

HELLER, NEW ORIGINALISM, AND LAW OFFICE HISTORY: “MEET THE NEW BOSS, SAME AS THE OLD BOSS”*

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District of Columbia v. Heller has been hailed by its supporters as a model of “new originalism,” a methodology that focuses on original public meaning and eschews any concern for original intent. The decision and its methodology have drawn fire from legal scholars from across the contemporary ideological spectrum. The “public meaning” approach employed by the Heller majority rests on a flawed methodology that is antithetical to Founding-era interpretive practices. The problems with this method are evident in Justice Scalia’s interpretation of the Second Amendment’s preamble. Scalia uses a “Cheshire Cat rule of construction” in which he reads the text of the Second Amendment backwards. In this bizarre approach, the Second Amendment’s preamble vanishes during the process of interpretation and only reappears at the very end when it is used to confirm Scalia’s interpretation. This rule has no foundation in Founding-era practice and violates the Blackstonian method favored by most judges in the Founding era. The problems with new originalism are also evident in post-Heller commentary, particularly criticism of Justice Stevens’ dissent. Gun rights advocates have been especially outraged by Stevens’ discussion of St. George Tucker. Yet, when Tucker’s earliest writings on the Second Amendment are examined with a Blackstonian interpretive method, they lend additional weight to Stevens’ argument. Indeed, Tucker’s earliest comments on the Second Amendment challenge Scalia’s ahistorical claim that the Founders believed that the English Bill of Rights established a broad right to have arms. In contrast to Scalia, Tucker thought that the scope of the English right to arms was so limited that it was virtually non-existent.

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* “Meet the New Boss, Same as the Old Boss,” is the final line in Pete Townshend classic rock anthem, “Won’t Get Fooled Again” originally released in 1971 by The WHO, *Won’t Get Fooled Again*, on WHO’S NEXT (MCA 1971).

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INTRODUCTION

The United States Supreme Court's controversial decision in *District of Columbia v. Heller*¹ has drawn fire from across the contemporary legal spectrum. Conservative judge Richard Posner attacked the opinion as “faux originalism.”² J. Harvie Wilkinson, another stalwart conservative jurist, criticized the decision as a right-wing *Roe v. Wade*,³ an example of judicial activism that rivals the most controversial decision in modern Supreme Court history.⁴ Scholars on the left, such as Cass Sunstein and Reva Siegel, echo Posner and Wilkinson's charges of judicial activism. In Sunstein's view, *Heller* is really a latter day *Griswold v. Connecticut*⁵—a decision cloaked in a thin veneer of originalism, but which is actually driven by a powerful popular movement for increased gun rights.⁶ Although Sunstein views the intellectual foundations of the decision as problematic, he is less critical of the actual holding, recognizing that *Heller* shares with *Griswold* one important commonality: the power of popular constitutionalism. Most Americans believe that the Second Amendment protects an individual right, and gun rights advocates are among the most vocal and well-organized special interests in American politics.⁷ Indeed, a decision rejecting the individual rights view might have created another *Roe*-like fissure in American politics. Rather than risk turning *Heller* into *Roe*, Sunstein believes that the Court needed to recognize an individual right. Adopting such a position need not mean an end to gun control if federal courts adopt Sunstein's minimalist approach in future gun cases.

1. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

2. Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 32–33.

3. 410 U.S. 113 (1973).

4. J. Harvie Wilkinson, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009).

5. 381 U.S. 479 (1965).

6. Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 260, 263–64 (2008); see also Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

7. For a useful overview of the politics of the gun control debate, see ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* (4th ed. 2008).

The law at stake in *Heller* was far more sweeping than most gun laws currently on the books, so if the courts follow Sunstein's recommendations, most existing regulations should pass constitutional scrutiny.⁸ If, however, judges begin striking down local gun laws, *Heller* could easily morph from *Griswold* into *Roe*. One of the biggest unanswered questions is the connection between *Heller*'s new individual rights view of the Second Amendment and the incorporation question.⁹ If the Supreme Court decides to incorporate the Second Amendment, it could hasten *Heller*'s transformation. Such a transformation from *Griswold* into *Roe* could undermine the ideals of federalism, have a chilling effect on efforts to stem gun violence, and heat up the gun debate at a time when American politics can ill afford another divisive culture war.¹⁰

Although there are an impressive array of scholars from across the political spectrum who have criticized the reasoning employed in *Heller*, praise for the decision has come largely from gun rights advocates and supporters of the so-called "new originalism."¹¹ Indeed, Randy Barnett has confidently proclaimed that the *Heller* opinion is one of the "finest example[s] of what is now called 'original public meaning' jurisprudence ever adopted by the Supreme Court."¹² Barnett goes even further, asserting that:

This approach stands in sharp contrast to Justice John Paul Stevens's dissenting opinion that largely focused on "original intent"—the method that many historians employ to explain away the text of the Second Amendment by placing its words in what they call a "larger context." Although original-intent jurisprudence was discredited years ago among constitutional law professors, that has not stopped nonoriginalists from using "original intent"—or the original principles "underlying" the text—to negate its original public meaning.¹³

8. See Wilkinson, *supra* note 4, at 266.

9. For an argument against incorporation, see Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1 (2009). For an argument for incorporation, see Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 SYRACUSE L. REV. 185 (2008).

10. See generally MARK V. TUSHNET, *OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS* (2007).

11. For criticism of the case, see *supra* notes 2–6.

12. Randy Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13.

13. *Id.*

Barnett is undoubtedly correct that *Heller* will be closely studied in the years to come. Several law review symposia on *Heller* are already in print,¹⁴ and more are likely.¹⁵ When the dust settles, *Heller's* new originalism is not likely to fare very well. Indeed, if one looks closely at *Heller*, particularly at Scalia's methodology, it seems clear that the case is not the triumph of a new methodology, but really just the latest incarnation of the old law office history¹⁶—a results oriented methodology in which evidence is selectively gathered and interpreted to produce a preordained conclusion. Rather than showcase an important new constitutional theory, *Heller* turns out to be just another example of activist judges manipulating the past to further their own ideological agenda.

I. THE NEW ORIGINALISM: CONCEPTUAL BREAKTHROUGH OR THE TRIUMPH OF LAW OFFICE PHILOSOPHY?

The new originalism has variously been described as plain-meaning originalism, public meaning originalism, and semantic originalism. The most sophisticated theoretical justification for the new originalism and its emphasis on public meaning has been elaborated by legal scholar Lawrence Solum, who grounds this new theory in the work of philosopher Paul Grice.¹⁷ Solum prefers to call his version of this theory “semantic originalism.” Solum's reliance on Grice is intended to deal with one of the major criticisms of originalism:

14. See, e.g., Siegel, *supra* note 6; Sunstein, *supra* note 6; Symposium, 69 OHIO ST. L.J. 603 (2008); Symposium: District of Columbia v. *Heller*, 59 SYRACUSE L. REV. 165–308 (2008).

15. Symposia on the case are forthcoming in the Lewis and Clark Law Review, Upcoming Issue, <http://www.lclark.edu/org/lclr/upcoming.html> (last visited Apr. 15, 2009), and the Hastings Law Journal, The Second Amendment After *Heller*, <http://www.uchastings.edu/hlj/symposium/heller.html> (last visited Apr. 15, 2009).

16. There is a large amount of scholarly literature on originalism. See generally, JACK N. RAKOVE, INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (1990); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988). For an excellent pro-originalist overview of these debates, see KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999). For recent endorsements of this methodology, see Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105–08 (2001), and John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 391–96 (2003). On the notion of standards for originalists, see H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987). For incisive critiques of this method and its lack of historical sophistication, see Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 523–29 (1995) and Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 405–07 (2003).

17. See PAUL GRICE, STUDIES IN THE WAY OF WORDS (1989). For a critique of Grice, see WAYNE A. DAVIS, IMPLICATURE: INTENTION, CONVENTION, AND PRINCIPLE IN THE FAILURE OF GRICEAN THEORY (1998).

the problem of multiple subjective intents.¹⁸ Solum believes that Grice's philosophy of language provides a means for salvaging the idea of originalism from this criticism.¹⁹

Solum's theory employs a highly technical vocabulary drawn from modern language philosophy. In this sense, Solum's theory is an excellent illustration of the challenges posed by contemporary interdisciplinary legal scholarship. Most law professors receive rigorous training in doctrinal analysis and similar legal methodologies, but relatively few are equipped to evaluate cutting-edge scholarship in philosophy, economics, history, or any other highly specialized field of inquiry. Compounding this problem is the lack of peer reviewed legal scholarship, which is the norm in philosophy publications. Solum is to be commended for raising the philosophical bar in originalist theory, but unless he is prepared to publish a version of his theory in a peer-reviewed philosophy journal in which philosophers of language provide a critical evaluation of the philosophical foundations of his theory, it will be difficult to determine if his theory is a major paradigm shift or simply a new breed of law office philosophy that suffers from the same sorts of intellectual problems as the old law office history. Debates in the blogosphere, postings to SSRN, and even law review publications are no substitute for the traditional methods of scholarly review that philosophers, economists, and historians have employed for generations. While peer review is imperfect, it is nonetheless an indispensable process of critically evaluating new theories.²⁰

Although the jury is still out on the philosophical underpinnings of Solum's version of plain-meaning originalism, legal scholars have good reason to be skeptical about any theory of originalism derived from Grice's work on language and meaning. Indeed, I suspect many philosophers would find the originalist turn to Grice puzzling. There is no doubt that Grice's work has

18. See Lawrence B. Solum, *District of Columbia v. Heller and Originalism* (Nov. 11, 2008) (unpublished research paper, Illinois Public Law and Legal Theory Research Paper Series No. 08-14, Univ. Ill. College of Law), available at <http://papers.ssrn.com/sol3/papers.cfm?abstractid=1241655>; Lawrence B. Solum, *Semantic Originalism* (Nov. 22, 2008) (unpublished research paper, Illinois Public Law and Legal Theory Research Paper Series No. 7-24, Univ. Ill. College of Law), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

19. One of the most serious problems with Solum's Gricean version of originalism is that it turns Founding-era interpretive practice on its head. Most interpretive theories in the Founding era did not use "semantic meaning" as the primary means of establishing meaning, but used it as one of several strategies designed to illuminate the intent of the legislator. On Founding-era interpretive practice, see *infra* note 25. For two other thoughtful critiques of Solum's variant of originalism, see Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185 and Larry Kramer, *Two (More) Problems With Originalism*, 31 HARV. J.L. & PUB. POL'Y 907 (2008).

20. See ROBERT J. SPITZER, *SAVING THE CONSTITUTION FROM LAWYERS: HOW LEGAL TRAINING AND LAW REVIEWS DISTORT CONSTITUTIONAL MEANING* 49-53 (2008).

been influential among philosophers of language, linguists, and to a lesser extent literary theorists. However, the relevance of Grice's theory to historical inquiry is less clear. It is easy to see why most historians would not find Grice's concept of semantic meaning particularly useful for the kinds of questions that most contemporary historians find interesting since these questions typically focus on issues of authorial intent or reader response. In both of these inquiries semantic meaning is less important than empirical evidence about how actual authors and readers understand particular texts.²¹

Setting aside the question about which notion of meaning is more pertinent to originalism, another clear problem emerges. Grice was part of a tradition of ordinary language philosophy and his theories are best suited to ordinary speech situations. To apply Grice in a rigorous historical fashion would mean tackling a range of empirical questions about gathering and evaluating evidence. These are simply not questions answered by Gricean theory. There is a great danger that by invoking Grice in the originalism debate, legal scholars will simply read Solum's gloss on Grice, proclaim themselves neo-Gricean originalists, and continue to churn out law office history characterized by the same evidentiary problems and interpretive errors that plagued earlier originalist scholarship.²²

21. As a general rule, most historians are more interested in questions about authorial intent and hence would likely find Grice's notion of speaker meaning more valuable than his concept of semantic meaning. See, e.g., *MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS* (James Tully ed., 1988). On the relevance of reader response theory as a mode for the history of political thought, see J.G.A. POCOCK, *VIRTUE, COMMERCE, AND HISTORY: ESSAYS ON POLITICAL THOUGHT AND HISTORY, CHIEFLY IN THE EIGHTEENTH CENTURY* (1985) and Martyn P. Thompson, *Reception Theory and the Interpretation of Historical Meaning*, 32 *HIST. & THEORY* 248 (1993). Grice's theory provides no concrete guidance about the difficult empirical questions related to establishing semantic meaning in a historical context.

22. Indeed, in several informal chats with philosophers about the application of Grice to constitutional originalism, there was general bewilderment as to why anyone would think that Grice could help solve the fundamental problems faced by originalism, which are matters of historical evidence and interpretation, not issues about the philosophy of language. On the problems with law office history, see Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 *SETON HALL L. REV.* 479 (2008); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 *SUP. CT. REV.* 119 (1965); Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 *CHI.-KENT L. REV.* 909, 917–25 (1996). Indeed, originalist Richard Kay makes a strong case that the new originalism is much more prone to manipulation than the old originalism, see Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 *NW. U. L. REV.* (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1259867.

II. SEMANTIC MEANING AND FOUNDING-ERA INTERPRETIVE PRACTICE

Leaving aside the larger philosophical questions about how one might apply Gricean theory to historical inquiry, there is another basic problem with Solum's effort to use the notion of semantic meaning to buttress new originalism.²³ In a thoughtful critique of Solum's variant of new originalism, legal scholar Stephen Griffin suggested that plain-meaning originalism fails to grapple with the interpretive pluralism embraced by the Founding era.²⁴ As Caleb Nelson and others have argued, the Founders were divided over the most basic question of constitutional interpretation.²⁵ Thus, the Founders disagreed over the proper methodology for reading constitutional texts: Was the Constitution more like a contract or a statute? One can take Nelson's observation and Griffin's argument a step further. New originalism is actually incompatible with many Founding-era practices. Thus, supporters of the new originalism are oddly advocating that we adopt a theory grounded in the authority of the Founding moment, but one that would have been rejected by many members of the Founding generation.²⁶

A brief overview of some of the more important Founding-era interpretive practices underscores the problems with new originalism. Three of the most important interpretive theories from the Founding era were popular constitutionalism, Madisonian theory, and Blackstonian theory. Rather than adopt a public meaning approach, each of these modalities of

23. For a critique of Solum's views of sentence meaning, see Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109, 1124 n.60, 1127 n.64 (2008). For a summary of the philosophical and linguistic critiques of Grice's work, see SIOBHAN CHAPMAN, PAUL GRICE, PHILOSOPHER AND LINGUIST 190–216 (2005). See also, Wayne Davis, *Implicature*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2008 ed.), <http://plato.stanford.edu/entries/implicature/#3>.

24. Griffin, *supra* note 19. This point has recently been underscored by Larry Kramer. See Kramer, *supra* note 19.

25. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 521 (2003). On the debate over the Founders' views of the matter, see Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77 (1988); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); and, most authoritatively, Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENT. 159 (1996).

26. See discussion, *supra* note 23. On Blackstone's incompatibility with plain-meaning originalism, see Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150 (2007).

constitutional interpretation is antithetical to the way new originalism approaches the problem of constitutional meaning.²⁷

Perhaps the most fundamental division during the Founding era was between those who believed that constitutional texts ought to be interpreted according to the rules of ordinary discourse and those who believed they should be interpreted according to well-established legal principles. As Larry Kramer correctly notes, choosing among different Founding-era practices is a political choice. Any approach to constitutional interpretation, including new originalism, requires that we take sides in the Founding-era's debates.²⁸

Although Justice Scalia's opinion in *Heller* is under-theorized, he clearly gestures toward new originalism in his analysis. Early in the opinion, Scalia makes this clear:

In interpreting this text, 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.”²⁹

At first glance, Scalia's approach seems perfectly consistent with mainstream Founding-era practices.³⁰ Scalia and new originalists would doubtless heartily endorse the proposition that “the courts are to give such meaning to the constitution as comports best with the common, and generally received acceptation of the words in which it is expressed, regarding their ordinary and popular use, rather than their grammatical propriety.” This rule was articulated by the Anti-Federalist author Brutus as part of his critique of Federalist theories of construction. Brutus recognized that Federalists rejected this approach in favor of orthodox Blackstonian modes of

27. See discussion *infra* pp. 1100–04. New originalism's emphasis on plain meaning is much closer in spirit to Anti-Federalist theories of constitutional interpretation than to Federalist notions, which is hardly surprising given the neo-Anti-Federalist leanings of the modern American Right. See Saul A. Cornell, *The Changing Historical Fortunes of the Anti-Federalists*, 84 NW. U. L. REV. 39, 59–60 (1990); Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 223 (2004).

28. Kramer, *supra* note 19, at 911.

29. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931) and citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824)).

30. See, e.g., Brutus, *Essays of Brutus XI*, in *THE COMPLETE ANTI-FEDERALIST* 358, 417–22 (Herbert J. Storing ed., 1981). Although there is a superficial resemblance to some Anti-Federalist ideas, Scalia's approach to preambles draws on the notions of nineteenth-century Federalists, such as James Kent. In this sense, Scalia's jurisprudence is a bit like one of the magical creatures from the world of Harry Potter, a sort of constitutional Hippogriff, an imaginary creature part eagle and part horse, or in Scalia's case, an eighteenth century Anti-Federalist head and nineteenth-century Federalist body. For the most recent literary use of the image of the Hippogriff, see J. K. ROWLING, *HARRY POTTER AND THE PRISONER OF AZKABAN* 114–17 (Scholastic Inc. 2001).

construction.³¹ Indeed, while new originalism may be consistent with this particular strain of Anti-Federalist constitutionalism, it is not compatible with the three modalities noted above, which were among the most important Founding-era approaches to constitutional interpretation.

Consider the case of popular constitutionalism. The essence of popular constitutionalism was the belief that one did not need any knowledge of the law to understand the meaning of constitutional texts. While this might sound like a ringing endorsement of Scalia's point of view, this is not what proponents of popular constitutionalism had in mind. Implicit in Scalia's method is the notion that meaning was fixed at the Founding moment. While popular constitutionalism endorsed the notion of interpreting the language of the Constitution in terms of ordinary meaning, it did not accept what Solum describes as the "fixation thesis."³² Popular constitutionalism gave no special status to the plain meaning of the text at the Founding moment. Popular constitutionalism was, and remains, closer in spirit to modern ideas of a living constitution, and is therefore ultimately incompatible with all forms of originalism. The people themselves were, and would continue to be, the arbiters of constitutional meaning.³³

One of the clearest expressions of the ideal of popular constitutionalism occurred in the 1788 libel case of *Respublica v. Oswald*.³⁴ Oswald, a leading Anti-Federalist printer, faced a politically motivated libel charge, but rather than look to judicial power to enforce his rights, he plead to the legislature and the jury, two agents of popular constitutionalism. Oswald rejected the notion that the judiciary was the ultimate interpreter of the law. In the course of his trial, he tried to use the press, the jury, and the legislature to assert his own popular constitutional vision of the law. Ultimately, Oswald failed to assert this power, and he ran directly into the judicial authority of Pennsylvania's courts.³⁵

The case was so controversial that the legal reporter included long extracts from the legislative debate on the Oswald affair. One of the most eloquent champions of popular constitutionalism during these debates was

31. Brutus, *supra* note 30, at 401.

32. See Solum, *supra* note 18, at 19.

33. For a general discussion of the idea of popular constitutionalism, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); SAUL CORNELL, *THE OTHER FOUNDERS ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828*, at 81–134 (1999).

34. 1 U.S. (1 Dall.) 319 (Pa. 1788).

35. The judge in the case used a charge of constructive contempt to imprison Oswald and effectively bypass the press, the jury, and the legislature. For further discussion of the *Oswald* libel case, see CORNELL, *supra* note 33, at 130–33.

Anti-Federalist William Findley. Echoing the populist sentiments that defined so much opposition to the Constitution, Findley declared that “every man . . . who possessed a competent share of common sense, and understood the rules of grammar,” was able to determine on a bare perusal of the Bill of Rights and Constitution what that document meant. While this claim appears to superficially resemble new originalist claims, Findley went on to note that “the law of the land was not, in fact, contra-distinguished from the judgment of his peers, but merely a diversity in the mode of expressing the same thing.” Findley was defending an expansive role for the jury, namely to decide both the facts of the case and the law. In essence, Findley was arguing that the meaning of the Constitution and the law was what the jury decided using common sense.³⁶ This vision of law did not accept the originalist premise that the meaning of the constitutional text was fixed at the time it was enacted. Rather, popular constitutionalism held that the plain meaning of the text was something that the people themselves, acting through popular bodies such as a jury, would decide.

Even among those Founding-era theories that looked to established legal rules of construction as the proper starting point for constitutional interpretation, there was considerable disagreement about how to interpret texts. Was the new Constitution more akin to a statute or to a contract? While a search for something akin to semantic meaning was relevant to all of these modalities of interpretation, in the case of the statutory model and of the contractual model, it was intent, not semantic meaning, that was the ultimate determinant.³⁷

One of the most important Founding-era theories of constitutional interpretation was the one developed by James Madison in the 1790s. Madison was one of the most innovative and complex constitutional thinkers in the Founding generation, and his ideas evolved in response to the changing circumstances of his day. Madisonian theory slowly coalesced around the notion that the Constitution was a compact among the states and the meaning of the document ought to be construed according to the intent of the ratifiers.³⁸ Thus, Madison framed the problem of constitutional interpretation in the following terms: “In controverted cases, the meaning of the parties to the instrument, if to be collected by reasonable evidence,

36. *Id.* at 133–34 (quoting NORMAN L. ROSENBERG, *PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL* 62–65 (1986)).

37. Powell, *supra* note 16, at 667–68; Nelson, *supra* note 25.

38. On Madison’s effort to work out a theory of originalism in the 1790s, see Rakove, *supra* note 25. On the scholarly debates over Madison shifting views, see Gordon S. Wood, *Is There a James Madison Problem?*, in *LIBERTY AND AMERICAN EXPERIENCE IN THE EIGHTEENTH CENTURY* 425 (David Womersley ed., 2006).

is a proper guide. Contemporary and concurrent expositions are a reasonable evidence of the meaning of the parties.”³⁹

Rather than focus on semantic content, Madison clearly believed that judges ought to interpret the Constitution according to the intent of the state ratification conventions. Madison’s theory was a new development in American constitutional thought. The notion of consulting ratifier intent made sense given Madison’s emphasis on popular sovereignty and the larger political context of the 1790s in which issues of federalism and states’ rights were of paramount importance.⁴⁰

During the same Congressional debate in which Madison articulated his approach to constitutional interpretation, Elbridge Gerry defended the traditional Blackstonian method as the appropriate technique for establishing the meaning of the Constitution. In his defense of semantic originalism, Solum invokes Blackstone’s rule, stating, “Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use.”⁴¹ A careful reading of all of Blackstone’s rules, however, reveals that the Blackstonian method is not compatible with new originalism. In fact, new originalism actually turns the great English jurist’s method on its head. Semantic meaning was not the ultimate source of meaning in Blackstonian theory, but rather the starting point. In addition to semantic meaning, there were several other principles necessary to establish the meaning of a statute. The ultimate goal was to discern “the will of the law maker.” In the passage preceding the one quoted by Solum, Blackstone says the following:

The fairest and most rational method to interpret the will of the legislator, is by exploring *his intentions at the time when the law was made*, by signs the most natural and probable. And these signs are *either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law.*⁴²

In addition to the plain meaning of the words, one had to consult the immediate context in which those words were used, including those in the preamble. Most importantly, one had to discern the “spirit and reason of the law.”⁴³

One of the clearest examples of how the Founders understood the application of Blackstonian rules may be found in Gerry’s important speech

39. Rakove, *supra* note 25, at 172–73.

40. STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* (1993); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801* (1997).

41. WILLIAM BLACKSTONE, 1 *COMMENTARIES* *59.

42. *Id.* at *51 (emphasis added).

43. *Id.*; for more on Blackstone’s method, see Cornell, *supra* note 26.

in Congress about the Bank of the United States. Gerry did not limit his inquiry to the semantic meaning of the words, but applied Blackstone's rules of construction to determine the meaning of the word "necessary." Gerry did not accept Madison's view that the state convention debates were a good guide, particularly given that they provided an imperfect transcription of what was actually said in those meetings.⁴⁴ Gerry did not focus on the subjective intent of the Framers; he was not interested in probing the memory of the members of the Constitutional Convention. The notion of intent that Gerry believed was legally binding was a complex legal construct that was determined by applying the Blackstonian method in a rigorous fashion. Although semantic meaning played a role in this inquiry, it was not the ultimate arbiter of constitutional understanding.⁴⁵

New originalism's focus on semantic meaning or original public meaning is inconsistent with the three most important models of constitutional interpretation from the Founding era. In contrast to popular constitutionalism, new originalism holds that meaning was fixed at the Founding. Nor is new originalism's focus on public meaning compatible with Madisonian constitutionalism's emphasis on the intent of the ratifiers. Finally, new originalism is similarly incompatible with Blackstonian theory, which uses a series of explicit rules of legal construction to discern the "will of the legislator."⁴⁶

III. CONSTITUTIONAL THEORY THROUGH THE LOOKING GLASS? PLAIN-MEANING ORIGINALISM AND THE CHESHIRE CAT RULE

It is not only that the theoretical foundation of new originalism is questionable in itself, but also that its practice in *Heller* is deeply problematic. Indeed, *Heller* clearly demonstrates that this method rests on a perverse reading of history that is totally inconsistent with Founding-era practice. In essence, Scalia's new originalism interprets the meaning of the Second Amendment from a post-Founding-era perspective and substitutes that later interpretation for the Amendment's original meaning.⁴⁷ While interpreting the meaning of the right to bear arms in light of an evolving

44. 2 ANNALS OF CONG., 1946–54 (1834) (statement of Rep. Elbridge Gerry).

45. *Id.* This was how Justice Stevens read the Second Amendment in his dissent. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2822 (2008) (Stevens, J., dissenting).

46. BLACKSTONE, *supra* note 41, at *54.

47. See Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 639 (2008).

tradition is defensible, it is not an approach consistent with any intellectually credible theory of originalism.⁴⁸

Scalia's approach to the Second Amendment's preamble illustrates the intellectually dubious methods of new originalism. Scalia argues that preambles may only be used to resolve ambiguities, and given this fact he ignores the preamble until the meaning of the operative clause is established.⁴⁹ This novel approach to constitutional interpretation—reading a text backwards—prompted Justice Stevens to remark:

The Court today tries to denigrate the importance of this clause of the Amendment by beginning its analysis with the Amendment's operative provision and returning to the preamble merely "to ensure that our reading of the operative clause is consistent with the announced purpose." That is not how this Court ordinarily reads such texts, and it is not how the preamble would have been viewed at the time the Amendment was adopted.⁵⁰

Scalia dismisses such concerns, believing that reading the Amendment backwards is consistent with Founding-era rules of construction. "Therefore, while we will begin our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose."⁵¹ In the accompanying note to this discussion, Scalia states his rule about preambles concisely: "[A] prologue can be used only to clarify an ambiguous operative provision."⁵² Scalia's interpretive principle might best be described as the Cheshire Cat Rule of Construction—now you see the preamble, now you don't. According to this approach, the preamble disappears during interpretation and only reappears if there is an ambiguity that needs to be resolved. While such a rule would be plausible if the Constitution had been written by Lewis Carroll, it seems hard to imagine the Founders embracing an *Alice in Wonderland*

48. Jack Balkin has attempted to reconcile originalism and the living constitution, but his effort to square the circle has not drawn much support. See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007). For a critique of this effort, see Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383 (2007). Moreover, it is odd to think that one would interpret Founding language from a particular moment in the nineteenth century. For a thoughtful exploration of how *Heller* might have been justified by an analysis of an evolving tradition, see William Eskridge, Jr., *Tradition and the People's Constitution: Sodomy and Guns: Tradition as Democratic Deliberation and Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL'Y 193, 203 (2009).

49. *Heller*, 128 S. Ct. at 2790 n.4.

50. *Id.* at 2826 (Stevens, J., dissenting) (citations omitted).

51. *Id.* at 2789–90 (majority opinion).

52. *Id.* at 2790 n.4.

approach to constitutional interpretation.⁵³ The fact is that the Cheshire Cat theory is inconsistent with Blackstone's primary injunction that one must consult the words, context, subject matter, effects, or spirit and reason of the law when seeking to discover the intent of the legislator. Blackstone's rule about preambles states:

If words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the fame legislator, that have some affinity with the subject, or that expressly relate to the same point.⁵⁴

Scalia's Cheshire Cat Rule distorts this rule. Note that Blackstone discusses the use of the preamble, or proeme, within his general discussion of the role of the immediate context in which a word or phrase appears in a legal text. If Scalia were correct, then it is not only the preamble that must be set aside, but also the immediate context. This would make Blackstone's rule nonsensical. Blackstone did not intend for judges to ignore the context, which he believed included the proeme. Scalia effectively rewrites Blackstone's rule so that it reads, "One may consult the context, including the preamble, if and only if there is an ambiguity to be resolved." If this were the case, then it would not simply be the preamble that disappeared, but every other part of the surrounding context would also vanish; there would be nothing left from the Second Amendment apart from the phrase "bear arms."

Scalia does not provide any evidence that anyone in the Founding era actually applied Blackstone's method according to the Cheshire Cat Rule of Construction. Indeed, if one looks at actual practices from the Founding era, it is clear that this was not how Blackstone was applied in the eighteenth century. The best example of this is Gerry's discussion of the meaning of the word "necessary" in Congressional debates over the Bank. Gerry noted that the popular understanding of the word "necessary," one of the central issues in the Bank debate, varied according to the context of its usage. He pointed out examples of these different uses and then reminded Congress that Blackstone's method provided a clear means of deciding how to determine which of these meanings was correct. Thus, Gerry did not treat preambles in

53. LEWIS CARROLL, *THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS* 87-91 (1960).

54. BLACKSTONE, *supra* note 41, at *60.

the way that plain-meaning originalism's Cheshire Cat Rule would require, but he followed Blackstone's injunction to treat the preamble as the guide to the legislator's intent.⁵⁵

Scalia sets aside any consideration of the preamble until he arrives at his own definition of the phrase "bear arms."⁵⁶ It is worth looking closely at the evidence Scalia uses for this decision. To support his claim that the phrase "bear arms" was commonly used to describe the use of arms outside of the context of the militia or public defense, Scalia cites a single English source from 1780.⁵⁷ To further buttress this odd choice of non-American sources, Scalia relies on a law review article written by two gun-rights advocates that was posted to SSRN and was soon to be published in one of the many new ideologically driven conservative "public policy journals" that have sprung up at many law schools.⁵⁸ It is hard to think of any comparable example of a major constitutional question being decided on such tenuous historical evidence. The vast majority of the sources cited in that article, which was specifically concocted for *Heller*, are either English sources or come from the

55. See 2 ANNALS OF CONG. *supra* note 45, at 1946–54. This was how Justice Stevens read the Second Amendment in his dissent. See *Heller*, 128 S. Ct. at 2822 (Stevens, J., dissenting).

56. To support this conclusion, Scalia cites Clayton E. Cramer & Joseph Edward Olson, *What Did "Bear Arms" Mean in the Second Amendment?*, 6 GEO. J.L. & PUB. POL'Y 511 (2008). If one tallies the sources cited in this article, the results are rather shocking. The first twenty-eight citations deal primarily with English sources. A reference to the most important digital collection of early printed sources understates the usages of bear arms within a military context, missing almost ninety-five such uses. For a useful corrective, one that was available to Scalia and to other members of the Court in *Heller*, see Nathan Kozuskanich, *Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?*, 10 U. PA. J. CONST. L. 413 (2008). The vast majority of the sources in Cramer and Olson's essay are from the nineteenth century. If one looks at the actual sources from the Founding era, they turn out to number less than a handful, including one that talks about bearing a gun, not bearing arms.

57. *Heller*, 128 S. Ct. at 2797 (citing 49 LONDON MAG. OR GENTLEMAN'S MONTHLY INTELLIGENCER 467 (1780)). It is ironic that Scalia, who generally frowns upon citation of foreign legal traditions, would use a non-American source as a cornerstone for his argument in *Heller*. For Scalia's tirade against foreign law, see Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 130–32 (2005). The case most closely associated with this tirade is *Roper v. Simmons*, 543 U.S. 551 (2005).

58. The mission statement of the *Georgetown Journal of Law and Public Policy* makes its ideological bias clear:

The Georgetown Journal of Law & Public Policy (GJLPP) is published twice annually by students of the Georgetown University Law Center. GJLPP is a scholarly legal journal with a focus on conservative, libertarian, and natural law thought. Though the bulk of our content will either advocate or critique conservative, libertarian, or natural law positions, our Washington location allows us to stay abreast of all areas of law and public policy. We hope that practitioners, professors, judges, and students of all stripes will enjoy reading and submitting to GJLPP.

See Georgetown Law: About GJLPP, http://www.law.georgetown.edu/journals/gjlp/About_Description.html (last visited May 22, 2008).

nineteenth century.⁵⁹ Yet, even if one accepts the truth of this erroneous claim, it only serves to underscore a point Scalia readily conceded: “Of course, as we have said, the fact that the phrase was commonly used in a particular context does not show that it is limited to that context, and, in any event, we have given many sources where the phrase was used in nonmilitary contexts.”⁶⁰

Given this fact, Blackstone’s rule is clear. If there are two plausible meanings, then one must turn to the preamble to decide which meaning of “bear arms” is correct in this particular context. Yet, Scalia did not consult the preamble to resolve this problem. His approach is simply inconsistent with the Blackstonian method. Scalia’s originalist methodology violates one of the most well-established rules of construction from the Founding era. As Gerry’s speech during the debate over the Bank makes clear, preambles were widely understood to be an essential part of the context needed to establish the meaning of a statute or constitutional provision, particularly when words were subject to multiple interpretations.⁶¹

IV. TEMPORAL DISTORTION AND ORIGINALIST THEORY

In his critique of *Heller*, J. Harvie Wilkinson notes the odd use of “post-enactment legislative history” by Justice Scalia.⁶² In particular, Wilkinson believed that such usage was especially fraught with danger because it was so easy for judges to cherry pick evidence, “choosing from a vast array of materials those that appear to support the preferred result.”⁶³ The same charge could be leveled at the Court’s highly selective use of academic scholarship on the Second Amendment. Indeed, Wilkinson and Sunstein each note that the Court simply ignored the large body of scholarship on the Second Amendment critical of the individual rights interpretation.⁶⁴

59. In his blog entry for Oct. 18, 2007, gun rights activist Clayton Cramer had this to say about this material:

Sorry, but I am assisting in preparation of amicus briefs for the D.C. case. I’m weaponizing the research that I did for my last book, *Armed America*. (Yes, just like weaponizing uranium, I’m concentrating it and refining it until you can’t put it too close together.) I’m also doing some original research that is beginning to produce WMDs of Second Amendment legal arguments—stuff that is more devastating than has been used in legal or intellectual warfare before. For obvious reasons, I can’t tell you about it—we need to keep everything holstered and discreet until the last minute.

Clayton Cramer’s Blog, <http://www.claytoncramer.com/weblog> (Oct. 18, 2007, 20:43 EST).

60. *Heller*, 129 S. Ct. at 2795.

61. See 2 ANNALS OF CONG. *supra* note 45, at 1947–49.

62. Wilkinson, *supra* note 4, at 270.

63. *Id.*

64. See *id.* at 271; Sunstein, *supra* note 6, at 255–57.

Sunstein and Posner note the oddity of the Court asserting its own historical judgment against the overwhelming weight of countervailing historical scholarship.⁶⁵ All of these critiques echo the standard charge that the Supreme Court's handling of historical materials is often amateurish and prone to ideological manipulation. Yet, there is a deeper problem with the historical assumptions used by the *Heller* majority. Reva Siegel identifies several bizarre qualities of *Heller* that she dubs "temporal oddities."⁶⁶ These temporal distortions include both anachronisms, such as using modern sources to illuminate eighteenth-century texts, and examples in which time literally appears to run in reverse.⁶⁷

One of the most serious problems with reading history backwards, using nineteenth-century texts as a means of understanding earlier ones, is that this ignores the profound changes that transformed American constitutionalism in the period between the Founding era and the middle of the nineteenth century. Abraham Lincoln and Thomas Jefferson inhabited different worlds, and while Lincoln's reading of the Declaration of Independence merits attention, it is a serious mistake to confuse Lincoln's understanding of that document with the Revolutionary generation's views of it.⁶⁸ Ignoring the profound change that transformed American constitutionalism in the period between the American Revolution and the Civil War is not simply an example of law office history in action; it demonstrates the profoundly anti-historical nature of the new originalism.

Scalia is hardly alone in his backwards approach to history. Second Amendment scholarship has been littered with such confusions.⁶⁹ Consider one of the articles cited by Scalia, Eugene Volokh's *Commonplace Second Amendment*.⁷⁰ In that article, Volokh makes a surprising claim.

My modest discovery is that the Second Amendment is actually not unusual at all: Many contemporaneous state constitutional

65. See Posner, *supra* note 2, at 35; Sunstein, *supra* note 6, at 255.

66. Siegel, *supra* note 6, at 196.

67. *Id.* at 196–97.

68. On the connections between Jefferson and Lincoln, see GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 42–43, 84–87, 103–05 (1993).

69. Indeed, the bizarre nature of Second Amendment scholarship prompted historian Jack Rakove to describe this field as a sort of "Twilight Zone," a reference to the popular science fiction TV show hosted by Rod Serling. Jack N. Rakove, *Confessions of an Ambivalent Originalist*, 78 N.Y.U. L. REV. 1346, 1354–55 (2003).

70. Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998). For a critique of the ahistorical character of Volokh's analysis, see 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, 154 n.96 (2004).

provisions are structured similarly. Rhode Island's 1842 constitution, its first, provides

The liberty of the press being essential to the security of freedom in a state, any person may publish his sentiments on any subject, being responsible for the abuse of that liberty⁷¹

Given that the Second Amendment was written and adopted in the 1790s and the provision Volokh discusses above was adopted in the 1840s, almost fifty years later, it is hard to grasp how one might describe it as a “contemporaneous” provision. The reason Scalia and Volokh can approach texts in such an ahistorical fashion is that each views history in essentially static terms. In his influential article, Volokh compresses the Founding era (1776–1791), the Federalist Era (1791–1800), the Jeffersonian era (1800–1816), the so-called Era of Good Feelings (1816–1824), and the Jacksonian era (1824–1840) into a single period. While historians and political scientists who work on these periods often disagree about how they ought to be divided, there is little disagreement that during this period American society underwent a profound transformation that has had important consequences for legal and constitutional history.⁷² Slowly, and sometimes fitfully, America moved from a culture shaped by civic republican ideas to one in which democratic and individualistic ideas became ascendant.⁷³

Nothing better illustrated this change than transformation in the language of state constitutional arms-bearing provisions. Several Founding-era state constitutions borrowed Pennsylvania's formulation of this right “to bear arms in defense of themselves and the state.” Sometime after the War of 1812 an alternative formulation gained currency: “Every citizen has a right to bear arms, in defence of himself and the State.”⁷⁴ Understanding this history is vital to evaluating *Heller*.⁷⁵

The meaning of Pennsylvania's 1776 Constitution and its formulation of this right has been the subject of some scholarly debate. For originalist

71. Volokh, *supra* note 70, at 794 (quoting R.I. CONST. of 1842 art I, § 20) (quotation marks added).

72. For the most recent effort to chart this transformation, see SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* (2005).

73. For a quick overview of the debate over the transition from republicanism to liberalism, see Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 551 n.23 (1986). For a more recent effort to chart these issues and their relevance to constitutional theory, see Festa, *supra* note 22.

74. Volokh, Reference Materials, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 209 (2006) (quoting several state “right-to-bear-arms provisions”).

75. On this shift, see SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 138–65 (2006).

Randy Barnett, this language is unmistakable evidence of an individual right.⁷⁶ Most early American historians who have worked on the Founding period reject this claim.⁷⁷ The Pennsylvania Constitutionals who drafted this provision were hardly champions of individual rights. Indeed, the same Constitutionals who framed the state constitution's arms-bearing provision also enacted one of the most sweeping disarmament statutes of the Revolutionary era.⁷⁸ Important new work by historian Nathan Kozuskanich, the leading authority on the 1776 Pennsylvania Constitution, clearly demonstrates that this provision emerged from the pre-Revolutionary demands of back-country residents battling against the Quaker pacifists who controlled the state government.⁷⁹ For Pennsylvania's back-country residents, it was vital to gain recognition for a right to bear arms in a state-controlled militia. The reference to a right to bear arms in defense of themselves was a statement in support of a right of community defense, not an effort to constitutionalize the common law right of self defense. As Kozuskanich notes, the common law right of self defense was well established in American law, and nothing in the Revolutionary experience of Pennsylvanians called that into question.⁸⁰ The right that the Pennsylvanians needed to secure regarded common defense, of community and of the state.⁸¹

Even if one casts the controversial example of Pennsylvania's 1776 Constitution aside, the constitutional language used by North Carolina, Massachusetts, and Tennessee all connect arms-bearing with some form of collective defense. During the debates over ratification, there were relatively few examples of the phrase "bear arms" being used outside of a traditional

76. Barnett, *supra* note 16, at 248.

77. See, e.g., Brief for Jack N. Rakove et al. as Amici Curiae Supporting Petitioners at 9–13, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) (hereinafter *Historian's Brief*).

78. Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 *CONST. COMMENT.* 228–30 (1999).

79. See Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 38 *RUTGERS L.J.* 1041, 1045–46 (2007).

80. *Id.* at 1069–70.

81. Supporters of the individual rights view of the 1776 Constitution have been unable to produce any contemporary evidence for their reading. Rather, they have once again read history backwards, using James Wilson's comments on the 1790 Constitution as the basis for reconstructing the meaning of the earlier document. The two provisions were not only drafted by different bodies, but the two provisions are structured differently. The earlier provision links the right to bear arms with the traditional Whig attack on standing armies. The latter provision clearly separates the two. What is less clear is how widely held Wilson's view was at the time. Thus, Albert Gallatin, another member of the convention, did not conceive of the right in the same way as Wilson. Nor do Pennsylvania Courts appear to have seen this provision as having constitutionalized the common law right of self defense. For further discussion and analysis of these sources, see Kozuskanich, *supra* note 79. See also CORNELL, *supra* note 75, at 39–70.

military context. One of those was a hastily drafted essay, *The Dissent of the Pennsylvania Minority*, an odd text whose formulation of this right gained no traction during the debate over the Constitution.⁸² The Anti-Federalist author Brutus, one of the most thoughtful opponents of the Constitution, framed a much more interesting discussion relevant to the central issue in *Heller*: the relationship between the common law right of self defense and the constitutional right to bear arms.⁸³ Brutus asserted that federal authority only extended to “protection and defence of the community against foreign force and invasion” and to the equally important role of suppressing “insurrections among ourselves.”⁸⁴ Demands for protection for the right to bear arms by Anti-Federalists were clearly shaped by this paramount principle. “[I]t ought to be left to the state governments to provide for the protection and defence of the citizen against the hand of private violence, and the wrongs done or attempted by individuals to each other”⁸⁵ It would have been anathema to Anti-Federalists to demand an amendment to protect a private right of self defense since doing so would have meant conceding that the federal government had general police powers. Federalists and Anti-Federalists were generally in agreement that the federal government did not have such a power. Indeed, Federalist Tench Coxe echoed this understanding when he dismissed the arguments of the Anti-Federalist Dissent of the Minority: “The states will regulate and administer the criminal law, *exclusively of Congress*”⁸⁶ On this point, Coxe and Brutus were in complete accord. State authority covered “matters which are *forbidden* from political considerations, though not in themselves immoral; such as unlicensed public houses, nuisances, and many other things of the like nature.”⁸⁷ The state’s police powers would not be diminished by the Constitution.

82. On the use and abuse of the Dissent of the Minority in the debate over the Second Amendment, see Historian’s Brief, *supra* note 77, at 22–24; Cornell, *supra* note 26.

83. Brutus, *Essays of Brutus VII*, in 2 THE COMPLETE ANTI-FEDERALIST 358, 400–05 (Herbert J. Storing ed., 1981).

84. *Id.* at 400–01.

85. *Id.* at 401.

86. See Tench Coxe, “A Freeman,” PA. GAZETTE, Jan. 23, 1788, reprinted in FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS 88, 95 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

87. *Id.* Coxe later wrote about the Second Amendment protecting private arms owned for a public purpose. Tench Coxe, A Pennsylvanian, FED. GAZETTE, June 18, 1789, reprinted in THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS IN COMMENTARIES ON LIBERTY, FREE GOVERNMENT AND AN ARMED POPULACE 1787–1792, at 670, 671 (David E. Young ed., 2d ed. 1995) [hereinafter, A DOCUMENTARY HISTORY]. Coxe was clearly talking about the arms of the soldier, and their use in the militia. In another essay, he wrote that Congress had no power to disarm the militia: “Their swords, and every other terrible implement of

It is unfortunate that there is no evidence from the debates within eighteenth-century state constitutional conventions, including Pennsylvania's 1776 Constitution. Evidence from nineteenth-century state constitutional conventions is much easier to document. Although it would be a mistake to treat these debates as evidence for what earlier constitutions meant, they do provide important insights into what the right to bear arms meant in the early nineteenth century. Given that Scalia claims that there was a broad consensus that ran from the Founding era up until the first two decades of the nineteenth century, this evidence bears directly on *Heller*. Rather than support Scalia's notion of consensus, however, it is clear that the meaning of the right to bear arms was among the most contested notions in antebellum American law.⁸⁸

Michigan's 1835 Constitutional Convention debates are among the best documented from the period and clearly demonstrate that conflict, not consensus, characterized nineteenth-century American thinking about the right to bear arms. One delegate suggested emulating Tennessee's 1796 provision: "That the freemen of this State have a right to keep and to bear arms for their common defence."⁸⁹ This formulation was thought to be too restrictive and caused some apprehension, because "the legislature might forbid a man to keep a musket" in his home for self defense.⁹⁰ If Scalia were correct, then this problem might have been easily solved by simply rewriting the provision to make it resemble Pennsylvania's provision. Yet, the convention did not choose to reformulate the provision in terms of the original Pennsylvania language: "bear arms in defence of themselves and the state." Instead, the convention chose to use the individualistic language of the Mississippi Constitution, "Every person has a right to bear arms for the defense of himself and the state."⁹¹

A similar dynamic emerged more than a decade later in the Texas Convention of 1845.⁹² In 1836, Texas adopted language based on the Mississippi model. A decade later, a new convention considered revising this language.⁹³ One delegate in the convention asserted that "the object of

the soldier, are *the birthright of an American*." Tench Coxe, *A Pennsylvanian III*, PA. GAZETTE, Feb. 20, 1788, reprinted in A DOCUMENTARY HISTORY, *supra*, at 275, 276.

88. See generally CORNELL, *supra* note 75, at 137–65.

89. THE MICHIGAN CONSTITUTIONAL CONVENTIONS OF 1835–36, at 283 (Harold M. Dorr, ed., 1940) (statement of John Biddle).

90. *Id.*

91. MICH. CONST. of 1835, art. I, § 13, reprinted in THE MICHIGAN CONSTITUTIONAL CONVENTIONS OF 1835–36, *supra* note 89, at 599 app.

92. See Saul Cornell, *The Ironic Second Amendment*, 1 ALBANY GOV'T L. REV. 292, 306–07 (2008).

93. See Volokh, *supra* note 74, at 203.

inserting a declaration that the people shall have a right to bear arms” was for a specific purpose, namely “that they may be well armed for the public defence.”⁹⁴ Another delegate opined that it was simply not necessary to provide for a constitutional right of self defense. “It is not a supposition which can arise in a country where the common law prevails, that it is necessary to bear arms for protection against a fellow citizen.”⁹⁵

The wording of the arms-bearing provision also prompted considerable debate at the Texas Convention, which did not evidence the type of hegemonic agreement Scalia imputes to the nineteenth century. One delegate even suggested borrowing the Second Amendment’s formulation of the right to bear arms.⁹⁶ This motion passed, but was later superseded by a subsequent proposal to restore the 1836 language, affirming an individual right to bear arms.⁹⁷ Ultimately, the Convention reaffirmed the Mississippi model: “Every citizen shall have the right to keep and bear arms in the lawful defence of himself and the state.”⁹⁸

The evidence from the debates within antebellum state constitutional conventions directly contradicts Scalia’s assertion that there was a broad individual rights consensus on the meaning of the right to bear arms in the early nineteenth century. It seems clear that Americans in the Jacksonian era clearly recognized at least two competing conceptions of the right to bear arms: a civic republican conception and a more individualistic conception. In essence, Scalia’s decision in *Heller* commits a compound, twofold error: It ignores the clear evidence of tensions within antebellum thought and projects this false consensus back onto the Founding era.⁹⁹ By the 1840s, two different views of the right to bear arms had emerged in American law. This fact was clearly recognized in antebellum case law. Scholars may disagree over how to characterize the pace of change, but the reality of this change is hard to dispute.¹⁰⁰

94. Stephen P. Halbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bill of Rights*, 41 BAYLOR L. REV. 629, 643 (1989) (quoting DEBATES OF THE TEXAS CONVENTION 311 (Houston 1846) (statement of John Hemphill)).

95. DEBATES OF THE TEXAS CONVENTION, *supra* note 94, at 311–12.

96. Cornell, *supra* note 92, at 306; Halbrook, *supra* note 94, at 644 (quoting DEBATES OF THE TEXAS CONVENTION, *supra* note 94, at 312).

97. See Cornell, *supra* note 92, at 306; Halbrook, *supra* note 94, at 644.

98. See Cornell, *supra* note 92, at 306–07; Halbrook, *supra* note 94, at 645 (quoting DEBATES OF THE TEXAS CONVENTION, *supra* note 94, at 312–13).

99. For cases supporting a militia based view, see *State v. Buzzard*, 4 Ark. 18 (1842) and *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840). For cases supporting the individual rights view, see *Nunn v. State*, 1 Ga. 243, 250–51 (1846) and *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822).

100. See Sanford Levinson, *Why the Second Amendment Is Worth Our Continued Attention: An Introduction to the Symposium*, 1 ALBANY GOV’T L. REV. viii, xi, xvi (2008).

If one understands these changes, one can begin to make sense of the comments of Benjamin Oliver, one of the most influential legal writers of the early nineteenth century. In *Heller*, Scalia dismisses Oliver's importance and makes the following erroneous claim: "We have found only one early 19th-century commentator who clearly conditioned the right to keep and bear arms upon service in the militia—and he recognized that the prevailing view was to the contrary."¹⁰¹ Scalia completely misrepresents Oliver's views. Oliver actually said:

The provision of the constitution, declaring the right of the people to keep and bear arms, &c. was probably intended to apply to the right of the people to bear arms for such [militia-related] purposes only, and not to prevent congress or the legislatures of the different states from enacting laws to prevent the citizens from always going armed. A different construction however has been given to it.¹⁰²

Scalia interprets Oliver's last phrase to mean that Oliver recognized that his own views were anomalous. Actually, if one reads the whole text and pays attention to evolving case law on state arms-bearing provisions, particularly as they related to concealed weapons statutes passed in the early decades of the nineteenth century, it is clear that what Oliver is actually saying is that the original militia-based view had recently been challenged by a new, more expansive, and individualistic conception of the right to bear arms. Rather than support Scalia's contention, Oliver very clearly suggests that the meaning of the right to bear arms had changed in the period between the Founding era and the Jacksonian period.

Serious scholars can disagree over the relative influence of these two alternative conceptions of arms-bearing at various points in this historical narrative, but the evidence for disagreement and change over time is indisputable. Adopting Scalia's originalist account would force us to conclude that the right to bear arms remained the only aspect of American life that did not change in this tumultuous period. That conclusion simply strains credulity.

Rather than erase the history that he finds inconvenient and projecting backwards a particular strain of Jacksonian thought, Scalia might have simply acknowledged that thinking about the right to bear arms has gradually developed in a more individualistic direction. Of course, making such a concession would

101. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2807 (2008).

102. BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN* 177 (Boston, Marsh, Capen & Lyon, Philadelphia, P.H. Nicklin & T. Johnson 1832).

have required that Scalia abandon his simplistic vision of originalism and approach the history in a sophisticated and intellectually honest fashion.

V. THE CURIOUS CASE OF ST. GEORGE TUCKER:
ORIGINALISM, CONSTITUTIONAL IRONY, AND THE ENGLISH
RIGHT TO HAVE ARMS

The problems with plain-meaning originalism are also evident in reactions to *Heller*. In his dissent, Justice Stevens discusses St. George Tucker, eighteenth-century America's leading student of Blackstone. Tucker also occupies a special place in modern gun rights theory.¹⁰³ Given Tucker's centrality to modern gun rights ideology, it is easy to see why Justice Stevens' Dissent in *Heller* has provoked anger, outrage, and sharp responses from David Hardy, David Kopel, and Alan Gura. Why would a single source in a lengthy dissent prompt such an intense reaction? Part of the ferocity of this response may be attributed to the fact that the case had a razor thin majority.¹⁰⁴ What did Justice Stevens say that has so outraged gun rights advocates? Stevens reminded the Court that "Tucker suggested that the Amendment should be understood in the context of the compromise over military power represented by the original Constitution and the Second and Tenth Amendments."¹⁰⁵ Gun rights activists insist that Justice Stevens has misread Tucker and that the passage he cites refers to the militia clauses, not the Second Amendment.¹⁰⁶ In their view, Tucker's views about the Second Amendment may be found in another passage from the law lectures

103. David Kopel notes, "St. George Tucker appears regularly in Standard Model articles discussing the Second Amendment. It is perhaps significant that none of the anti-individual writers even admit Tucker's existence, let alone attempt to address the meaning of the most important law book of the Early Republic." David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1378 (footnote omitted) (emphasis omitted); see also Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 246 (2004) (reviewing H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002)) (claiming that an excerpt from Tucker's published work supports an individual-rights interpretation).

104. For an overwrought discussion of the dangers of reversal, see Posting of David Kopel to The Volokh Conspiracy, <http://volokh.com/posts/1229984079.shtml> (Dec 22, 2008, 17:14 EST), and Alan Gura's essay in this Volume, Alan Gura, *Heller and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvie Wilkinson*, 56 UCLA L. REV. 1127 (2009). For a sensible discussion of why judicial restraint is likely to preserve *Heller*, see Sunstein, *supra* note 6. On modern gun rights ideology, see generally JOAN BURBICK, *GUN SHOW NATION: GUN CULTURE AND AMERICAN DEMOCRACY* (2006).

105. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2839 n.32 (2008) (Stevens, J., dissenting).

106. David Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NW. U. L. REV. COLLOQUY 272, 278-79 (2008).

that describe the Second Amendment as the “palladium of liberty.”¹⁰⁷ Unfortunately, this critique of Stevens rests on a misreading of both passages.

Neither Hardy nor Gura, the two most vociferous critics of Stevens, reproduce the full text of the disputed passages in their critiques. This omission ought to raise a red flag for anyone interested in understanding the true historical meaning of these texts. If one looks closely at these sources it is clear that Hardy and Gura have misrepresented their content and misinterpreted their meaning. Here are the two passages from the law lectures that directly reference the Second Amendment:

First Passage (quoted by Justice Stevens in <i>Heller</i> ¹⁰⁸)	Second Passage (quoted by David Hardy ¹⁰⁹)
<p>If a State chooses to incur the expence of putting arms into the Hands of its own Citizens for their defence, it would require no small ingenuity to prove that they have no right to do it, or that it could by any means contravene the Authority of the federal Govt. It may be alleged indeed that this might be done for the purpose of resisting the Laws of the federal Government, or of shaking off the Union: to which the plainest answer seems to be, that whenever the States think proper to adopt either of these measures, they will not be withheld by the fear of infringing any of the powers of the federal Government. But to contend that such a power would be dangerous for the reasons above-mentioned, would be subversive of every principle of Freedom in our Government; of which the first Congress appear to have been sensible by proposing an Amendment to the Constitution, which has since been ratified and has become a part of it, viz. “That a well regulated</p>	<p>The right of the people to keep and bear arms shall not be infringed—this may be considered as the palladium of liberty. The right of self defense is the first law of nature. In most governments it has been the study of rulers to abridge this right with the narrowest limits. Where ever standing armies are kept up & the right of the people to bear arms is by any means or under any colour whatsoever prohibited, liberty, if not already annihilated is in danger of being so.—In England the people have been disarmed under the specious pretext of preserving the game. By the alluring idea, the landed aristocracy have been brought to side with the Court in a measure evidently calculated to check the effect of any ferment which the measures of government may produce in the minds of the people.—The Game laws are a [consolation?] for the government, a rattle for the gentry, and a rack for the nation.</p> <p>[Tucker note: In England the right of the people to bear arms is confined to</p>

107. *Id.* at 278.

108. 128 S. Ct. at 2839 n.32 (Stevens, J., dissenting) (quoting St. George Tucker, Ten Notebooks of William and Mary Law Lectures 126–29 (unpublished Tucker-Coleman Papers, located at the Earl Gregg Swem Library at The College of William and Mary)).

109. Hardy, *supra* note 106, at 278–79.

<p>militia being necessary to the Security of a free State, the right of the people to keep & bear Arms shall not be infringed.” To this we may add that this power of arming the militia, is not one of those prohibited to the States by the Constitution, and, consequently, is reserved to them under the twelfth article of the ratified Aments.</p>	<p>protestants—and by the terms suitable to their condition & degree, the effect of the Declaration is entirely done away. Vi: Stat. 1 W & M 1:2 c. 2.]</p>
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David Hardy and Alan Gura mistakenly assert that the passage quoted by Stevens on the left is about the militia clauses and not the Second Amendment. Given that the passage cited by Stevens expressly discusses the Second Amendment and its relationship to the militia clauses, it is hard to fathom how anyone, including Hardy and Gura, could make such a claim. The passage clearly links the Second Amendment to the militia clauses, which is far different than claiming, as Hardy and Gura each do, that the text is nothing more than a simple gloss on the militia clauses.¹¹⁰ The text of Article I, Section 8 asserts federal power over the militia, including the right to put down insurrections. Nothing in Article I, Section 8 remotely suggests that states retained the right to take up arms against the federal government. Yet, in this passage Tucker expressly states that the intent of the First Congress in framing the Second Amendment was to give the states this awesome power. At a very minimum this passage provides incontrovertible evidence that Tucker believed the adoption of the Second Amendment changed the meaning of Article I, Section 8. If one applies the Blackstonian method that Tucker himself esteemed, Hardy and Gura’s argument about the meaning of this text is even less persuasive. The evil that Congress intended to remedy by adopting the Second Amendment was not a threat to the private right of self defense, but the danger of federal military power. Read in light of the Blackstonian rules of construction, this passage provides powerful evidence that Tucker’s earliest understanding of the Second Amendment supports the argument of Stevens’ dissent. One can however argue over how

110. Gura seems to rely heavily on the work of Hardy, *supra* note 106, and historian Robert Churchill whose insurrectionary view of the Second Amendment has been heavily criticized by other scholars. See David Thomas Konig, *Arms and the Man: What Did the Right to “Keep” Arms Mean in the Early Republic?*, 25 LAW & HIST. REV. 177 (2007); Saul Cornell, *Early American Gun Regulation and the Second Amendment: A Closer Look at the Evidence*, 25 LAW & HIST. REV. 197 (2007). For Churchill’s views of Tucker, see Robert Churchill, *Three Steps Forward, One Step Back*, H-NET REVS., Sept. 2007, <http://h-net.org/reviews/showrev.php?id=13574> (reviewing CORNELL, *supra* note 75).

representative Tucker's views of the Second Amendment were in 1791, as his interpretation represented a distinctively Anti-Federalist view of the Second Amendment, not a Federalist one.

Now consider the other passage that describes the Second Amendment as "the palladium of liberty." Hardy and Gura's reading of this text suffers from similar problems.¹¹¹ The constitutional evil to be remedied by the Second Amendment discussed in this text was the same one described in the other passage: the danger of federal military power. Here is what Tucker said: "Where ever standing armies are kept up & the right of the people to bear arms is by any means or under any colour what-soever prohibited, liberty, if not already annihilated is in danger of being so."¹¹²

What are we to make of Tucker's discussion of "the first law of nature" in this text?¹¹³ This reference is not a description of the meaning of the Second Amendment, but merely the restatement of a truism of eighteenth-century constitutional and political theory: Before entering civil society, every person has an unlimited right of self defense. No serious constitutional thinker in the Founding era believed that one retained this right after entering civil society; entering civil society was premised on the renunciation of this right. In exchange for abandoning the first law of nature, one gained the protections of the rule of law and the more limited conception of self defense that had evolved under the common law.¹¹⁴ Hardy and Gura appear to be unaware of this aspect of Founding era thought and have therefore conflated three very different conceptions of the right to have arms: the natural right of self defense, the common law right of self defense, and the constitutional right to keep and bear arms. Tucker did not share this confusion; he understood that these three rights were distinct. To illustrate this point, one need only look at the situation of slaves in Virginia. Slaves enjoyed an

111. Gura appears to have relied on Churchill's discussion of this passage and does not appear to have examined the evidence himself. Churchill's quotation from the passage, it is worth noting, omits the crucial language about the danger of a standing army and thus leaves the impression that the discussion of the game laws refers to an effort to strike at a private right of self defense. When the passage is read in its entirety, it is clear that the fear of disarmament was focused on public, not private action. Churchill, *supra* note 110.

112. St. George Tucker, *Of the Constitution of the United States*, in 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 300 app. (Lawbook Exch., Ltd. 1996) (1803). For the full text, see discussion, *supra*, at pp. 29–30.

113. For a discussion of this question, see Saul Cornell, *St. George Tucker's Lecture Notes, the Second Amendment, and Originalist Methodology: A Critical Comment*, 103 NW. U. L. REV. COLLOQUY 406 (2009).

114. For a more detailed discussion of natural rights theory and self defense in this context, see *id.* at 413–14.

unlimited right of self defense in the state of nature, but most Virginians, including Tucker, did not believe that slaves enjoyed such a right under Virginia law. The right of self defense for slaves was virtually extinguished by Virginia law, and slaves certainly did not typically bear arms in Virginia.¹¹⁵

Tucker's discussion of the game laws also supports Justice Stevens' interpretation. Tucker does not discuss these laws in the context of a threat to a private right of self defense, as the danger here is also public and political in character, not private and personal. Yet, in contrast to Scalia, Tucker describes the scope of the English right to arms as minimal. "In England the right of the people to bear arms is confined to protestants—and by the terms suitable to their condition & degree, the effect of the Declaration is entirely done away."¹¹⁶ In *Heller*, Justice Scalia claimed that the Second Amendment protected a well established preexisting right that had been enshrined in the English Bill of Rights. Tucker's discussion contradicts one of the central pillars of Scalia's analysis in *Heller*.¹¹⁷ Ironically, the passage from Tucker highlighted by Hardy and Gura may provide the strongest evidence that Scalia seriously misinterpreted the Founding era's own understanding of the scope of the English right to arms. By drawing our attention to these remarkable passages, Gura and Hardy may have unwittingly provided critics of *Heller* with one of their most powerful historical critiques of Scalia's majority opinion!

One final point is worth making about the relationship between Tucker's law lectures and his writings on this subject more than a decade later. David Hardy and historian Robert Churchill have each argued that the two passages about the "palladium of liberty" are nearly identical. In reality there are subtle but important differences in the language of the two texts. Hardy and Churchill's misreading of the text is understandable. I myself only came to fully appreciate the true significance of these textual differences when I reread these passages in the context of the debate occasioned by Hardy's recent article.¹¹⁸ Here are the two discussions of the palladium of liberty:

115. For a discussion of how Tucker's views of the rights of slaves illuminate his views on the right to bear arms, see *id.* at 415.

116. For the full text, see Tucker, *supra* note 108, at 144, *quoted in* Hardy, *supra* note 106, at 278–79.

117. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2783, 2798–99 (2008) (citation omitted).

118. See Hardy, *supra* note 106.

Unpublished Version of the “Palladium of Liberty” Passage ¹¹⁹	Published Version of the “Palladium of Liberty” Passage ¹²⁰
<p>The right of the people to keep and bear arms shall not be infringed—this may be considered as the palladium of liberty. The right of self defense is the first law of nature. In most governments it has been the study of rulers to abridge this right with the narrowest limits. Where ever standing armies are kept up & the right of the people to bear arms is by any means or under any colour whatsoever prohibited, liberty, if not already annihilated is in danger of being so.—In England the people have been disarmed under the specious pretext of preserving the game. <i>By the alluring idea, the landed aristocracy have been brought to side with the Court in a measure evidently calculated to check the effect of any ferment which the measures of government may produce in the minds of the people.</i>—<i>The Game laws are a [consolation?] for the government, a rattle for the gentry, and a rack for the nation.</i></p> <p>[Tucker note: In England the right of the people to bear arms is confined to protestants—and by the terms suitable to their condition & degree, the effect of the Declaration is entirely done away. Vi: Stat. 1 W & M 1:2 c. 2.]</p>	<p>This may be considered as the true palladium of liberty. . . . The right of self defense is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. In England, the people have been disarmed, generally, under the specious pretext of preserving the game: a never failing lure to bring over the landed aristocracy to support any measure, under that mask, though calculated for very different purposes. True it is, their bill of rights seems at first view to counteract this policy: but the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorize the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty.</p>

In the law lectures, Tucker frames his discussion of the English game laws with the following observation: “By the alluring idea, the landed aristocracy have been brought to side with the Court in a measure evidently calculated to check the effect of any ferment which the measures of government may produce in the minds of the people.” This sentence was not included in the later published version and directly links the English game laws with the goal of preventing concerted political action. Thus, the earlier

119. *Id.* (emphasis added).

120. Tucker, *supra* note 112, at 300 app.

text actually makes an even stronger argument that the constitutional evil posed by the game laws was that they robbed the people of their ability to act as a collective check on government tyranny. In America, this public use of arms was embodied in the idea of a well regulated militia. This sentence forges an even stronger link between the “palladium of liberty passage” and the other discussion of the Second Amendment in the law lectures that was quoted by Stevens in *Heller*.¹²¹

Rather than present two distinct visions of the Second Amendment in his law lectures, both of Tucker’s discussions are driven by the same spirit and address the same constitutional evil: the danger of federal military power. Recognizing this fact does not mean that Tucker did not accept a robust common law understanding of the right of self defense. Nor does it call into question that Tucker clearly shared the Founding generation’s belief in the need for an armed citizenry organized as a well regulated militia. Yet Tucker was not an early-American Charlton Heston defending gun rights against modern gun control laws. Tucker was an eighteenth-century Jeffersonian Republican who saw the Second Amendment as a necessary check on federal military power.¹²² There is no small irony that two of the nation’s most ardent gun rights advocates have inadvertently drawn our attention to an aspect of Tucker’s thought that was overlooked by both sides in *Heller*. Tucker’s discussion of the anemic scope of the preexisting English right to have arms may well provide the strongest evidence yet that Justice Scalia’s interpretation of the Founders’ understanding of that right was premised on a profound historical error. If Tucker’s views are as important as Kopel, Hardy, and Gura suggest, it now seems clear that the historical foundations of *Heller* rest on even shakier ground. Apparently those who live by the sword of originalism are bound to perish by it as well. A constitutional irony well worth savoring.

CONCLUSION

Plain-meaning originalism’s debut in *Heller* and recent scholarship has not been auspicious. Although it may be possible to produce decent, historically sophisticated scholarship within an originalist paradigm, that has certainly not happened in recent Second Amendment scholarship, and it certainly did not happen in *Heller* itself. Without a mastery of the elementary techniques of historical research, and without some grounding in the relevant

121. 128 S. Ct. at 2839 n.32 (2008) (Stevens, J., dissenting).

122. Cf. BURBICK, *supra* note 104, at 57–65 (discussing similarities and differences between the modern pro-gun view of the amendment and that of the founding fathers).

historiography of early American history, the new originalism will continue to be little more than a rebranded version of the old law office history.