fashion of Montesquieu's *la bouche qui prononce les paroles de la loi*?<sup>85</sup> Reliance on an algorithm guaranteed to purge subjectivity from interpretative process?<sup>86</sup> Or is this a case of window-dressing a policy choice made on the bench and imposed upon a polity whose legislature had selected another option?

While the *Heller* opinion is in many respects disingenuous, Justice Scalia invests some limited energy in putting on appearances of reasonableness, or at least acknowledging that there is some quantum of evidence that cuts against his analysis. Thus, after labeling carrying weapons for purposes of confrontation the “natural meaning” of bearing arms, he does admit that the “phrase ‘bear Arms’ also had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: ‘to serve as a soldier, do military service . . . .’”<sup>87</sup> So, for Scalia, the meaning that the phrase “bear arms” carried in over ninety-five percent of its surviving eighteenth-century uses in British North America and the United States is not natural but idiomatic. And, presumably based on his locution, also entirely out of fashion in our own times—after all, “bear arms” had that quirky idiomatic meaning “at the time of the founding,” as opposed to here and now. But *bear arms*, according to Scalia, carried this idiomatic meaning only when the phrase was expanded into the three word construct *bear arms against*. Since the Second Amendment speaks of the right to keep and bear arms, not the right to bear arms against enemies of the state, the idiomatic meaning (which, it bears repeating, the phrase carried over ninety-five percent of the time) can be discarded. Justice Scalia seized on this useful contrivance thanks to the radical libertarian blogger Clayton Cramer, who, in a piece co-authored with Joseph Edward Olson but not yet published at the time the *Heller* decision was announced, first made the claim regarding the difference between *bearing arms against* and simply *bearing arms*.<sup>88</sup> Some convenient sleight of hand was absolutely essential for purposes of propping up the originalist case for a private right to arms against the obvious challenge that *bear arms* almost always carried a military meaning when uttered during the founding period, and that it did so uniformly during Congressional debates on the Amendment. Cramer's move had the added advantage of not appearing in print in time to be refuted prior to publication of the *Heller* decision. Unfortunately for Scalia, Cramer's claim is unmasked as absurd in a

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<sup>84</sup> Cf. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 197 (Jack N. Rakove ed. 1990).

<sup>85</sup> BARON DE MONTESQUIEU, 1 THE SPIRIT OF LAWS 151–53 (Thomas Nugent trans., 1900).

<sup>86</sup> SCALIA, *supra* note 24, at 94.

<sup>87</sup> *District of Columbia v. Heller*, 128 S. Ct. 2783, 2794 (2008).

<sup>88</sup> Clayton E. Cramer & Joseph Edward Olson, *What Did “Bear Arms” Mean in the Second Amendment?*, 6 GEO. J.L. & PUB. POL'Y 511, 520 (2008).

forthcoming piece in the *Journal of the Early Republic* by Nathan Kozuskanich who has laboriously catalogued every surviving use of the phrase bear arms available in electronic collections of colonial and founding era writings, and counted up hundreds of instances where the phrases *bear arms* or *bearing arms* are used without the qualifier against to mean rendering service in the army or militia.<sup>89</sup>

Philological and syntactical exegesis rather than historical context determine meaning for devotees of original public meaning constitutionalism,<sup>90</sup> but the meaning of the Second Amendment Justice Scalia divines from those processes is not, he assures us, out of harmony with historically inflected meaning.<sup>91</sup> Indeed, that “meaning is strongly confirmed by the historical background of the Second Amendment,” which, it turns out, is relevant “because it has always been widely understood that the Second Amendment, like the First and the Fourth Amendments, codified a *pre-existing* right.”<sup>92</sup> Implicitly then, history is not material when considering constitutional rights newly minted by drafters and ratifiers because judicial interpreters’ contemplation of historical sources would shade into original intent based inquiries disfavored by members of the original public meaning school. In contrast, history is relevant when considering the meaning of more venerable rights merely codified by drafters and ratifiers because then those making the inquiries are not probing the intentions of the constitution makers. But why are interpreters not probing those intentions—or at least the received meaning of their expressed language—in precisely the same way interpreters approach relevant considerations concerning rights newly created by the Constitution? After all, it is still the ratifiers who gave the old common law right constitutional status. Consequently, I see no material differences respecting the relevance of history when it comes to attempting to figure out the meaning of text codifying old rights and text recognizing new ones. Whatever differences there may be, Justice Scalia assures us that because the right to bear arms is a common law right predating the Bill of Rights, it is not “in any manner dependent upon that instrument [the Second Amendment] for its existence.”<sup>93</sup> So constitutional text tells the whole the story, but the right under analysis in *Heller* we suddenly learn does not depend on text in any manner? This is a very odd—and perhaps too telling—concession, seeing as the first third of Justice Scalia’s opinion was devoted entirely to a-historical textual analysis leading to a historically implausible reading of the text under analysis. Justice Scalia never explains the basis for his distinction between rights with pre-constitutional pedigree and those without, leaving the reader to wonder why history is not relevant for the first part of the

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<sup>89</sup> Kozuskanich, *supra* note 17, at \*2.

<sup>90</sup> SCALIA, *supra* note 24, at 45–46; Barnett, *supra* note 79, at 621.

<sup>91</sup> *Heller*, 128 S. Ct. at 2797.

<sup>92</sup> *Id.* (italics in original).

<sup>93</sup> *Id.*

opinion when he determined the meaning of constitutional text. This question is vexatious, but on the terms of the opinion, perhaps unfathomable. In any case, the history Justice Scalia deploys after abruptly and unexpectedly conceding history's relevance turns out to be tendentious, wrong, and sometimes irrelevant.

To keep *Heller's* odd relation with history in perspective, recall that for Scalia, the debates in the United States House of Representatives in 1789, concerning the meaning of the proposed amendment guaranteeing the right of the people to keep and bear arms, are irrelevant to the judicial task of giving meaning to the constitutional text that Congress forwarded to the states for ratification. Of much greater relevance for Justice Scalia is the alleged meaning of Section 7 of the English Bill of Rights of 1689, as glossed by Joyce Lee Malcolm in our own time, or as glossed by William Blackstone in the 1760s, or as glossed at two levels removed by Professor Malcolm's glossing Blackstone's gloss of the original.<sup>94</sup> Now, it is not entirely clear that the English statutory language, "That the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law,"<sup>95</sup> means remotely the same thing as the American constitutional text, "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."<sup>96</sup> The English Bill of Rights was concerned with recognizing limits on executive authority that William and Mary accepted as conditions for being offered the crown that had been abdicated when James II fled the country.<sup>97</sup> Except in so far as the Crown prerogatives were concerned, the English text took for granted legislative omnipotence.<sup>98</sup> In contrast, the United States Bill of Rights was concerned with marking out limits to federal legislative authority.<sup>99</sup> The English right described an immunity against the Crown that could be waived as Parliament saw fit; the American right described a right against Congress that left state regulatory authority untouched. The question of what sort of governmental actors were estopped and which were not blends into substance because in both instances, legislators—Parliamentary in one case, state in the other—remained fully licensed by the terms of the social compact to regulate gun possession. The scope of the textually protected right differs between the 1689 and 1789 Bills of Rights as well in that the English right is limited to Protestants, dependant on conditions, and subject to statutory allowance, while the right secured in the United States is

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<sup>94</sup> See Schwoerer, *supra* note 43, at 48–50; Heyman, *supra* note 46, at 253.

<sup>95</sup> SCHWOERER, *supra* note 63, at 74.

<sup>96</sup> U.S. CONST. amend. II.

<sup>97</sup> SCHWOERER, *supra* note 63, at 290–91; IAN LOVELAND, CONSTITUTIONAL LAW, ADMINISTRATIVE LAW, AND HUMAN RIGHTS: A CRITICAL INTRODUCTION 19–28 (4th ed. 2006).

<sup>98</sup> LOVELAND, *supra* note 97, at 22–28.

<sup>99</sup> *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833); BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 193 (1977).

syntactically linked to the existence of a well-regulated militia. Neither right is boundless and unlimited, and neither represents an atomistic liberty characteristic of a pre-social, lawless state of being. But the limits to which the English and American rights are subject are different because the two texts specify different limits, and in that context, Justice Scalia's claim that Blackstone, when analyzing the English Bill of Rights, did not have militia dependency in mind rather misses the mark because Blackstone was not discussing the American right with its textual commitment to a well-regulated militia. Blackstone did, as Scalia claims, link Section 7 of the English Bill of Rights to "the natural right of resistance and self-preservation" and "the right of having and using arms for self-preservation and defence,"<sup>100</sup> but it is not at all clear that he was interested in doing anymore than making the orthodox Lockean move of retroactively justifying the show of force that ushered in the bloodless or Glorious Revolution.<sup>101</sup>

One of the principal hazards of originalism is that modern American jurists are relatively inexpert in the history of late eighteenth-century American constitutional thought.<sup>102</sup> They tend to know even less about seventeenth and eighteenth century English constitutional thought. Bearing this in mind, I shall offer a radical proposition, not at all in harmony with Justice Scalia's interpretive scheme: since neither the framers of the English Bill of Rights nor William Blackstone lived to see the Second Amendment to the United States Constitution, arguing over what spin they placed on the textually different Section Seven of the English Bill of Rights is not guaranteed to yield unambiguous and neutral answers respecting the contested meaning of that American constitutional text they never saw. Figuring out what the materially different American language meant to everyday, intelligent language users on the streets and fields of the new republic—if that is to be our task—requires consultation of other sources. And if constitutional language has meaning that depends on more than the isolated (and themselves frequently ambiguous) meanings of the words that make up that constitutional text, why not consult the works of commentators from the immediate post-constitutional period, all the more so when they purport to explain what that text means (and not what it ought to mean) as a coherent and integrated whole?<sup>103</sup>

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<sup>100</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 136, 139–40 (1765).

<sup>101</sup> The quotes are from Scalia's opinion, which cites Blackstone's *Commentaries on the Laws of England*, but the language appears to be Scalia's gloss rather than verbatim Blackstone. Cf. *Heller*, 128 S. Ct. at 2798; see Heyman, *supra* note 46, at 257.

<sup>102</sup> Rakove, *supra* note 30, at 105–06; Saul Cornell, "Don't Know Much About History" *The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 666 (2002).

<sup>103</sup> By comparison, the standard interpretive maxim of international law holds that learned treatises are authoritative evidence of what the law is, but only in so far as the treatise writers wrote to explain what the law is as it actually exists and not to argue what the law should become, has been consistently followed by the Supreme

Now, to be fair, Justice Scalia does reference, and on occasion excerpt, treatise writers of the late eighteenth and early nineteenth centuries.<sup>104</sup> One could argue easily—and Saul Cornell does so masterfully—that he excerpts them tendentiously, and that when he does so he blends analysis of the common law right of self-defense into the Second Amendment when in reality jurists of the times viewed the right of self-defense and the right to arms as distinct and separate constructs.<sup>105</sup> But my point here is another one. When Justice Scalia cites treatise writers in *Heller*, he cites them not to establish the meaning of the Second Amendment but only to confirm the putative meaning of the text he had already cobbled together from his a-historical and anachronistic musings respecting the Second Amendment's various words and phrases pondered as isolated phonemes rather than as parts of an integrated whole. In contradistinction to Scalia, I am proposing reliance on the meaning treatise writers ascribe to the text of the Second Amendment as a complete and coherent ensemble. Accepting, at least *arguendo* (well, to be honest, perhaps only *arguendo*), Justice Scalia's preference for original public meaning, there is no reason not to focus on the meaning of whole provisions as originally received, rather than on the component parts of a text that early Americans read as a whole. While original public meaning advocates generally eschew historical context, it is hardly clear that individual words have plain meaning while complete texts communicate only ambiguous purposes and shady intentions. To read a text as a complete entity is no more inherently likely to slide into non-interpretive intent-focused methods than focusing on individual words, unless of course the authors of the completed text succeeded in integrating their intended meaning into the text, which would surely make our reliance on that intended meaning legitimate so long as we understand it as the ratifiers did. Let us try the holistic approach then, or rather check in with a treatise writer who pursued a holistic approach to explaining the Second Amendment's meaning in those halcyon days so long ago, before activists ascended to the Bench and made war on behalf of rights social conservatives do not like, and against rights that they do.

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Court since the beginning. *See e.g.*, *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163–64 (1820) (Justice Story looking to treatises on the law of nations to interpret the Congressional power to define the crime of piracy under Art. I sec. 8 cl. 10, and finding that Congress acted within that power by simply incorporating customary international law into the Statutes at Large), *The Paquete Habana*, 175 U.S. 677, 701–709 (1900) (Justice Grey consulting treatises to discover a customary rule against seizure of enemy coastal fishing vessels during war time).

<sup>104</sup> *Heller*, 128 S. Ct. at 2789–2807 (J. Tiffany at 2789, F. Dwarris at 2789, T. Sedgwick at 2789, J. Bishop at 2789, S. Johnson at 2791, T. Cunningham at 2791, N. Webster at 2791, J. Trusler at 2791, W. Blackstone at 2792, Hawkins at 2792, T. Sheridan at 2793, T. Walker at 2793, T. Clarkson at 2796, Lord Richmond at 2797, J. Story at 2798, G. Sharp at 2798, J. de Lolme at 2798, St. George Tucker at 2799, W. Duer at 2799, J. Eliot at 2804, W. Rawle at 2805–06, B. Oliver at 2807).

<sup>105</sup> Cornell, *supra* note 10, at 633–36.

The treatise writer I have in mind is Joseph Story, Justice of the Supreme Court, Harvard College professor, and along with New York's Chancellor James Kent, the most influential scholar of constitutional law during the early national period. Story published the first edition of his *Commentaries on the Constitution of the United States* in 1833,<sup>106</sup> some twenty years after being appointed to the Supreme Court and more than forty years after the Bill of Rights was ratified. But Story was around to take in the received meaning of the Bill of Rights in 1789–91, having been born in Marblehead, Massachusetts in 1779.<sup>107</sup> Story's father, a medical doctor, served with George Washington in the Continental Army, and Story grew up in politically-aware circles in Marblehead, Massachusetts.<sup>108</sup> He did not start reading law until he graduated from Harvard in 1798, so when he first encountered the proposed Bill of Rights as a student at Marblehead Academy in 1789, Story understood it as an intelligent school boy, not as a doctrinaire lawyer.<sup>109</sup> When he came to write the *Commentaries* in the early 1830s, he wrote not with a view of new-modeling a visionary understanding of the Constitution of his youth, but of preserving the orthodox views of the Age of Federalism against the newly emerging anti-statist, anti-corporatist, and profoundly individualistic views of the Age of Jackson.<sup>110</sup> (It is telling, incidentally, that Scalia, the alleged originalist, cites more Jacksonian authorities on the meaning of the Second Amendment than he does Federalist or Jeffersonian authorities.)<sup>111</sup> This is Story's entry concerning the Second Amendment and the federal constitutional right to arms:

The importance of this article will scarcely be doubted by any persons, who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist

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<sup>106</sup> 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION* (De Capo Press 1970) (1833).

<sup>107</sup> R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC*, 5 (University of North Carolina Press 1985).

<sup>108</sup> *Id.* at 10.

<sup>109</sup> *Id.* at 20–21, 36.

<sup>110</sup> *Id.* at 192–195.

<sup>111</sup> *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789–2807 (2008). See Cornell, *supra* note 10, at 631–36 (noting the treatise writers cited by Justice Scalia relied on nineteenth-century discussions of constitutional interpretation).

and triumph over them. And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.<sup>112</sup>

Story's right to arms does not concern hunting, or defense of the home against burglars, or the joys of collecting. It concerns service in the militia, the preferred alternative to the standing army, bulwark of civic republicanism, and shield against tyranny. Story's entry on the Second Amendment laments the passing of the New England militia of his youth and the abandonment of the communal tradition of obligatory service in local units comprising a universal army of the people and of the Constitution. The late Richard Uviller and I chronicled the demise of the citizen militia of the framers in our book *The Militia and the Right to Arms*, in which we described rising popular disaffection for compulsory militia duty in the post-revolutionary years which lead to the disappearance of the old militia during the Age of Jackson, and its replacement by volunteer companies of select militia, who no longer represented the undifferentiated communities of the Republic, but only selected parts, composing small segments of the population who banded together for reasons such as ethnic pride, social ostentation, or desire for status and for glory.<sup>113</sup> This process took longer in New England than the rest of the country, but by 1830s it was well underway even in Massachusetts, and Justice Story needed no special sense of prescience to foretell the ultimate demise of the army of the people.<sup>114</sup> Crucially, for present purposes, the end of the common militia signaled for Story the evisceration of the constitutional right to arms. "There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights." All the protection, says Justice Story, intended by the Second Amendment, will be eviscerated by the passing of the militia system. This can only be because all the protection intended by the Second Amendment was linked to the militia system, and because the farmers successfully imbedded that intention in the language they chose to constitutionalize the right.

Justice Scalia, who was not born in Marblehead, Massachusetts, in 1779 but in Trenton, New Jersey, in 1936, sees things differently.<sup>115</sup>

<sup>112</sup> STORY, *supra* note 106, at 746–747.

<sup>113</sup> UVILLER & MERKEL, *supra* note 9, at 109–24.

<sup>114</sup> *Id.* at 30–31, 109–24.

<sup>115</sup> ROSSUM, *supra* note 42, at 3.

According to Justice Scalia, “[t]he prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.”<sup>116</sup> This is the crux of Scalia’s analysis, and it is a claim for which he does not cite and cannot cite any authority whatsoever. It is a leap of faith, not a logical surmise or plain deduction from the text that pointedly links the right to the militia and not to hunting or to defense of the person or home. It is an assertion based on beliefs which, if they existed from 1789–1791, were none the less omitted from the language selected to codify the right to arms. Justice Scalia’s right to arms may be based on natural law, common law, the Ninth Amendment, or historical fiction, but it is not plainly enshrined in the Second Amendment.

This Essay began with the observation that there were at least two plausible reasons to recognize a private right to weapons possession under the United States Constitution, i.e. fealty to persistent, popular and super-majoritarian demands for such a right, and the popular belief that a right to have guns is in fact rooted in the Second Amendment as originally understood. There may well be other ways to articulate the right, more in harmony with mainstream American judicial traditions of rights enforcement than appeals to popular sovereignty as the source of concrete unwritten norms. One could, without forsaking the Supreme Court’s extra-textual claim of *Marbury v. Madison*<sup>117</sup> and *Cooper v. Aaron*<sup>118</sup> to have the dispositive and final say in matters of constitutional interpretation (a claim with which the people out of doors, even popular constitutionalists among them, have largely acquiesced, even if Professors Tushnet, Levinson and Kramer do not join them in so doing), find a basis for a judicially minted right to arms in the penumbra of various elements of the Bill of Rights, in common law constitutional traditions, in substantive due process, in firmly rooted history and traditions of the American people, or in the Ninth Amendment. Indeed, in his recent piece in the *Harvard Law Review*, Cass Sunstein accuses Justice Scalia of performing precisely this operation.<sup>119</sup> The great irony, as developed by Chief Judge Harvey Wilkinson of the Fourth Circuit in his comment in the *Virginia Law Review*,<sup>120</sup> is that Justice Scalia came to prominence as a self-avowed principled opponent of judicial recognition of textually unspecified rights—at least those not firmly rooted in American history and tradition. And Justice Scalia’s claim that there is in fact a deeply entrenched history of immunity against gun control regulations in the United States is patently false, as ably demonstrated respecting colonial times by Justice Breyer in dissent,<sup>121</sup> and respecting the early national

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<sup>116</sup> *Heller*, 128 S. Ct. at 2801.

<sup>117</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>118</sup> 358 U.S. 1 (1958).

<sup>119</sup> Sunstein, *supra* note 12, at 249.

<sup>120</sup> Wilkinson, *supra* note 11, at 4.

<sup>121</sup> *Heller*, 128 S. Ct. at 2848.

period and the twentieth century by Professor Saul Cornell.<sup>122</sup> Indeed, even Professor Robert Churchill, the most careful and sophisticated historical scholar to endorse a private right to arms on originalist grounds, concedes that gun regulation (but not prohibition) was commonplace in the early national period.<sup>123</sup> One could perhaps say in Justice Scalia's favor that Justice Douglas took a longer and more convoluted path in *Griswold* from the emanations of the First, Third, Fourth, and Fifth Amendments to the right to sexual privacy than Justice Scalia took in *Heller* from the arms related language of the Second Amendment to his newly forged private right to arms. But that is rather like the claim made on behalf of *Lochner* era substantive due process, that at least there is language in the Constitution about contract. To be sure there is, but it addresses impairment of the obligations of existing contracts, not the right to be free of government interference when entering into any contractual work arrangement no matter how onerous and coercive the terms. Indeed, there is arms related language in the Constitution, but without making Justice Scalia's leap of faith, one cannot tie that language to hunting game or shooting home intruders.

The sense of boot-strapping, artifice, and judicial innovation that *Heller* conveys does not enhance the decision or the Court's legitimacy. Yet bad history and manufactured immunities are perhaps not *Heller's* greatest failings. There is also something profoundly anti-democratic, and anti-localist about Justice Scalia's holding in *Heller* that rather undermines his populist claims. The case, after all, does not hold that the good people of Montana may legislate to allow guns free of interference by do-gooders and know-it-alls in Washington, or that the legislative agents serving the teaming elite masses of New York and California should keep their hands off Mississippians. Rather, with the *Heller* decision, Justice Scalia annulled crime control measures embraced by the legislative agents of the people of the District of Columbia who deemed them urgently necessary to curb an epidemic of violent crime in the 1970s, and who to this day consider the measures effective in having partially mitigated the problems of homicide and assault in the District. It does not help the Court's pretence at legitimacy to reflect that home rule came very late to the District, that the District is majority black and was long ruled directly by a lily white Congress, that the victims of violent crime in urban areas are disproportionately black, and that the Supreme Court is overwhelmingly non-black. When all is said and done, *Heller* allows officious individual residents of the District who disagree with popularly enacted local policies to veto those policies by obtaining a one vote majority among the appointed justices of the national Supreme Court whose policy preferences happen to be out of harmony with those of the majority of the District's residents. And this profoundly anti-

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<sup>122</sup> CORNELL, *supra* note 21, at 26–30.

<sup>123</sup> Churchill, *supra* note 30 at 143.

democratic act relies for authority on nothing more than historical fantasy and imagination.

#### IV. FAILURE, FRAUD, AND ORIGINALISM

For the legal process theorists who dominated American jurisprudence from the New Deal to the 1970s, judges were meant to stick to what they were good at most of the time, which is to say judging particular controversies under existing law as opposed to legislating proposed resolutions of broader problems by making new law. In *Carolene Products*, Justice Stone described three classes of exceptions to this general rule, in which judicial intervention was warranted to make or undue legislatively determined policy to uphold larger constitutional values.<sup>124</sup> Stone had in mind situations involving legislative violations of express constitutional prohibitions, cases in which the normal channels of democratic redress through the legislature had malfunctioned or been blocked off, and matters adversely impacting discreet and insular minorities who could not hope for remedies through the same majoritarian process that had embraced oppressive policies in the first place.<sup>125</sup>

For at least thirty years, process theory was ascendant in the Supreme Court. Process theory and the three *Carolene* exceptions explain much of the Court's post-War jurisprudence on civil rights, desegregation, criminal procedure, and voting. But beginning in the 1970s, originalist critics of the Warren and early Burger Courts mounted a counter-offensive. For Bork, Scalia, and Meese, process theory was an excuse for judicial subjectivity. Allowing judges to occasionally violate the norm against judicial legislation impermissibly introduced judges' personal preferences into the judicial process resulting in usurpation of the lawmaking function. In essence, the originalists argued judges should stick to what they were good at—judging controversies under the law—not just most of the time, but all of the time. While constitutional text

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<sup>124</sup> See *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

<sup>125</sup> *Id.* at 153 n.4 (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities[;] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry” (internal citations omitted); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW passim* (1980).

might warrant occasional judicial invalidation of legislation, it could never authorize active lawmaking by unelected judges. Originalism's assertion of legitimacy by virtue of neutrality built on compact theories of the Constitution to argue that the Court could validly undo the acts of a democratic majority, but only when those acts were prohibited in the fundamental law originally ratified by the higher authority of a constitutional supermajority.

Other auxiliary claims are not always stated but require assertion and resolution to complete the originalists' argument and cement their method's alleged legitimacy. Any given originalist must decide what aspect of original meaning tests her claim to be in harmony with the constitutional design as it existed when the language at issue became part of the constitutional compact to which she claims fidelity. Is it the original intent of the framers? But the framers did not all share the same understanding of contested text. Debates dragged on over four months at the Constitutional Convention, and the Bill of Rights was on the floor of the House for three months. Had the members been in harmony, they surely would have spared themselves these long weeks of disputation. Respecting the Bill of Rights and all other contested provisions of our constitutional text (and those would be all the provisions that matter, and nearly all the provisions we have), some who participated in the framing process wished to scuttle, others to modify, still others to water down, and others still to pass as-is in expectation the language would ratchet itself up over time. Search for unified understanding among the drafters will very likely prove futile (or delusional). Perhaps then it is not collective or individual intention of the legislators who created text, but the understanding of the ratifiers who gave the text life that should guide the modern interpreter. And yet the national polity has never been any less fissured than national or state representative assemblies.

Adherents of the original public meaning school of plain meaning textualism maintain there is a way out of this conundrum. They assert that the subjective understanding of several tens of thousands of ratifiers need not concern us because we can safely recreate their understanding by objective consultation with dictionaries of the times. Note we are by now several steps removed from the comparatively straight-forward argument that a modern legislature (say one consisting of the elected representatives of the three-hundred million individuals making up the national population) must yield to the voices of a majority in each of the nine states required for ratification under Article VII in 1787–89 when fewer than a half million persons—all of them long since dead—were entitled to vote. We have added assumptions that those barely half million or so permitted to participate in 1787–89 all shared exactly the understanding of the originalist jurist in our time, or that the understanding two hundred years ago does not matter since it, or something just as useful, can be surmised from a straight-forward consultation with a dictionary written by Johnson or Webster (one a hidebound Tory, the other a fanatical High Federalist). Either way, the

claim that a supermajority of the late eighteenth century trumps the majority of today is not unmediated or direct. It may not be nonsense, but whatever it is, it stands on stilts and very big ones at that. We are left with the assertion that only one reading matters, and it is the one that original public meaning adherents offer up for our consumption. It is, they proudly avow in attestation of its principled neutrality, a meaning unburdened by context or history, a meaning that follows mechanically from consulting with dictionaries. That this proffered meaning—divorced as it purports itself to be from the nuanced history that gave it life—has some title based on super-majoritarian democracy is anything but self-evident.

In my view, just as Scalia and company flatter themselves respecting their ability to divine unambiguous historical truth from mystic séances with the spirits of 1787, so Barnett and partners significantly overestimate their skill at deriving unambiguous meaning of text by casual perusal of lexicographers' entries for individual terms in dictionaries. To the limited extent that historical truth and historical meaning is ascertainable, much work is required to acquire sufficient perspective to discern the probable and plausible from the facile and fallacious. The originalists' jurisprudential *oeuvre* gives no reason to believe that they (Manning, Rosen and some few others excepted)<sup>126</sup> have laid the perspectival foundations to support their bold, confident, historical, and linguistic assertions. This holds for the majority's mistake-ridden efforts in *Heller*. Perhaps Justices Scalia, Roberts, Thomas, and Alito possess special gifts that particularly suit them to performing the legislative function, and perhaps, in a common law culture in which constitutional law has always developed at least in part in a common law way,<sup>127</sup> these gifts make them fit candidates to "legislate from the bench." There is however absolutely no evidence to support the proposition that any of them has arrived at a sufficiently accurate understanding of late eighteenth-century American constitutional history to be able to read "neutrally" and without recourse to other internal or external values the original meaning of the Second Amendment. It is past time for judges and jurists with political agendas (something they share in common with most of humanity) and marginal senses of historical literacy to abandon disingenuous claims of principled neutrality based on little more than glib assumptions that the framers, ratifiers, and dictionary writers of the 1780s and 90s must have harbored political sensibilities similar to their own. There is in fact nothing neutral about this self-indulgent leap of

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<sup>126</sup> See, e.g., the historically informed and nuanced arguments in John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337 (1998) and JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* (2006).

<sup>127</sup> See generally Thomas C. Grey, *Do We Have an Unwritten Constitution?* 27 STAN. L. REV. 703 (1975); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

faith. When judges say we are faithful to our ancestors because they looked like us, they do not engage in self-abnegation. When jurists imagine that these ancestors made constitutional laws that look like laws we would wish to have, they compound their error. And when they imagine into being a judicial duty to enforce those imagined laws, they are making law, with no more democratic legitimacy and a great deal less candor, than the process theorists during the days of Harlan Stone and Earl Warren. In our age of originalism, the nation worships and the Court reifies what never before existed, and fidelity to false history elevates an imaginary constitutionalism of the past into a new modeled higher law of the present.<sup>128</sup> The driving engine of this revolution, and of Justice Scalia's *Heller* decision, is the predictable capacity of the imagined past to harmonize with the normative vision of those inside and outside the judiciary and academy who are most active in imagining that fictive past into existence. As a consequence of this triumph of imaginary history, the originalist project first celebrated by Robert Bork, Edwin Meese, and Antonin Scalia as a means of restoring neutral principles to constitutional adjudication and supplanting the value-laden judging of the process theorists and living constitutionalists has failed—and failed colossally—to remain true to its own creed.<sup>129</sup>

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<sup>128</sup> See Gordon S. Wood, Comment, Laurence H. Tribe, Comment, Mary Ann Glendon, Comment, & Ronald Dworkin, Comment in SCALIA, *supra* note 24, at 49–127 (on the inability of originalism to confine judges to neutral—as opposed to subjective—values in constitutional and statutory interpretation).

<sup>129</sup> See BORK, *supra* note 22, at 153–55 (discussing the classic arguments for originalism as a neutral principle of interpretation); SCALIA, *supra* note 24, at 3–47. See generally Bork, *supra* note 84; Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 989 (1987) (arguing that the original meaning of the constitutional provisions and statutes provides the only reliable guide for judgment).