

HELLER AND THE TRIUMPH OF ORIGINALIST JUDICIAL ENGAGEMENT: A RESPONSE TO JUDGE HARVIE WILKINSON

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Judge J. Harvie Wilkinson criticizes the U.S. Supreme Court’s landmark decision in District of Columbia v. Heller through the lens of post-Roe judicial conservatism, a doctrine that exalts judicial deference to the political branches above the interest in individual liberty. But that vision is incompatible with the sort of judiciary the Framers established, and Wilkinson’s prescription does not lay out neutral guidelines for use of the judicial power. In Heller, the Supreme Court acted exactly according to Constitutional design, enforcing a fundamental right against recalcitrant political forces. Not just conservatives, but all Americans, should rejoice in the decision.

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INTRODUCTION

“Jubilation”¹ at the U.S. Supreme Court’s landmark decision in *District of Columbia v. Heller*² has been tempered by Judge J. Harvie Wilkinson’s reluctance to join the celebration. In a widely circulated *Virginia Law Review* Essay,³ Judge Wilkinson lambastes *Heller* as an example of all that judicial conservatives should find wrong with modern jurisprudence. Wilkinson posits that originalism as practiced by the *Heller* majority is but one tenet of conservative judicial thought, the core others being “textualism, self-restraint, separation of powers and federalism.”⁴ *Heller*, he claims, discarded all but originalism as a guide. Absent the other aforementioned ingredients called for by the conservative judicial recipe, the *Heller* court brewed the ultimate conservative apostasy: an act of “judicial activism” on par with the supposedly execrable *Roe v. Wade*,⁵ an error so grievous as to potentially “detract” from Justice Scalia’s otherwise “powerful legacy.”⁶ Most respectfully, I disagree.

I hope that this Article might convince Judge Wilkinson and others who might share his concerns that the *Heller* party is one at which they would feel very much welcome, and at home, even if they leave the sometimes messy task of “popping the champagne”⁷ to others. For *Heller* is a significant triumph for exactly those principles that judicial conservatives have long espoused.

Indeed, all jurists should adhere to *Heller*’s original public meaning methodology. The approach has intrinsic value, independent of the identity of its celebrants, and there is no reason why originalism must remain a conservative-only jurisprudence. Consider the words once uttered by Walter Dellinger, our esteemed opponent in *Heller*, endorsing the originalist approach that would be practiced by the *Heller* majority:

The text of the Constitution has meaning only if it is the meaning that those supermajorities would have adopted. You cannot take the language and play linguistic games with it. It may be fun for a linguist to make something different out of a phrase in the Constitution. But unless it is the meaning that those who marshaled the support of three-fourths of the states and supermajorities in Congress for adoption, then

1. J. Harvie Wilkinson III, *Of Gums, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009).

2. 128 S. Ct. 2783 (2008).

3. Wilkinson, *supra* note 1.

4. *Id.* at 256.

5. 410 U.S. 113 (1973).

6. Wilkinson, *supra* note 1 at 256.

7. *Id.* at 257.

judges have no warrant imposing it. So I do not understand how there can be any non-originalist constitutionalism that is worthy of the name.⁸

Interpreting the Second Amendment, the *Heller* Court did not fall for fantastical academic constructs, driven by modern ideological dogmas and backed by historical revisionism or selective citation. Rather, the Court affirmed the Second Amendment's original public meaning, as confirmed by its plain text. Having determined the Amendment's meaning, the Court showed the proper level of deference to the D.C. City Council's outright repudiation of the constitutional text: none. This, too, is the Framers' Constitution in action—one from which conservatives have only recently strayed in confusing judicial lawlessness with judicial review.

My qualification to offer this competing view of conservative jurisprudence comes from Judge Wilkinson's opening reference to the "conservative lawyers" who "triumph[ed]" in *Heller*,⁹ a group of which I am probably a member. But I would be the first to disclaim a patent on what qualifies one as a conservative lawyer, and I freely admit that Judge Wilkinson's views of conservatism, to the extent they differ from mine, enjoy meaningful (but far from universal) support on the legal Right.¹⁰ This Article should not be read as seeking a contest as to who is the more correct conservative. I would be happy to cede the title of True Conservatism, and settle for some other label that might better reflect appreciation of the courts' proper role in our constitutional order.¹¹

In Part I, I define judicial conservatism, and examine the difference between political and judicial conservatism. Judge Wilkinson stands unassailable in offering that textualism, originalism, federalism, and respect for the separation of powers are hallmarks of proper constitutional interpretation. But Wilkinson errs in questioning whether *Heller* faithfully adhered to these conservative tenets. More critically, the deference to the political branches hailed by Judge Wilkinson as the central organizing principle of conservative judicial

8. Walter Dellinger, *Panel on Originalism and Unenumerated Constitutional Rights*, in ORIGINALISM: A QUARTER CENTURY OF DEBATE 113, 117 (Steven G. Calabresi ed., 2007).

9. Wilkinson, *supra* note 1, at 254.

10. The views I offer here break no new philosophical ground. Significant scholars and practitioners on the legal Right endorse robust exercise of the judicial power. See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (2004); CLINT BOLICK, DAVID'S HAMMER (2007).

11. Among possible alternatives: "classical conservative," as opposed to the "modern conservative," which is defined by Judge Wilkinson as a reactionary to all things *Roe*, Wilkinson, *supra* note 1, at 264; or even the somewhat pejorative label—"radical libertarian"—employed by my esteemed opponent in *Heller* at oral argument, to my great delight. It should be noted, however, that my libertarianism is hardly radical by modern standards.

thought is just not so. Most importantly, such deference is neither warranted, nor healthy, nor consistent with ancient constitutional wisdom.

As shown in Part II, conservatives have traditionally been willing, if not eager, to employ the judicial power against political actors that stray from their constitutional confines. Part III then observes how modern politicians have lived down to the Framers' worst fears, willfully ignoring and even scorning the notion that they must be bound by any constitutional restraints. The deference proposed by Judge Wilkinson, in practice, amounts to a form of living constitutionalism, with the Constitution evolving to permit whatever politicians presently desire. In exercising their judicial power (regardless of whether it was in pursuit of a substantively correct constitutional interpretation), conservatives have faithfully hewed to the Framers' vision of an active, coequal judiciary jealous of its powers. The judicial deference desired by Judge Wilkinson, whatever its hypothetical merits, is not an innately conservative policy.

In Parts IV through VI, I turn to Judge Wilkinson's more specific criticisms of *Heller*. Of these criticisms, the most astonishing is the claim that *Heller* rejects textualism.¹² Whatever else might be said about the opinion, *Heller* focused intensely on the text and its original public meaning. In focusing on the text, all nine Supreme Court Justices did their job: Constitutional text cannot be ignored on grounds of ambiguity by those tasked with the text's interpretation and application. Textualism does not in and of itself solve all questions, but the notion that the text has a fixed, operative meaning is the defining feature of constitutional government. Judge Wilkinson suggests that, where the text is ambiguous, the courts should defer to the legislature.¹³ Yet claims of ambiguity do not set out a neutral principle for deciding cases, nor is the evasion of constitutional text a value-free judgment. As Wilkinson proposes, ambiguity as an interpretive principle would lead to a form of authoritarianism inconsistent with our constitutional framework.

If, as Wilkinson posits, judicial abstention in supposedly close cases promotes public confidence in the courts, reassuring people that judges do not impose their own policy preferences through their opinions,¹⁴ *Heller* presents a particularly bad opportunity to test the theory, as the decision was

12. *Id.* at 254.

13. *Id.* at 267.

14. *Id.* at 255–57.

wildly popular with the American public.¹⁵ Conversely, affirming the products of a democratic process can be profoundly unpopular and shake public confidence that the courts are committed to preserving individual liberty. Judges should make their decisions without regard to popular opinion, leaving polling to the professionals and letting the proverbial constitutional chips fall where they may.

Judge Wilkinson may be correct that *Heller* will lead the courts to embark upon a long, complex litigation endeavour.¹⁶ But such odysseys are not necessarily bad. They are often, as in the Second Amendment field, commanded by the Constitution, or in any event prompted not by judges and those asserting their rights, but by politicians committed to resisting constitutional limits. In any event, firm judicial engagement of the Constitution can foreclose complex litigation programs by enforcing limits on the government's ability to regulate. A small dose of "activism" can radically shrink the docket.

Finally, in Part VI, I examine Wilkinson's critique of *Heller* as failing to honor federalist principles.¹⁷ His criticism is at best premature, considering that the issue at hand was a limitation upon congressional authority. To the extent Judge Wilkinson believes *Heller* upset the balance of power between the federal and state governments, however, his complaint reflects acquiescence to the dissent's conception of the Second Amendment and not any neutral, generally applicable interpretive principle.

I. HOW ARE CONSERVATIVES CONSERVATIVE?

In order to study whether *Heller* comports with judicial conservatism, it is first necessary to define what judicial conservatism is—and is not. Judge Wilkinson correctly suggests, without explicitly declaring, that labels such as "conservative" and "liberal" are somewhat misleading in the context of judicial review.¹⁸ Yet in doing so, Judge Wilkinson repeats the error. Behold, he argues, *Heller*'s conservative result attained by nonconservative means.¹⁹

The mistake here is the confusion of political and judicial preferences. The past few years have seen the Court's allegedly conservative Justices

15. *Supreme Court Viewed More Favorably Following Gun Ruling*, RASMUSSEN REPORTS, June 29, 2008, http://www.rasmussenreports.com/public_content/politics/mood_of_america/supreme_court_ratings/supreme_court_viewed_more_favorably_following_gun_control_ruling.

16. Wilkinson, *supra* note 1 at 254.

17. *Id.* at 254–55.

18. *Id.* at 254.

19. *Id.*

reach outcomes that until very recently were, or still are, associated with the political left—and the so-called “liberal” justices have mirrored the experience.²⁰ Preference for a strong individual right to arms is more consonant with the political right in the United States today, although this may be more a product of cultural experience than anything else, and many people of the left value the right to arms as they do other rights.²¹ But the Justices in the *Heller* majority are not politicians. To suggest they practiced outcome-determinativism in *Heller* based upon their personal political preferences—“search[ed] for congenial results”²²—gives the Justices too little credit, and overlooks much of the Court’s recent history.

The modern political definitions of “conservative” and “liberal” do not comfortably fit the judges to whom those labels are affixed. In the popular political mindset, conservative judges are law-and-order types who would find little sympathy for those accused of widely condemned criminal conduct, such as carrying a gun to school,²³ rape,²⁴ or drug use.²⁵ Conservative judges would also be more willing to view constitutional guarantees of a criminal defendant’s procedural rights as mere technicalities standing in the way of maintaining social order.²⁶

Liberal judges would oppose all these instincts, displaying heightened concern for an individual facing the awesome prosecutorial powers of the state, no matter the suspected offense. And of course, average Americans might be forgiven for still thinking of liberals as those people who relentlessly champion certain freedoms of speech that conservatives might view

20. On the *Heller* court, the justices popularly considered liberals would be Justices Stevens, Souter, Ginsberg, and Breyer, while their allegedly conservative counterparts are Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Justice Kennedy is widely viewed as a swing vote.

21. In *Heller*, fifty-five Senators and two hundred and fifty House members joined a strong brief supporting the individual rights interpretation of the Second Amendment, including noted non-conservatives Russell Feingold (D-WI) and John Dingell (D-MI). See Brief for Amici Curiae 55 Members of United States Senate, the President of the United States Senate, and 250 Members of United States House of Representatives in Support of Respondent, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

22. *Wilkinson*, *supra* note 1, at 265.

23. *United States v. Lopez*, 514 U.S. 549 (1995) (rejecting the constitutionality of a prosecution for carrying a gun in a school zone; Justice Stevens and liberals dissent).

24. *United States v. Morrison*, 529 U.S. 598 (2000) (rejecting the constitutionality of federal civil liability for sexual misconduct; Justice Souter and liberals dissent).

25. *Gonzales v. Raich*, 545 U.S. 1 (2005) (Justice Stevens and fellow liberals vote to uphold federal criminalization of marijuana usage notwithstanding state-sanctioned medicinal use of the drug, while Justices O’Connor and two conservatives—Rehnquist and Thomas—dissent.).

26. *Giles v. California*, 128 S. Ct. 2678 (2008) (Justice Scalia leads the Court to a broad originalist view of Sixth Amendment Confrontation Clause, while Justice Breyer dissents.).

as subversive.²⁷ The liberals would be troubled by assigning children to public schools on account of race,²⁸ sympathize with chronically ill patients seeking marijuana for palliative care,²⁹ and stand up to large developers who would employ government force to seize homes from politically weak individuals.³⁰

A cursory review of the cases footnoted in the preceding paragraphs would challenge any adherents of the view that conservative and liberal judges are *politically* so. Along the alleged conservative-liberal divide, the Supreme Court has in recent years seen its conservative members limit the government's ability to criminalize conduct, as in *United States v. Lopez*³¹ and *United States v. Morrison*;³² throw their bodies on the gears of new speech-regulating machines, as in *McConnell v. FEC*³³ and *Davis v. FEC*;³⁴ resist racially-motivated school assignments and admissions decisions, as in *Parents Involved in Community Schools v. Seattle School District No. 1*,³⁵ *Grutter v. Bollinger*,³⁶ and *Gratz v. Bollinger*;³⁷ side with Californians wishing to grow and sell marijuana notwithstanding alleged federal law to the contrary, as in *Gonzales v. Raich*;³⁸ and vigorously champion the cause of homeowners whose property rights might be extinguished by powerful corporate interests, as in *Kelo v. City of New London*.³⁹

In all these cases, conservatives showed themselves comfortable with setting aside the political branches' handiwork. And in all these cases, the liberals tended to side with the prosecutors, speech regulators, segregationists at the schoolhouse door, drug warriors, and developers.

27. *Texas v. Johnson*, 491 U.S. 397 (1989) (Justice Scalia joins the majority striking down flag burning ban, while Justice Stevens dissents.); *McConnell v. FEC*, 540 U.S. 93 (2003) (The decision reveals that conservative justices tend to favor First Amendment restrictions on the government's ability to regulate speech.); *Davis v. FEC*, 128 S. Ct. 2759 (2008).

28. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Chief Justice Roberts and the other conservative Justices strike down race-based school assignment; Justice Stevens and the liberal Justices dissent.); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

29. *Raich*, 545 U.S. 1.

30. *Kelo v. City of New London*, 545 U.S. 469 (2005) (Justice Stevens's majority opinion sanctions developers using eminent domain to acquire property from unwilling individual sellers; Justice O'Connor and the conservatives dissent.).

31. 514 U.S. 549 (1995).

32. 529 U.S. 598 (2000).

33. 540 U.S. 93 (2003).

34. 128 S. Ct. 2759 (2008).

35. 127 S. Ct. 2738 (2007).

36. 539 U.S. 306 (2003).

37. 539 U.S. 244 (2003).

38. 545 U.S. 1 (2005).

39. 545 U.S. 469 (2005).

The real ideological divide on today's Supreme Court is not a red-blue political divide. It is instead, as it has long been, between Justices who tend to view the Constitution as retaining its original vitality, and those who see it as a more flexible document. The former look to originalism and there find, with happy (though as yet insufficient) frequency, that the government's powers are limited to begin with, and further constrained by meaningful reservations of individual rights. The latter believe the government generally empowered to achieve whatever social good is expedient, but ought not violate that handful of rights that must be protected in a progressive society, regardless of whether they are spelled out in the constitutional text.

Not surprisingly, the liberals are more open to at least admitting the existence of unenumerated rights, the one area where they ever-so-slightly out-originalize the conservatives who would stumble past the Ninth Amendment.⁴⁰ But liberals are less apt to secure individual rights in cases where such rights, textually enumerated though they may be, conflict with current progressive notions, including the suppression of disfavored campaign speech, racial discrimination for allegedly benevolent ends, central planning of property uses, and yes, gun prohibition.

It is this divide—the commitment to originalism versus the commitment to an evolving living constitution—that tends to separate the Justices, regardless of the political outcome in a given case. Increasingly, the originalist bloc will side with the individual against the state, and the living constitutionalists will side with the state against the individual. It should not surprise us that the originalist bloc would become increasingly skeptical of an ever-expanding government, and grow comfortable invoking judicial power to stem what they see as extraconstitutional and undesirable government conduct, while the living constitutionalists might rediscover second thoughts about judicial review, as empowered courts frustrate these judges' favored regulatory endeavors.

The modern Court's originalist-evolutionist fault lines are starker today than they were during periods of relative ideological orthodoxy among the Justices, but are much less pronounced than those which existed during a time of true constitutional crisis: the Progressive Era. Then, liberals fought mightily to expand governmental authority over economic policy,

40. For one persuasive originalist take on unenumerated rights, a topic well beyond the scope of this paper, see Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006).

pressing for ever-broader interpretations of enumerated powers,⁴¹ while giving narrow, parsimonious views of power-limiting⁴² and rights-securing⁴³ provisions that would interfere with government programs. The conservatives may have had their political differences with President Roosevelt, but their opinions, in majority or dissent, rested on heretofore accepted notions of narrow governmental authority over a population retaining significant economic liberties.⁴⁴

In the Progressive Era, it was the conservatives who felt no compunction about using the judicial power to strike down what they perceived to be unconstitutional laws, notwithstanding the fact that those laws were enacted by overwhelming political majorities under truly desperate economic circumstances. Not for nothing were the New Deal Court's conservative core⁴⁵ derided as "the Four Horsemen of the Apocalypse."⁴⁶ Only direct political pressure in the form of President Roosevelt's threat to pack the Court broke the back of conservative judicial resistance to the New Deal.⁴⁷

One might say many things about the New Deal's enemies on the Supreme Court, but it is impossible to question that these were what passed for conservatives before most of today's conservatives were born. To paraphrase Barbara Mandrell, these Justices were conservative when conservative wasn't cool. Considering that these ancient conservatives, like their ideological heirs today, did not exhibit the sort of deference to the political branches favored by Judge Wilkinson, it warrants inquiring: Just what is the relationship of originalism to deference? Judge Wilkinson posits that deference constrains originalism, though his Essay largely asserts rather than examines this contention. I shall examine, and reach a different conclusion: originalism *precludes* deference.

41. Compare *Wickard v. Filburn*, 317 U.S. 111 (1942) (A unanimous Roosevelt Court adopts broad view of Congressional Commerce power.), with *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (A conservative majority adopts a narrow Commerce Clause reading over "liberal" dissent.).

42. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (The "Four Horsemen" dissent from the Court's holding that states may alter mortgage terms notwithstanding the Contracts Clause.).

43. *W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (The "Four Horsemen" dissent from Court's holding that liberty of contract is subject to deferential rational basis review.); *Nebbia v. New York*, 291 U.S. 502 (1934) (same).

44. CHRISTOPHER TOMLINS, *THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE*, 246–48 (2005).

45. This core was comprised of Justices McReynolds, Sutherland, Van Devanter, and Butler. President Hoover and Franklin Roosevelt's more progressive nominees would eventually prevail in shifting the Court's direction.

46. TOMLINS, *supra* note 44, at 246.

47. See, e.g., Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?* (Sept. 10, 2008) (unpublished manuscript), available at <http://dho.stanford.edu/research/switch.pdf>.

II. JUDICIAL DEFERENCE AND “ACTIVISM” AMONG THE FRAMERS:
ORIGINAL NOTIONS OF POPULAR SOVEREIGNTY
AND THE JUDICIAL POWER

It is utterly predictable that Judge Wilkinson would root his criticism of *Heller* in *Roe v. Wade*,⁴⁸ for Wilkinson’s strain of conservatism is a post-*Roe* phenomenon:

It is no exaggeration to say that *Roe* gave rise to the modern conservative legal movement. The decision came to stand for the worst kind of judicial overreaching; a generation of conservative lawyers came of age in its shadow. Conservatism was all those things that *Roe* was not, the movement’s virtues illuminated by *Roe*’s vices.⁴⁹

Depending on one’s moral views of abortion, the worst or second-worst aspect of that decision ought to be the degree to which it has discom-bobulated the legal Right. *Roe* taught conservatives to inveigh against “judicial activism,” of which that case is the sine qua non. But this term can mean different things to different people, and even with reference to *Roe* it admits of more than one definition.

One take on judicial activism is as the opposite of textualism: judges making up the law, or substituting their own preferences for those commanded by legal texts. On this score, *Roe* is obviously ripe for vigorous debate by judicial conservatives, including those who might favor abortion rights as a political matter. But Wilkinson also appears to employ another, perhaps equally or more common definition of judicial activism: as a synonym for judicial review.⁵⁰ As discussed by Wilkinson, *Roe* was activist not merely because it manufactured a right from whole cloth, but because the Court struck down a legislative enactment. And in this mechanical respect, *Heller* is said to be activist as well.

Judicial activism as judicial encroachment on the legislative power would have been condemned in the Framers’ day much as it is in ours. Oddly, Judge Wilkinson skirts over the fact that if this first activist sin of *Roe*, the recognition of an allegedly nonexistent right, had not been committed, he would have no occasion to further worry about institutional deference. One can vigorously dispute that the courts need show any deference to the political process, yet still reject *Roe* for all the usual substantive reasons. This leads to the problem with the second definition of judicial activism. If by judicial activism

48. 410 U.S. 113 (1973).

49. Wilkinson, *supra* note 1, at 264.

50. *Id.* at 265–67, 289, 293.

we mean a tendency by courts to check political decisions, the Framers would today condemn us not for too much activism, but for too little. The words they left us make it quite plain.

For an Essay extolling principles of judicial conservatism, Judge Wilkinson's all but total ignorance of *The Federalist Papers* is odd. And of his two fleeting references to Publius, only one mentions Hamilton's *Federalist No. 78*, which serves as "an examination of the judiciary department."⁵¹ The oversight is significant, for *Federalist No. 78* refutes the argument that judicial deference would have been endorsed by the Framers. This warrants extensive review.

Federalist No. 78 is often cited for the proposition that the judiciary "will always be the least dangerous to the political rights of the constitution."⁵² The observation is conditional: The judiciary is only harmless "so long as the [it] remains truly distinct from both the legislature and the executive."⁵³ Only in passing did Hamilton observe that the true distinction of the powers requires judges to refrain from acting as legislators. The bulk of *Federalist No. 78* addresses the concern that judges would kowtow to political decisions:

[L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments . . . [F]rom the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches.⁵⁴

Hamilton wished to stiffen the judiciary's spine, emphatically rejecting the notion that the judiciary ought to defer to the legislature in matters of constitutional interpretation:

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, *that this cannot be the natural presumption*, where it is not to be collected from any particular provisions in the constitution It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and *peculiar* province of

51. THE FEDERALIST NO. 78, at 401 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

52. *Id.* at 402.

53. *Id.*

54. *Id.* at 402–03.

the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore *belongs to them* to ascertain its meaning, as well as the meaning of [legislative acts].⁵⁵

Hamilton exhibited flippant disdain for the notion that judges and legislators were on equal footing in interpreting the Constitution, such that judges should respect legislative pronouncements on constitutional matters:

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.⁵⁶

And nowhere did Hamilton disdain judicial deference more than in cases that, like *Heller*, questioned the limits of legislative authority:

The *complete independence* of the courts of justice is peculiarly essential in a limited constitution . . . [that] contains certain specified exceptions to the legislative authority Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.⁵⁷

Madison shared this robust view of the judicial power, describing it for his fellow members of Congress upon introducing the Second Amendment and other provisions of the Bill of Rights:

If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.⁵⁸

Hamilton also made clear that judges must often resist unconstitutional majoritarian desires, no matter how popular. The people could always abolish or amend the Constitution, but this did not mean that courts must yield to popular opinion:

55. *Id.* at 403–04 (emphasis added).

56. *Id.* at 405.

57. *Id.* at 403 (emphasis added).

58. 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1789) (statement of Rep. Madison).

[I]t is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution, where legislative invasions of it had been instigated by the major voice of the community.⁵⁹

Hamilton was familiar with the sort of argument raised by Judge Wilkinson, that judicial review would amount to judicial supremacy. “Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power.”⁶⁰ Hamilton rejected the claim:

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.⁶¹

Judge Wilkinson’s error is thus in locating the expression of popular sovereignty in mere legislative behavior. The Framers viewed the Constitution as the people’s ultimate expression of popular sovereignty. And the Constitution, to have effect, must be interpreted by judges removed from the political process, not legislatures that could not be entrusted to determine the limits of their own powers. “It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents.”⁶²

William Paterson, a critical drafter of the Constitution and member of the first Senate, was appointed by President Washington to the Supreme Court in 1793. Riding circuit in 1795, Paterson eloquently offered the same vision of popular sovereignty:

59. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 51, at 406 (emphasis added).

60. *Id.* at 403.

61. *Id.* at 404.

62. *Id.*

What is a constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature . . . What are legislatures? Creatures of the constitution; they owe their existence to the constitution: they derive their powers from the constitution: It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void. The constitution is the work or will of the people themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature. The constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move.⁶³

Hamilton's solution to the problem of political influence over the judiciary: lifetime appointment during good behavior. "[A]n excellent barrier to the despotism of the prince: in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body."⁶⁴ And indeed, the Constitution not only guarantees judges lifetime appointment, but also further guarantees their salaries.⁶⁵

This vision of popular sovereignty as residing in a constitution, to be enforced by judges against the legislature, comported well with the Framers' disdain for democracy. Edmund Randolph did not exaggerate in summing up the Constitutional Convention's work: "[T]he general object was to provide a cure for the evils under which the United States labored; . . . in tracing these evils to their origin every man had found it in the turbulence and follies of democracy."⁶⁶

Other Framers endorsed the idea that the judicial power included the exclusive power to review and strike down unconstitutional legislation, without affording any particular weight to the contrary desires of the other branches. James Wilson, soon to be an original Supreme Court Justice, declared before his fellow delegates to the Pennsylvania ratifying convention:

63. *Vanhome's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 28 F. Cas. 1012, 1014 (C.C.D. Pa. 1795).

64. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 51, at 402.

65. U.S. CONST. art. III, § 1.

66. Debates of the Federal Convention of 1787, Held at Philadelphia (1787), reprinted in 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 138 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter DEBATES] (statement of Edmund Randolph on May 31, 1787).

If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void; for the power of the Constitution predominates.⁶⁷

At the Connecticut ratifying convention, future Chief Justice Oliver Ellsworth explained:

[I]f the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void.⁶⁸

And long before Framers John Marshall would famously delineate the judicial power in *Marbury v. Madison*,⁶⁹ Justice Paterson would wield the judicial power to strike down legislation, explaining:

[I]f a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that, in such case, it will be the duty of the court to adhere to the constitution, and to declare the act null and void. The constitution is the basis of legislative authority; it lies at the foundation of all law, and is a rule and commission by which both legislators and judges are to proceed. It is an important principle, which, in the discussion of questions of the present kind, ought never to be lost sight of, that the judiciary in this country is not a subordinate, but co-ordinate, branch of the government.⁷⁰

Even the Anti-Federalists understood that the judicial power secured by Article III should be exercised without any deference to the political branches. Patrick Henry expressed skepticism that federal judges would be as independent as those of Virginia courts:

The honorable gentleman did our judiciary honor in saying that they had firmness to counteract the legislature in some cases. Yes, sir, our judges opposed the acts of the legislature. We have this landmark to guide us. *They had fortitude to declare that they were the judiciary, and would oppose unconstitutional acts.* Are you sure that your federal judiciary will act thus? Is that judiciary as well constructed, and as independent

67. The Debates in the Convention of the State of Pennsylvania of the Adoption of the Federal Constitution, reprinted in 2 DEBATES, *supra* note 66, at 489 (statement of James Wilson on Dec. 4, 1788).

68. *Id.* at 196 (statement of Oliver Ellsworth on January 7, 1788).

69. 5 U.S. (1 Cranch) 137, 174 (1803).

70. *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 28 F. Cas. 1012, 1015 (C.C.D. Pa. 1795).

of the other branches, as our state judiciary? Where are your landmarks in this government? I will be bold to say you cannot find any in it. I take it as the highest encomium on this country, that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary.⁷¹

Before the Maryland ratifying convention, Anti-Federalist Luther Martin likewise saw judges as possessing the exclusive authority to declare what is, or is not, constitutional. “Whether, therefore, any laws or regulations of the Congress, any acts of its President or other officers, are contrary to, or not warranted by, the Constitution, *rests only with the judges, who are appointed by Congress . . .*”⁷²

We can debate whether, as a normative matter, Judge Wilkinson’s populist preference for having constitutional enforcers defer to “democracy” provides for better government. But such a system would be the Framers’ vision turned upside-down. It directly contradicts the Framers’ belief that true popular sovereignty rested in a Constitution that must be judicially enforced against encroachment by untrustworthy democratic processes. The Constitution was intended to “form a *more* perfect union,”⁷³ not a perfect one. In the words of Gouverneur Morris, “control over the legislature might have its inconveniences; but view the danger on the other side. The most virtuous citizens will often, as members of a legislative body, concur in measures which afterwards, in their private capacity, they will be ashamed of.”⁷⁴ We should hope, as did the Framers, that judges take greater pride in their work.

III. POLITICIANS AS CONSTITUTIONAL GUARDIANS: FOXES AMOK IN THE HENHOUSE

Our politicians have frequently lived down to the Framers’ low expectations of Constitutional fidelity, and deep beneath. A central gap in Judge Wilkinson’s vision of judicial deference to political will is the unstated and wholly unwarranted assumption that the political branches exercise something akin to the restraint he prescribes for judges, that Congress and the President are careful and conscious stewards of constitutional standards, limitations, and responsibilities.

71. The Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution, *reprinted in* 3 DEBATES *supra* note 66, at 324–25 (statement of Patrick Henry on June 12, 1788).

72. Yate’s Minutes, *reprinted in* 1 DEBATES *supra* note 66, at 380 (statement of Luther Martin on Jan. 27, 1788) (emphasis added).

73. U.S. CONST. pmb1.

74. Debates in the Congress of the Confederation, From November 4, 1782, to June 21, 1783; and From February 19 to April 25, 1787, *reprinted in* 5 DEBATES, *supra* note 66, at 429 (statement of Gouverneur Morris on Aug. 15, 1787).

Would that this were so. Alas, members of Congress and the President are, to put it mildly, politicians, not constitutional scholars.⁷⁵ They are beholden to political constituencies, sensitive to rent-seeking factions, and mindful of the aggrandizement of their own power. Above all, office holders are students of polling, and of their letters, emails, phone calls, and personal visits from constituents. They devote endless resources to constituent services—helping grandma deal with Social Security, working through the kinks with the Passport Office, recommending Johnny to the service academy.

As a rule, members of Congress do not employ scholars to agonize over the constitutionality of their decisions. Members rarely know the full content of the bills on which they vote, nor would they have the time to read the volumes of legislative bills before them, were they even interested in doing so. The skill set for retaining one's congressional office differs vastly from that of judging. Judges, ideally, should be committed to the truth, to dispassionate and neutral examination of the evidence and the finer point of law, stand beyond corruption, and maintain "good behaviour."⁷⁶ Political survival, on the other hand, is enhanced by compromising, pleasing important constituencies, and of course, fundraising. Former U.S. District Judge Alcee Hastings is a case study contrasting these differing skill sets. Impeached for bribery and perjury, Hastings found stable employment as a Member of Congress.⁷⁷

Simply put: Members of Congress in general lack the competence, resources, interest, or motivation to learn whether their acts are constitutional. Worse yet, they are incentivized to ignore such concerns. They are elected, and reelected, for delivering to their constituents the desired goods, not for telling constituents they can't get something as a constitutional matter.

City politicians are hardly better. Why should Justice Scalia defer to Marion Barry's views of the Constitution, assuming he has any? Jackson,

75. Among the many lawyers-turned-politicians, some are distinguished practitioners but few are noted for constitutional scholarship. Three exceptions prove the rule. President Madison might have been presumed to be faithful to the Constitution if only because he largely wrote the document. Upon appointment as Chief Justice, former President Taft quipped, "I don't remember that I ever was President." Biography of William Howard Taft, The White House, <http://www.whitehouse.gov/history/presidents/williamhowardtaft> (last visited May 23, 2009). It's just as well, for whatever his talents as Chief Justice, Taft was considered a failure by the electorate that soundly rejected his quest for a second term—making him the only incumbent President to finish third in a quest for reelection. In the modern era, the most notable successful politician who has exhibited serious thought about and familiarity with the Constitution is Barack Obama, who was once a professor of constitutional law. But, very few "judicial conservatives" are likely to share President Obama's views on the Constitution.

76. U.S. CONST. art. III, § 1.

77. David Johnston, *Hastings Ousted as U.S. Judge by Senate Vote*, N.Y. TIMES, Oct. 21, 1989, at 1. Hastings was subsequently elected to Congress in 1992, where he remains to this day.

Mississippi Mayor Frank Melton explained, “We have some issues that are much bigger than the Constitution.”⁷⁸ Even post-*Heller*, Pittsburgh City Councilwoman Tonya Payne expressed the typical legislative attitude toward the notion that the Constitution might restrain her powers to enact gun laws: “Who really cares about it being unconstitutional? . . . This is what’s right to do, and if this means that we have to go out and have a court battle, then that’s fine”⁷⁹

Who really cares about it being unconstitutional? If not the courts, nobody. Politicians can find ready reenforcement for positions scornful of the Constitution. For example, the *Washington Post* Editorial Board, which routinely weighs in on upcoming Supreme Court decisions, does not much care that elected officials do their part maintaining an operative Constitution. Advocating passage of a bill granting the District of Columbia Congressional representation, notwithstanding that doing so may be unconstitutional, the *Post* declared that “the case should be made on principle, not technicalities.”⁸⁰ Upholding and defending the Constitution is apparently not a principled position, but a “ruse”⁸¹ by cowards afraid to do the right thing. In any event, according to the *Post*, the “technicality” ought to be of no concern to Congress: “the question is best left to the courts to decide.”⁸²

Lest anyone think that Councilwoman Payne’s who-cares-about-the-Constitution viewpoint is one politicians utter only when they are being careless, consider this gem from the District of Columbia’s pleadings in the *Heller* case before the District Court, explaining why the city should have prevailed: “Conditions and practical considerations, not arcane legal theories and historical excursions, should determine the outcome of cases like the present and the constitutionality of statutes like those at issue here.”⁸³

There you have it. If the legislature says it’s practical, then it’s constitutional, “arcane legal theories” be damned. This is just another version of President Nixon’s maxim that “when the president does it, that

78. Paulo Prada, *Mayor Fights Crime, Finds Trouble*, WALL ST. J., Feb. 2, 2009, at A4.

79. Rich Lord, *Council Passes Controversial Bill on Stolen Guns*, PITTSBURGH POST-GAZETTE, Nov. 24, 2008, available at <http://www.postgazette.com/pg/08329/930426-100.stm>.

80. Editorial, *Representation for D.C.: Steny Hoyer Shows a Welcome Impatience in the House*, WASH. POST, Jan. 28, 2009, at A14.

81. *Id.*

82. *Id.*

83. Reply Brief to Plaintiffs’ Opposition to Defendants’ Motion to Dismiss the Complaint and Opposition to Plaintiffs’ Motion for Summary Judgment, at 16, *Parker v. District of Columbia*, 311 F. Supp. 2d 103 (D.D.C. 2004) (No. 03-0213), 2003 WL 24057553.

means that it is not illegal.”⁸⁴ Nixon was a lawyer by training, and, like the lawyers arguing for the District, should have known much better.

Nixon was far from the only president with a loose regard for the Constitution. It should by now be painfully clear that even presidents—the only politicians elected by the entire nation and universally recognized by all Americans—can fail miserably at their oath to uphold and defend the Constitution.

One need not question every unconstitutional presidential decision and speculate as to whether the president, in making the decision, believed in good faith that it was constitutional, perhaps upon receiving poor legal advice. Recent history affords a clear example of a president explicitly violating his oath of office, by signing into law a bill that he understood to be unconstitutional. Even more troubling, this president had been elected to office after vowing that he would veto the bill. It is fair to believe that at least some voters in that very close election preferred the winning candidate at least in part based on his broken veto promise. Such a situation disproves Judge Wilkinson’s theory that judges should defer to elected officials because they represent the will of citizens.

I speak, of course, of President George W. Bush’s troubled relationship with the Bipartisan Campaign Reform Act of 2002, known popularly as the McCain-Feingold Act.⁸⁵ Notably, the chief Senate sponsor of this legislation and the man most closely identified with it had declared that he cared not about the bill’s impact on “quote ‘First Amendment rights.’”⁸⁶ Why such an attitude deserves deference from a constitutional court is unclear, though it sadly might be expected from the bill’s sponsor. President Bush’s behavior is less excusable.

Speaking on the campaign trail in 2000, Bush declared unequivocally that he would veto the McCain-Feingold Act, stating, “I think it does . . . restrict free speech for individuals.”⁸⁷ Two years later, when Congress passed the

84. *Excerpts From Interview With Nixon About Domestic Effects of Indochina War*, N.Y. TIMES, May 20, 1977, at A16. Had President Nixon made these comments about the Congress, he would have only been describing the rational basis test.

85. Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 and 36 U.S.C.).

86. Tony Mauro, *For McCain, First Amendment Runs 2nd to Campaign Reform*, FIRST AMENDMENT CENTER, Oct. 1, 2008, <http://www.firstamendmentcenter.org/analysis.aspx?id=18997>.

87. Akhil Reed Amar & Vikram David Amar, *Breaking Constitutional Faith: President Bush and Campaign Finance Reform*, FINDLAW, Apr. 5, 2002, <http://writ.news.findlaw.com/amar/20020405.html>; see also Rich Lowry, *Bush’s Broken Promise*, NAT’L REV. ONLINE, Feb. 21, 2002, <http://www.nationalreview.com/lowry/lowry022102.shtml>.

McCain-Feingold Act, the President still believed the bill to be unconstitutional. He all but said as much, in his signing statement enacting the bill into law.⁸⁸

So why not veto the unconstitutional bill? Bush instead simply assumed “that the courts will resolve these legitimate legal questions as appropriate under the law.”⁸⁹ So much for the political branches’ coequal responsibility to enforce the Constitution.⁹⁰

Whatever the reason, Bush’s behavior here was not the stuff of careful constitutional stewardship. The Supreme Court would go on to uphold the constitutionality of a law the President believed violates the First Amendment, plunging the Supreme Court into one of those endless complex litigation enterprises decried by Judge Wilkinson.⁹¹

George Will, who approvingly parroted Judge Wilkinson’s Essay in his column, but who had asked the question of candidate Bush that elicited the broken veto promise, reacted differently to the Supreme Court’s goring of his campaign finance ox in *McConnell v. FEC*:⁹²

Conservatives should be reminded to be careful what they wish for. Their often-reflexive rhetoric praises “judicial restraint” and deference to—it sometimes seems—almost unleashable powers of the elected branches of governments. However, in the debate about the proper role of the judiciary in American democracy, conservatives who dogmatically preach a populist creed of deference to majoritarianism will thereby abandon, or at least radically restrict, the judiciary’s indispensable role in limiting government.⁹³

Indeed.

88.

[T]he bill does have flaws. Certain provisions present serious constitutional concerns. In particular, H.R. 2356 goes farther than I originally proposed by preventing all individuals, not just unions and corporations, from making donations to political parties in connection with Federal elections. I believe individual freedom to participate in elections should be expanded, not diminished; and when individual freedoms are restricted, questions arise under the First Amendment. I also have reservations about the constitutionality of the broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election.

Statement on Signing the Bipartisan Campaign Reform Act of 2002, 1 PUB. PAPERS 517, (Mar. 27, 2002).

89. *Id.*

90. One plausible defense of President Bush’s behavior that made the rounds in Washington is purely political in nature. Bush wanted desperately to avoid a primary challenge by his rival Senator John McCain in the 2004 election. Vetoing McCain’s signature bill would provide the Arizonan something to rally against. Signing the bill into law would diffuse McCain. I cannot vouch for this theory, but the only rational explanation for the President to sign into law a bill he believes to be unconstitutional would be political.

91. *McConnell v. FEC*, 540 U.S. 93 (2003).

92. *Id.*

93. George F. Will, *Damaging ‘Deference’*, WASH. POST, June 24, 2005, at A31.

Yet conservatives should be well positioned to honor the Framers' skepticism of the political branches, as they are already comfortable in condemning living constitutionalism when it emanates from judges. The concept of a living constitution is one of a document whose meaning shifts with a judge's notions of societal needs. This vision has rightly been derided as one of a dead constitution, a constitution whose text lacks fixed meaning and thus, living force.⁹⁴ If the Constitution means whatever we want it to mean, it means, really, nothing at all. Judicial deference is merely living constitutionalism by another name. The judiciary does not enforce its views of the Constitution's meaning, so by default the Constitution evolves to conform to the standards of the day envisioned by the political branches—if they think about the Constitution at all.

IV. TEXTUALISM AND THE ABSENCE OF CLEAR MANDATES

A. Textualism Does Not Answer All Questions

The most astonishing accusation leveled by Judge Wilkinson at *Heller* is his critique that the decision is marred by “an absence of a commitment to textualism.”⁹⁵ Although *Roe v. Wade*⁹⁶ never cites the words of the Fourteenth Amendment upon which it relies, *Heller* does the opposite, poring over the meaning of each word in the Second Amendment: Who are the people, what are arms, what of the militia clause? Judge Wilkinson may dispute the Supreme Court's answers to the Second Amendment's textual questions, but it is difficult to maintain that *Heller* is not committed to the text's meaning, however much that meaning may be disputed.

Conservatives endorse textualism because even if the text is misinterpreted, at least an agreement that text is controlling limits judges to a range of plausible interpretations.⁹⁷ Textualism is a grounding doctrine, though it will not inexorably lead to a specific conclusion so long as parties dispute the meaning of the relevant text. In their *Heller* opinions, Justices Scalia and Stevens dispute

94. Timothy Sandefur, *The Real Problem With a Living Constitution* (Aug. 29, 2005), <http://www.positiveliberty.com/2005/08/the-real-problem-with-a-living-constitution.html>.

95. Wilkinson, *supra* note 1, at 254.

96. 410 U.S. 113 (1973).

97. See, e.g., *Webster v. Doe*, 486 U.S. 592, 619 (1988) (Scalia, J., dissenting) (“We have rejected . . . judicial rewriting of legislation even in the more appealing situation where particular applications of a statute are not merely less desirable but in fact raise ‘grave constitutional doubts.’ That, we have said, only permits us to adopt one rather than another permissible reading of the statute, but not, by altering its terms, to ignore the legislative will in order to avoid constitutional adjudication.”) (citation omitted).

the meaning of the Second Amendment's text: The majority concerned itself with the text's original public meaning, while the dissent cared more about interpreting the text in light of what it believed to be the original intent of the document's authors. But Stevens' dissent could have been easily written as a purely textual piece; it could have reached the same wrong conclusion, relying solely on wrong textual interpretation.

This brings us to the limits of textualism. The Constitution's text, perfectly understood, frequently fails to offer clear mandates.⁹⁸ Were it otherwise, a legislature or executive faithfully upholding the Constitution would be infallible. To admit that a court might review the constitutionality of political decisions in a system where all constitutional results are obvious is to admit that the political branches are either incapable of understanding obvious concepts or may act in bad faith. Of course, both of these propositions are often true: The political branches are prone to irrational behavior and rarely, if ever, care whether their actions are constitutional even when they understand the document.

But the lack of clear mandates in all areas of law is itself clear. The Constitution flatly prohibits unreasonable searches and seizures,⁹⁹ but exactly which searches or seizures are clearly mandated to be unreasonable under the Fourth Amendment? The mandates in this area, clear or not, must be defined ultimately by judges, and judging is difficult, dangerous work precisely because it often involves more than rote application of clear text to linearly derive a foretold result.

B. "Ambiguity:" A Hopelessly Subjective Standard

How should judges deal with areas that confound them? Judge Wilkinson offers as a purportedly neutral principle the notion that close or ambiguous cases be decided in the government's favor. "When a constitutional question is so close, when conventional interpretive methods do not begin to decisively resolve the issue, the tie for many reasons should go to the side of deference to democratic processes."¹⁰⁰ Apparently, only where the Constitution "clearly mandate[s] the result"¹⁰¹ is a court to side with liberty, and restrain

98. See Wilkinson, *supra* note 1, at 255 ("In both cases [Roe and Heller] the constitutional text did not clearly mandate the result . . ."); *id.* at 302 ("Absent the clearest sort of textual mandate, we should not entrust courts with such life and death decisions.").

99. U.S. CONST. amend. IV.

100. Wilkinson, *supra* note 1, at 267.

101. *Id.* at 255.

the government from interfering with individual behavior. *Heller* wrongly secured a right “only ambiguously rooted in the Constitution’s text.”¹⁰²

That ambiguity as an interpretive principle could be declared neutral is surreal. It is the definition of subjectivity to proclaim that courts should reach only those decisions that are clear. But by whose lights? *Heller* itself, right or wrong, exposes the rootless nature of Judge Wilkinson’s subjective exercise. For Wilkinson, *Heller* was a close call. But to the nine Justices who considered the matter, the three appellate judges who heard the case in the D.C. Circuit, the District Judge, and every author of the parties’ briefs and of the sixty-seven amicus briefs on either side of the case, the matter was clear. All believed, unequivocally, that the Second Amendment meant one thing or another.

It is most unlikely that *all* of these people were wrong, that the Second Amendment stands for some proposition not considered in the exhaustive survey presented to the Court.¹⁰³ One side was right, the other wrong, and it was the Court’s duty to determine which. Those of us who believe the Constitution to be relevant, who believe that every provision within it was included for a reason and has some specific meaning that guides our government, lack the luxury of throwing up our hands and ignoring a specific constitutional amendment—a part of the Bill of Rights no less!—because it is too difficult for us to discern its meaning.

Were ambiguity a useful neutral principle, we should at least expect Judge Wilkinson to demonstrate fidelity to his own views of what is ambiguous. But even here, the theory falls apart. Judge Wilkinson instructs us that *Roe* was wrong because

[t]he Justices should never have attempted to find substantive rights in what was at best an ambiguous constitutional provision. The difference between substantive and procedural due process is an important one in Fourteenth Amendment law.¹⁰⁴

Fair enough. “Never” should the Court “find substantive rights” in the Due Process Clause, which is “at best an ambiguous constitutional provision.” A fine ambiguity-based principle of neutrality, except for Judge Wilkinson’s disclaimer that follows immediately: “To be sure, the point should not be pushed to extremes, as salutary substantive decisions like *Loving v. Virginia*, *Skinner v. Oklahoma*, *Pierce v. Society of Sisters*, and *Meyer v. Nebraska* make clear.”¹⁰⁵ In other words, Judge Wilkinson recognizes the substantive due process

102. *Id.* at 257.

103. Judge Wilkinson does not offer any Second Amendment interpretations missing from the *Heller* briefs.

104. Wilkinson, *supra* note 1, at 258.

105. *Id.* at 258–59 (citations omitted).

rights protected in the four cases he cites.¹⁰⁶ He just doesn't care for abortion.¹⁰⁷ Such a definition of "never"¹⁰⁸ cannot reliably steer the courts.

Roe standing alone demonstrates the hopelessly subjective nature of discerning between close and clear cases. To Judge Wilkinson, *Roe* is a tour de farce. To others, it is gospel that the Constitution secures a right to abortion, either for the reasons enunciated in *Roe* or, as Wilkinson points out, on the basis of other theories he would likely find equally unconvincing.¹⁰⁹ Supporters of abortion rights jurisprudence, applying the close/clear principle in good faith, would reach the conclusion opposite to that reached by Judge Wilkinson.

Wilkinson may well be right in his views of *Roe*, but his preferred constitutional results in that case would not appear "clearly mandated" to anyone not already inclined to agree with him. Far from being a neutral principle for deciding cases, the close/clear distinction is nothing more than post hoc rationalization.

C. "Ambiguity:" Authoritarianism by Default

Just as the principle of ignoring "close" constitutional provisions fails to offer a neutral guide to judicial decisionmaking, so too is such a principle not neutral in its substantive effect. As Neal Peart postulated, "if you choose not to decide, you still have made a choice."¹¹⁰

Even if one were to accept that the question of whether the Second Amendment secures an individual right is inherently close, why should such closeness counsel disregard of what might well be a fundamental constitutional right? Let us pause and consider Judge Wilkinson's breathtaking proposition: An entire, complete amendment to the United States Constitution, part of our Bill of Rights no less, must be ignored by the courts because one judge (though not a single Supreme Court Justice) can make neither heads nor tails of it.

106. The substantive due process cases approved by Judge Wilkinson imposed the following unenumerated rights against the democratic preferences of various states: a right to interracial marriage, see *Loving v. Virginia*, 388 U.S. 1 (1967); a right against forced sterilization, see *Skinner v. Oklahoma*, 316 U.S. 535 (1942); and a right to direct the education of one's children, by sending them to private school, see *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), or by teaching them a foreign language, see *Meyer v. Nebraska*, 262 U.S. 390 (1923).

107. Just as *Roe*'s conservative opponents should recognize their argument is not with judicial review, so should they make peace with the concept of unenumerated rights even as they resist the notion that abortion is among those rights. But that is a topic for another day.

108. W.S. Gilbert & Sir Arthur Sullivan, *My Gallant Crew, Good Morning!*, reprinted in H.M.S. PINAFORE (Dover Publications 2002) (1878) ("What, Never? No, Never! What, Never? Hardly Ever!").

109. See Wilkinson, *supra* note 1, at 257–64.

110. RUSH, *Freewill*, on PERMANENT WAVES (Island Def Jam 1980) (words by Neal Peart).

It is difficult to accept that this is, or should be, the standard judicial doctrine among conservatives or anyone else. As Justice John Marshall explained, “It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it.”¹¹¹ Constitutional text cannot be faithfully applied by willfully ignoring it. Nor should anyone, for one moment, believe that such methodology would be confined to the Second Amendment. Most of the Bill of Rights has been bitterly debated for decades, if not longer. In the Supreme Court, the Second Amendment is in its infancy relative to other amendments that, if contentiousness is to be the standard, must be wholly disregarded by courts under Judge Wilkinson’s theory.

In a supposedly free country, where government is limited and has only specifically enumerated powers, one would imagine that the burden of proof rests always upon the government to establish its authority for regulating, not on the individual to show the rights-securing text must at a minimum even be considered. As the subtitle of Professor Barnett’s excellent book describes, there ought to be a “[p]resumption of [l]iberty.”¹¹² Wilkinson suggests that in the absence of a clear mandate to the contrary, government may do as it pleases. Indeed, a mere allegation of ambiguity suffices to destroy any restraint on government authority such that the only restraints on government would be those universally acknowledged. Considering that government rarely accepts limitations on its powers, in practice, the argument is for unlimited government.

The authoritarian instinct is revealed in Judge Wilkinson’s observation that in the absence of a constitutional right limiting governmental authority, “the balance [between individual and community] is set by democracy.”¹¹³ Not always. In a government of limited, enumerated powers, democracy often lacks constitutional authority to regulate the individual in the first instance, regardless of whether any authority is further proscribed by some right limiting all enumerated powers. Political conservatives may favor robust government empowered to accomplish all sorts of social goals, though they quickly squeal when the same-said regulatory apparatus is deployed by the left. Judicial conservatives find specific meaning in the constitutional text granting government power to perform discreet tasks, an exercise that invariably rejects vague and sweeping grants of authority.¹¹⁴

111. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

112. BARNETT, *supra* note 10, at 5.

113. Wilkinson, *supra* note 1, at 259.

114. The laws struck down in *Heller* were enacted pursuant to the District Clause, arguably the broadest congressional power of all—the power to “exercise exclusive Legislation in all Cases whatsoever” for the seat of government. U.S. CONST. art. I, § 8, cl. 17. But even this power is not absolute, for the

Indeed, given the essential character of the federal government as one of enumerated rights that can only be exercised in necessary and proper ways, and from which the people retain rights not specifically enumerated,¹¹⁵ enjoy privileges and immunities,¹¹⁶ and along with their state governments reserve all powers not specifically granted Washington,¹¹⁷ any tie goes not to authority (what Judge Wilkinson euphemistically terms “democracy”) but to the individual. I might trade all “ambiguous” guarantees of liberty, including the Second Amendment, for a commensurate understanding that by the same standards, the powers of government are likewise void, and can no more be exercised by the government than can allegedly vague liberties be asserted by individuals. Would that we could apply Judge Wilkinson’s ambiguity test not just to liberty-preserving text, such as the Second Amendment or the Due Process Clause, but also to text that grants the government authority, perhaps, the Commerce Clause.¹¹⁸ The Supreme Court has long agonized over that provision, which, whatever its scope, covers far more ground than does the Second Amendment. If the Second Amendment is hopelessly ambiguous, by the same standard so must be the Commerce Clause—with far graver consequences for every facet of American life. And who can conceive of the specific four corners of the states’ police power?

Alas, this is not the deal proposed by Judge Wilkinson or others, such as Judge Robert Bork, who see only “inkblots”¹¹⁹ where individual rights are secured but eagerly defer to almost any exercise of government authority as the product of benevolent expertise, or, at least, popular will.

D. Judicial Competence to Gauge the Popular Will

Judge Wilkinson assumes that the democratic decisions to which courts must defer best reflect the popular will. Under this view, the danger in having

Framers felt compelled to also grant Congress the power to construct military buildings in the District. *Id.* It can be seriously questioned whether a law banning the private ownership of firearms is within the traditional police power secured by the District Clause, or necessary and proper to that end. The city must have sensed this was an issue, for it claimed the gun ban was sourced in the penumbral emanations of the aforementioned authority for the “Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.” Brief for Petitioners at 37–38, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

115. U.S. CONST. amend. IX.

116. U.S. CONST. art. IV, § 2; U.S. CONST. amend. XIV, § 1.

117. U.S. CONST. amend. X.

118. This is no prescription for anarchy. It would still leave us with a post office. U.S. CONST. art. I, § 8, cl. 7.

119. See *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong.*, (1987) (statement of Robert A. Bork); see also ROBERT BORK, *THE TEMPTING OF AMERICA* 166 (1997).

courts supplant political acts is that the public would lose confidence in the courts, seeing them as just another political entity “exercising discretion.”¹²⁰ This view underestimates the public, which is not necessarily interested in rubber-stamp courts and whose popular culture is steeped with heroic tales of courts resisting political actors.¹²¹ It improperly assumes that all “democratic” acts are popular. And it exposes the fact that judges make poor pollsters.

Consider the Supreme Court’s recent decision in *Kelo v. City of New London*¹²² eviscerating the Fifth Amendment’s Takings Clause. To be sure, the Court upheld the political action of a democratically elected city council, which forced residents to sell their land to the city so that private businesses generating greater tax revenue could be built.¹²³ Wilkinson might say the Court properly deferred to “democracy” because of the hotly contested meaning of Takings Clause’s public use requirement. Accordingly considered ambiguous, the Takings Clause is unenforceable, and the City of New London must be allowed to wantonly redistribute property—lest the public lose confidence in the Supreme Court.

Kelo is, of course, one of the most widely reviled Supreme Court decisions in recent memory. *Kelo* sparked a monumental backlash, as the decision offended the sensibilities of most Americans and prompted legislative reform. Within two years of *Kelo*, “[forty-two] states . . . passed new laws aimed at curbing the abuse of eminent domain for private use.”¹²⁴ That some of these reforms are more effective than others does not change the fact that *Kelo* prompted significant democratic response. Three years after *Kelo*, polls showed that 75 percent of Americans still disagreed with the Supreme Court’s conclusion in that case.¹²⁵

If *Kelo* demonstrates how profoundly unpopular the courts’ deference to democracy can be, *Heller* is perhaps the ultimate example of public support for judicial review. Judge Wilkinson is demonstrably wrong in holding up

120. Wilkinson, *supra* note 1, at 267.

121. *Brown v. Board of Education*, 347 U.S. 483 (1954), readily comes to mind, as does Steven Spielberg’s popular adaptation of *The Amistad*, 40 U.S. (15 Pet.) 518 (1841), in which the Supreme Court resisted President Van Buren’s arguments to return Africans to captivity as slaves. Underlying American popular culture’s obsession with lawyer and judge TV shows, movies, and books is the expectation that judges will produce justice, even if they must stand up to politicians and powerful interests. One would be hard pressed to find, among the vast output of legal-centric entertainment, many episodes where a judge is sympathetically portrayed reaching an unappetizing decision out of deference to the political branches of government.

122. 545 U.S. 469 (2005).

123. See *id.* at 469–70.

124. CASTLE COALITION, 50 STATE REPORT CARD TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE KELO, (Aug. 2007), http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf.

125. AP/ABT SRBI, NATIONAL CONSTITUTION CENTER POLL, (Aug. 22–29, 2008) (Question 14C).

Heller as an example of a court exercising discretion in such a way that “members of the public lose faith in the idea that justice is blind.”¹²⁶ Quite the opposite. Public opinion polls have reflected overwhelming belief that the Second Amendment means what the Supreme Court has said it means in *Heller*, and those same polls showed overwhelming support for the Court’s decision.

According to Gallup, 73 percent of Americans believe the Second Amendment guarantees them an individual right to keep and bear arms.¹²⁷ Harris Interactive reported similar results: 70 percent of respondents believe the Second Amendment guarantees an individual right to arms, of which 29 percent believe the Second Amendment also guarantees the states’ “right to form a militia.”¹²⁸ Rasmussen Reports polled Americans on another specific constitutional issue in *Heller*: “[W]hile there is an even divide on the question of whether stricter laws are needed, only 26 [percent] believe that city governments have the right to prevent citizens from owning handguns in their city. [64] percent . . . say such a restriction is a violation of the Second Amendment.”¹²⁹ Perhaps not surprisingly, polling showed that the public’s opinion of the Supreme Court improved dramatically following the *Heller* decision.¹³⁰

Yet Judge Wilkinson is not completely off track in considering the public. The *Kelo* backlash might have paled in comparison to what would have followed the reverse outcome in *Heller*. Had the Court erased from the Bill of Rights a right that significant portions of our population view as inherent in their civic identity, the damage to the Court’s political capital would likely have been immense. St. George Tucker, an early constitutional scholar who shared the *Heller* majority’s view of the Second Amendment, observed that “[a] bill of rights may be considered, not only as intended to give law, and assign limits to government . . . , but as giving information to the people . . . [so that] every man of the meanest capacity and understanding may learn his own rights, and know when they are violated.”¹³¹

126. Wilkinson, *supra* note 1, at 267.

127. Jeffrey M. Jones, *Americans in Agreement With Supreme Court on Gun Rights*, GALLUP, June 26, 2008, <http://www.gallup.com/poll/108394/Americans-Agreement-Supreme-Court-Gun-Rights.aspx>.

128. Press Release, *The Harris Poll, Second Amendment Supreme Court Ruling Matches With Public Opinion From the Harris Poll*, (June 26, 2008), http://www.harrisinteractive.com/harris_poll/index.asp?PID=922.

129. *Voters Split on Need for Stricter Gun Control Laws, but Oppose City Handgun Ban*, RASMUSSEN REPORTS, June 22, 2008, http://www.rasmussenreports.com/public_content/politics/issues2/articles/voters_split_on_need_for_stricter_gun_control_laws_but_oppose_city_handgun_ban.

130. *Supreme Court Viewed More Favorably Following Gun Ruling*, *supra* note 15.

131. 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES app. at 308 (Lawbook Exchange, Ltd. 1996) (1803).

If public approval is needed to legitimize the courts, we need fewer decisions like *Kelo* affirming legislative acts, and more decisions like *Heller* striking them down.

E. *Heller*: Not All That Close a Case

Accepting for the sake of argument Judge Wilkinson's ambiguity standard as a neutral principle, or perhaps, to demonstrate how ambiguity is not a neutral principle, I submit that *Heller* was not at all a close case. Like Wilkinson, I will "not completely rehash the debate about the right at stake in *Heller*; the story is simple."¹³² Three examples of disputed issues disprove the assertion that, "[f]or every persuasive thrust by one side, the other has an equally convincing parry."¹³³

First, with respect to the meaning of "keep and bear arms," Wilkinson asks, "[i]s 'keep and bear arms' a construction that refers specifically to military uses, or does it mean the personal right to possess and carry firearms?"¹³⁴ He concedes that "Justice Scalia brings forth founding era dictionaries and treatises, English and colonial laws, and legal scholarship supporting" the proposition that "keep and bear arms" was not a term "restricted to military uses."¹³⁵

Game, set, match. Does it really matter if the dissent can show that *sometimes*, "bear arms" had a militaristic idiomatic meaning? By showing that the term had a common civilian usage, the majority terminated the argument that "keep and bear arms" is restricted to military uses. It also showed that the object of "the right of the people" is, as in the First and Fourth Amendments and as one might expect in the Bill of Rights, an individual right. The dissent's thesis rests on proving that the militaristic interpretation is an exclusive one.¹³⁶ However, example after boundless example of "keep arms" and "bear arms" used in purely civilian, nonmilitary contexts conclusively demolishes the claim.¹³⁷

132. Wilkinson, *supra* note 1, at 271.

133. *Id.*

134. *Id.* at 268.

135. *Id.*

136. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2827–31 (2008) (Stevens, J., dissenting).

137. See, e.g., *id.* at 2792 (majority opinion) (citing Bill of Rights, 1689, 1 W. & M., c. 15, § 4 (Eng.)) ("[N]o Papist . . . shall or may have or keep in his House . . . any Arms . . ."); *id.* at 2792 n.7 (collecting examples of uses the phrase "keep arms" in a civilian context); *id.* at 2795 n.10 (collecting examples of uses of the phrase "bear arms" in a civilian context). For an exhaustive work recounting the commonplace usage of "bear arms" in a civilian context, also referenced by the *Heller* majority, see Clayton E. Cramer & Joseph Edward Olson, *What Did 'Bear Arms' Mean in the Second Amendment?*, 6 GEO. J.L. & PUB. POL'Y 511 (2008).

The dissent would counter by asserting that its militaristic interpretation is the “most natural,” such that “[t]he absence of any reference to civilian uses of weapons tailors the text of the Amendment to the purpose identified in its preamble.”¹³⁸ This argument depends entirely on assuming the correctness of the dissent’s approach to statutory construction, ascribing powers to the preambular language not accepted by the majority. But even so, this does not answer the majority’s textual analysis of the people’s rights under the Second Amendment. As the majority explained, an individual right to keep and bear arms is harmonious with the need to preserve the Framers’ conception of a “citizen militia.”¹³⁹ The dissent’s exclusive idiomatic definition of “keep and bear arms” thus depends further on assuming the purpose for which it believes the Second Amendment was adopted. In other words, for the dissent, the desired conclusion drives the meaning of the text. This is a pile of assumptions, not a rebuttal of the majority’s textual analysis of what “keep and bear arms” meant in 1791.

Judge Wilkinson references a “lively” debate between Justices Scalia and Stevens about “post-enactment commentary” of the Second Amendment.¹⁴⁰ In his telling, Judge Wilkinson refers only to Stevens’ criticism of a reliance upon such interpretive guides, and not Stevens’ reliance on any competing, pre-twentieth century description of the Second Amendment as a so-called collective right—which in fact did not exist.¹⁴¹ So what are we to make of Justice Stevens’ “equally convincing parry” of the mountain of commentary by the Second Amendment’s contemporaries and earliest analysts, uniformly endorsing the individual rights point of view?

The only somewhat detailed “parry” questions the views of St. George Tucker, the leading legal scholar of the Early Republic. In 1803, Tucker published a version of *Blackstone’s Commentaries on the Laws of England* with comparative notes on American law.¹⁴² “[T]he standard work on American law for a generation,”¹⁴³ Tucker’s *Blackstone* described the Second Amendment in unmistakable individualist terms, and was thus relied upon by the *Heller*

138. *Heller*, 128 S. Ct. at 2828–29 (Stevens, J., dissenting).

139. *Id.* at 2801 (majority opinion).

140. Wilkinson, *supra* note 1, at 270.

141. Save for one obscure commentary observing that the Second Amendment “probably” is limited to guaranteeing military activity, yet conceding that “[a] different construction however has been given to it.” *Heller*, 128 S. Ct. at 2807 (citing BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN* 177 (1832)). The concession was necessary. By the time of its publication, the Early Republic’s constitutional giants, including St. George Tucker, Joseph Story, and Second Amendment-ratifier (as a member of the Pennsylvania legislature) William Rawle, had endorsed the individual rights construction.

142. TUCKER, *supra* note 131.

143. Paul Finkelman & David Cobin, *Introduction* to 1 TUCKER, *supra* note 131, at xii.

majority.¹⁴⁴ The dissent, referencing a portion of Tucker's unpublished lecture notes, claimed Tucker "did not consistently adhere" to this view of the Second Amendment.¹⁴⁵ The majority correctly responded that "[n]othing in the passage [quoted by the dissent] implies that the Second Amendment pertains only to the carrying of arms in the organized militia."¹⁴⁶

The majority's response would be sufficient to remove this small dispute from the realm of the close, yet there is another story here. The dissent's citation to Tucker's lecture notes appears to come from the subsequently referenced law review article, Saul Cornell's *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*.¹⁴⁷ That article has been debunked.¹⁴⁸ The passage cited by Cornell does not come from Tucker's lecture notes regarding the Second Amendment, but his notes concerning the militia clauses of Article I:

[T]he dissent relied uncritically on the portions of the lecture notes quoted by Saul Cornell in a 2006 article, which the dissent cites as authority. The article sets out quotations cited by the dissent and argues that they reflect Tucker's "earliest formulation of the meaning of the Second Amendment," and "casts the right to bear arms as a right of the states."

In fact, the article's quotations are misleading; they come from Tucker's discussion of the *militia clauses* of the original Constitution, which predictably deal with military power and the States. . . . When, less than twenty pages later, Tucker does discuss the Bill of Rights, the language he uses closely parallels his 1803 Blackstone's *Commentaries*, usually down to the word.¹⁴⁹

144. *Heller*, 128 S. Ct. at 2805.

145. *Id.* at 2839 n.32 (Stevens, J., dissenting).

146. *Id.* at 2805 n.19 (majority opinion).

147. 47 WM. & MARY L. REV. 1123 (2006).

148. See David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NW. U. L. REV. COLLOQUY 272, 277–79 (2008). For another work laying bare Saul Cornell's highly selective use of Tucker, see Stephen P. Halbrook, *St. George Tucker's Second Amendment: Deconstructing "The True Palladium of Liberty,"* 3 TENN. J.L. POL'Y 120, 198–99 (2007) (noting that, when it comes to interpreting Tucker, "[a]s usual, Cornell avoids the embarrassing quotations," and that "Cornell's rendition of Tucker . . . is woefully short on Tucker's actual words").

149. Hardy, *supra* note 148, at 278.

This error, which earlier appeared in Cornell's book on the topic, SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006), was pointed out in an otherwise favorable book review by historian Robert Churchill:

[T]he passages of the manuscript draft that Cornell discusses are not Tucker's gloss on the Second Amendment. They are instead his gloss on the militia clauses of the original Constitution. On Tucker's gloss on the Second Amendment itself, both in the 1790s manuscript and in the 1803 published version, Cornell is silent. I hope Cornell will take the opportunity to explain his decision to pass over this material.

Regardless of the explanation for Cornell's citations, the dissent's unquestioning reliance on Cornell's discredited article does it no service.

Judge Wilkinson's least defensible example of *Heller's* alleged closeness is not, however, the dissent's circular nonresponse to the text's meaning. Nor is it the dissent's invocation of a misrepresented historical source, where the true source supports the majority. It is this statement:

Justice Scalia distinguished the cases—notably *United States v. Cruikshank*, *Presser v. Illinois*, and *United States v. Miller*—appearing to view the Second Amendment right as a collective one, while Justice Stevens contended that they foreclosed the Court's interpretation.¹⁵⁰

Judge Wilkinson's description of these cases as “appearing to view the Second Amendment right as a collective one” reveals his personal views. Had Judge Wilkinson described these cases as “contended to view the Second Amendment right as a collective right,” he would be only two-thirds wrong, as neither *United States v. Cruikshank*¹⁵¹ nor *Presser v. Illinois*¹⁵² were claimed as such authority by the dissent. The dissent questioned whether the indictment in *Cruikshank* reflected an individual rights interpretation of the Second Amendment, but asserted that the *Cruikshank* Court “did not itself describe the right, or endorse the indictment's description of the right.”¹⁵³ With respect to *Presser*, the dissent referenced only passages claiming that the

Robert H. Churchill, *Three Steps Forward, One Step Back*, H-NET REVS., Sept. 2007, <http://www.h-net.org/reviews/showrev.php?id=13574> (reviewing CORNELL, *supra*).

It might be useful to note that Cornell serves as the Director of something called “The Second Amendment Research Center,” created in 2002 with a \$399,967 grant by the Joyce Foundation. Citation to Newly Published Authority Per Rule 28(j), at 2, *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007) (No. 04-7041) (citing the Joyce Foundation website). The Second Amendment Research Center's website now claims it is “supported by a generous grant from the Joyce Foundation.” Second Amendment Research Center, http://secondamendmentcenter.com/about_us.asp (last visited May 26, 2009). The Joyce Foundation is the nation's preeminent and perhaps most lavish sponsor of extremist gun prohibitionist groups and publications, including the Violence Policy Center, Handgun Free America, and Legal Community Against Violence. The Joyce Foundation, Grant List, <http://www.joycefdn.org/Programs/GunViolence/GrantList.aspx> (last visited Mar. 31, 2009). It is unlikely that anything funded by the Joyce Foundation, or produced by its “Second Amendment Research Center,” would conclude the Second Amendment has any meaning as an individual right.

I do not question the Joyce Foundation's logic in funding work that supports its political objectives, nor would I fault Cornell for accepting support from sympathetic donors. Indeed, it is only natural and proper that people seek out and support those with whom they agree. The money does not alter the merits, if any, of their work. My point is only that political advocacy should not be taken at face value as neutral scholarship, regardless of the manner in which it is presented.

150. Wilkinson, *supra* note 1, at 271 (footnotes omitted).

151. 92 U.S. 542 (1875).

152. 116 U.S. 252 (1886).

153. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2843 (2008) (Stevens, J., dissenting).

Second Amendment, by its terms, binds the federal government, and that seem to reject a right to arms located in the Fourteenth Amendment.¹⁵⁴

The situation regarding *United States v. Miller*¹⁵⁵ is different. The *Heller* opinions did spar over whether that case reached a collectivist conclusion.¹⁵⁶ And Judge Wilkinson tips his hand in siding with the dissent's interpretation by declaring that the case "appear[s] to view the Second Amendment right as a collective one."¹⁵⁷ Whatever the merits of that view, it is assuredly not stating that the issue is too close to call.

V. COMPLEX ENDEAVORS AND POLICY COMPETENCE

The most puzzling of Wilkinson's critiques of *Heller*, and indeed, of *Roe v. Wade*,¹⁵⁸ is the claim that courts should not display a "willingness to embark on a complex endeavor that will require fine-tuning over many years of litigation."¹⁵⁹ For what other purpose are judges employed, if not the complex endeavor of organically discovering, on a case-by-case basis, the contours of the law applied to daily life? Justice may be the law's overarching objective, but predictability is a close second. If judges demur the unduly difficult and time consuming task of answering complex legal questions, the outcome would at best be arbitrary government.

Judges do not write the laws and constitutional provisions they are called to interpret, nor do they foment the cases and controversies that land before them. If the people have ratified an individual right to keep and bear arms, or even for that matter a right to abortion, the courts are properly charged with the task of delineating such rights' application in as many relevant circumstances as might be implicated by an imaginative legislature and the happenstance of daily life.

Judge Wilkinson's lamentation of judicial journeys through complex and time-consuming litigation stands directly at odds with his professed aversion to judicial review. After all, were the objective the simplification of the courts' dockets, a few activist decisions narrowly construing or declining to sanction altogether the exercise of political power would go a long way toward lightening the judiciary's workload. Again, refusing to look beneath the inkblot of the Commerce Clause could save the federal judiciary a lot of

154. *Id.*

155. 307 U.S. 174 (1939).

156. See *Heller*, 128 S. Ct. at 2813–16; *id.* at 2822–24 (Stevens, J., dissenting).

157. Wilkinson, *supra* note 1, at 271.

158. 410 U.S. 113 (1973).

159. Wilkinson, *supra* note 1, at 254.

work. Or failing to see any constitutional authority for the delegation of legislative power, the Supreme Court could eliminate the entire federal regulatory bureaucracy, and the D.C. City Council as well.

Assuming for the sake of argument that there is something inherently wrong with complex endeavors requiring years of fine tuning by litigation, the fault in the gun arena lies, where it usually does, with the legislatures that devote limitless resources to regulating and restricting our rights. The Supreme Court did not instruct the D.C. City Council to make gun ownership impossible. Had the politicians taken seriously their oath to uphold and defend the Constitution, there would not have been a *Heller* case.

Legislative resistance to *Heller* underscores the need for aggressive court intervention. Unwilling to accept the Second Amendment's core principles as enunciated by the Court, D.C. City Council Member Harry Thomas, Jr., reacted to *Heller* by announcing, "it is imperative that we develop the most rigorous and stringent gun laws possible."¹⁶⁰ He then introduced the "Sense of the Council on Future Handgun Regulation Resolution of 2008," declaring that "strict and rigorous handgun regulations must be in place."¹⁶¹ Not to be outdone, Council Chairman Vincent Gray declared, "[w]e intend to preserve the most restrictive handgun regulation provisions that the Constitution permits."¹⁶²

Council Member Muriel Bowser added that "[t]here is no right to carry handguns in the District. That has not changed. Automatic and semi-automatic weapons will continue to be banned throughout the City."¹⁶³ The city must have realized its unique ban on semiautomatic firearms was unconstitutional, for it quickly repealed it. Having reluctantly realized a complete ban on semiautomatic guns would not survive court challenge, the city set out to add a new slew of byzantine restrictions on the right to arms. The "Firearms Registration Amendment Act of 2008"¹⁶⁴ contained a smorgasbord of Second Amendment violations designed to harass gun ownership into oblivion and replicate a blanket ban on all firearms ownership with new

160. Posting of David A. Nakamura to D.C. Wire, http://voices.washingtonpost.com/dc/2008/06/reaction_to_gun_ruling.html (June 26, 2008, 10:47 EST).

161. Sense of the Council on Future Handgun Regulations Resolution of 2008, (D.C. 2008), available at <http://www.dccouncil.us/images/00001/20080716085012.pdf>.

162. Press Release, D.C. Council Chairman Vincent C. Gray, Council Chairman Vincent Gray Reaction to *Heller* Ruling (June 26, 2008), <http://www.dcwatch.com/issues/gun060826c.htm>.

163. Press Release, D.C. Councilmember Muriel Bowser, Statement of Ward 4 Councilmember Muriel Bowser in response to United States Supreme Court Decision in *Heller v. District of Columbia* (June 26, 2008), <http://www.dcwatch.com/issues/gun080626f.htm>.

164. S.B. 17-843, 2008 Leg., 37th Sess. (D.C. 2008), available at <http://www.dccouncil.us/images/00001/20081210115303.pdf>.

wide-ranging bans on a variety of firearms that adds up to an all but complete handgun ban by 2011. As a civil rights litigator, I consider this guarantee of many years of litigation as a glass half-full, but please, don't blame the courts for taking an interest in vindicating constitutional rights in the face of a recalcitrant legislature.

Undoing political mischief aimed at subverting constitutional rights is the very business of the federal courts. By nature, civil rights litigation frequently aims at relentless, obstinate, and creative legislative behavior, demanding perseverance from advocates and courts alike. The courts' duty is to come back, time and again, and challenge every harebrained legislative device contrived to deny Americans their constitutional rights. Neither the bar nor bench may quit in the face of massive resistance simply because those who seek to extinguish constitutional rights have greater will. They do not.

Some complex litigation endeavors are not legislatively directed, but are unavoidable given the Constitution's text. For example, the Fourth Amendment clearly proscribes only those searches and seizures that are "unreasonable."¹⁶⁵ The language contemplates the hard reality that government agents will conduct searches and seizures, but also that courts will tell us which ones are reasonable. Few specifics in this field can be said to be textually mandated, yet the richness of daily human interaction guarantees endless permutations of searches and seizures, the reasonableness of which must be adjudicated.

Judge Wilkinson correctly advises that courts should not themselves needlessly embark upon complex litigation endeavors. And Judge Wilkinson is doubly correct to suggest that failure to adhere to the original meaning of constitutional text is to blame for many such needless adventures. But in such cases, the courts also fail in another important respect: They fail to exercise the judicial power to rein in out-of-control politicians wildly exceeding their constitutional authority, or trampling upon individual rights.

Consider the morass of campaign finance regulation. It should not take an originalist or textualist jurist more than one paragraph, citing to the First Amendment, to dispense with the Federal Elections Commission and all its roots and branches. Who is to blame for complex litigation endeavors figuring out exactly which laws and regulations "abridging the freedom of speech"¹⁶⁶ Congress may authorize with respect to politics? In the first instance, blame might exist with Congress and the President for ignoring the constitutional command, to be sure. In the second instance, the Supreme

165. U.S. CONST. amend. IV.

166. U.S. CONST. amend. I.

Court might be at fault, for deferring to the notion that Congress may make laws restricting purely political speech.¹⁶⁷ A healthy dose of judicial review would—and still should—terminate that legislative adventure.

Judge Wilkinson endorses a false dichotomy between what he views as policy choices, to be decided by legislatures, and constitutional decisions, said to be nonpolitical. Thus, in *Heller*, the Supreme Court entered a “political thicket,”¹⁶⁸ and there was no reason to do so where allegedly “no one ha[d] suggested that the political process [of firearms regulation was] not working exactly as it should.”¹⁶⁹

This is the central flaw in Judge Wilkinson’s “complexity” argument: the failure to recognize that the Constitution itself is a set of policy choices. Who should have the power to declare war? Should we have prohibition? What about a state church? The decisions on these subjects are reflected in our Constitution as a result of political processes, albeit those that in the Framers’ view endorse the ultimate popular sovereignty. Madison in *Federalist No. 10* rejected the notion that legislative work, in the end, was all that different from judging:

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine?¹⁷⁰

The Constitution is therefore designed to remove certain choices from the legislative sphere:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles

167. See, e.g., *McConnell v. FEC*, 540 U.S. 93 (2003) (upholding the constitutionality of the federal McCain-Feingold Act, which places restrictions on political donations and their solicitation, as well as campaign advertising); *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding the constitutionality of amendments to the Federal Election Campaign Act that set limits on campaign contributions).

168. Wilkinson, *supra* note 1, at 275.

169. *Id.* at 288 (quoting *District of Columbia v. Heller*, 128 S. Ct. 2783, 2846 n.39 (2008) (Stevens, J., dissenting)). This viewpoint ignores the voices of millions of Americans who believe the political process in this area failed by violating their Second Amendment rights.

170. THE FEDERALIST NO. 10, at 44 (James Madison) (George W. Carey & James McClellan eds., 2001).

to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.¹⁷¹

These political decisions to limit legislative powers are not conjured from thin air. They are based on the people's deepest beliefs and often, embittering experience. As Judge Learned Hand explained, "constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go *pari passu* with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past."¹⁷²

The Second Amendment is no different in this respect. There can be no doubt—neither our opponents in *Heller* nor the *Heller* dissents disputed—that the Framers were familiar with gun prohibition, having experienced it to their great displeasure at the hands of the English. The facts of early American antagonism toward British disarmament and criticism of European gun prohibition are not controversial. For example, celebrating "the advantage of being armed, which the Americans possess over the people of almost every other nation," Madison reflected in *Federalist No. 46* that "[n]otwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms."¹⁷³

Gun ownership was not just favored by the Framers as a means of checking state authority. The Framers were also familiar with the nanny-state "safety" logic of today's gun prohibitionists, criticized in Cesare Bonesana, Marquis Beccaria's landmark 1764 treatise *On Crimes and Punishments*.¹⁷⁴ John Adams cited Beccaria to open his argument at the Boston Massacre trial,¹⁷⁵ demonstrating an expectation that a Boston jury of the day would know the work. In a passage Jefferson copied into his *Commonplace Book* of wise excerpts from philosophers and poets, Beccaria decried the "False Utility" of laws that

disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code . . . will respect the less important and arbitrary ones, which can be violated with

171. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1942).

172. *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926).

173. THE FEDERALIST NO. 46, at 247 (James Madison) (George W. Carey & James McClellan eds, 2001).

174. CAESAR BONESANA, MARQUIS BECCARIA, AN ESSAY OF CRIME AND PUNISHMENTS, 101–02 (Richard Bellamy ed., Richard Davies, et al. trans., 1995) (1764).

175. John Adams, Adams Argument for the Defense, reprinted in 3 LEGAL PAPERS OF JOHN ADAMS 242 (L. Kinvin Wroth & Hiller B. Zobel eds. 1965).

ease and impunity, and which, if strictly obeyed, would put an end to personal liberty . . . Such laws make things worse for the assaulted and better for the assailants . . . [These] laws [are] not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree . . .¹⁷⁶

So we know the Framers were critical of gun prohibition efforts, suffered through oppressive gun prohibition they detested, and were exposed to all the familiar arguments about whether gun ownership tends to be a good or bad thing. Yet the Second Amendment was designed specifically to reflect and enforce the policy choice securing private firearms ownership.

Rejecting “better-late-than-never” as a jurisprudential approach, Judge Wilkinson wonders why “the Court had never acknowledged [the right to arms] in the more than two hundred years since the amendment’s enactment.”¹⁷⁷ Assuming the statement’s accuracy, the response is obvious. The Second Amendment reflected popular belief about the wisdom of gun regulations, not to mention long-prevailing views regarding Congress’s lack of a police power to regulate guns—hence the dearth of federal gun regulation for the courts to address.

Considering that gun regulation is a matter for the state police power, state courts were more likely to run into Second Amendment questions. And they did, occasionally striking down gun laws on Second Amendment grounds, starting as early as 1846.¹⁷⁸ The list of cases striking down all weapons laws on Second Amendment state constitutional analogs would be yet longer. So it is not as though the judicial enterprise of restricting legislative authority to regulate in this area was suddenly invented in *Heller*.

Nor is there reason to doubt the courts’ institutional capability to better enforce constitutional standards. The country is used to courts delving into the finer aspects of enforcing constitutional rights, among other complex tasks, and still we have judicial review. Recognizing the true talents necessary for political longevity—which are not Article III’s “good behavior” standards—should answer the shibboleth that the political branches should be deferred to by the courts on any matter where supposed technical expertise is required for better decisionmaking. And since the Constitution is nothing but a collection of policy choices, the expertise excuse could easily swallow the entire document.

176. BECCARIA, *supra* note 174, at 101.

177. Wilkinson, *supra* note 1, at 265.

178. See, e.g., *Nunn v. State*, 1 Ga. 243, 251 (1846) (striking down an 1837 act allowing the open carrying of weapons); *In re Brickey*, 70 P. 609 (Idaho 1902) (striking down a law involving the open carry of weapons).

It isn't hard to demonstrate the legislature's lack of expertise on the subjects about which it claims to most passionately care. Take gun control, for instance. Recall D.C. City Councilman Harry Thomas's proposed "Sense of the Council" resolution offered in *Heller's* wake. The resolution claimed that "[a]ccidental deaths by firearms rank in the top 10 of accidental deaths in our country," and "[a]pproximately 1,500 deaths per year result from the accidental use of a fire-arm. Of the 1500, 75% are young males between the age of 14 and 25"¹⁷⁹ But the latest government figures show that accidental deaths by firearms are not in the top ten causes of accidental deaths, and are responsible for only 789 such deaths, not 1500.¹⁸⁰ Of these 789 deaths, accidental fatality by gun for males aged 14–25 number 219 of the 789, or only 27.7 percent, not 75 percent.¹⁸¹ Fact checking is more likely to occur in an adversarial rather than a legislative process.

And in any event, Judge Wilkinson's statement that the right to arms had never before been acknowledged by the Supreme Court is not even accurate. The Supreme Court had long acknowledged the Second Amendment right to arms. For example, in *Scott v. Sanford*,¹⁸² the Court explained that among the rights of citizenship it would deny African-Americans were "the full liberty of speech in public and in private upon all subjects . . . to hold public meetings upon political affairs, and to keep and carry arms wherever they went."¹⁸³ And in *Johnson v. Eisentrager*,¹⁸⁴ the Supreme Court dismissed the idea "that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second"¹⁸⁵

Reviewing gun laws is a job assigned to the judiciary by the Framers. The judiciary has some experience in the field; here's to more of it, until recalcitrant politicians learn their lesson. Right or wrong, the policy to be enforced by the courts is reflected in the Constitution, which precludes enactment of contrary legislative policy beliefs no matter how fervently held.

179. Sense of the Council on Future Handgun Regulations Resolution of 2008, (D.C. 2008) available at <http://www.dccouncil.us/images/00001/20080716085012.pdf>.

180. U.S. DEP'T OF HEALTH & HUMAN SERVS., CTR. FOR DISEASE CONTROL, NATIONAL VITAL STATISTICS REPORTS DEATHS: FINAL DATA FOR 2005, at 42 tbl. 12, available at http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_10.pdf (last visited Dec. 31, 2008).

181. Nat'l Ctr. for Injury Prevention & Control, WISQARS Injury Mortality Reports, 1999–2005, http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html (last visited Dec. 31, 2008) (using tool).

182. 60 U.S. 393 (1857).

183. *Id.* at 417 (emphasis added).

184. 339 U.S. 763 (1950).

185. *Id.* at 784 (emphasis added).

VI. FEDERALISM

Whatever one thinks of *Heller*, no one disputes that the Second Amendment constrains federal authority, or that the *Heller* opinion was addressed to laws enacted pursuant to an assertion of congressional power. It is therefore quite odd that *Heller*, of all cases, would be criticized for violating principles of federalism. Yet that is just what Judge Wilkinson does, anticipating that Second Amendment rights will sooner rather than later be incorporated as against the states, and presenting this as contrary to conservative principles of federalism.

Assuming for the sake of argument that the incorporation of the Second Amendment is a terrible idea, what of it? Should the Court reject limits on federal authority merely because they might be incorporated improperly against the states in a subsequent decision? The federalism critique is inapposite and, in any event, premature.

Of course, Second Amendment incorporation, regardless of whether it is Judge Wilkinson's desired policy outcome, is the correct textualist and originalist outcome. It does not even require resort to the sometimes-detested, sometimes-salutary substantive aspects of the Fourteenth Amendment's Due Process Clause. This is because the Fourteenth Amendment's Privileges or Immunities Clause was originally intended and understood to incorporate the Bill of Rights—including, specifically, the Second Amendment—as against the states.

Unlike *Roe v. Wade*,¹⁸⁶ but as in *Heller*, let us consider the relevant constitutional text: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."¹⁸⁷ The opening command, "no state shall," directly copies from the prohibitory language of Article I, section 10, which limits states' powers. This is no accident. Interpreting the pre-Fourteenth Amendment Constitution in *Barron ex rel. Tiernan v. Mayor of Baltimore*,¹⁸⁸ the Supreme Court declined to incorporate the Bill of Rights, reasoning, "[h]ad the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention."¹⁸⁹ Fourteenth Amendment author Representative John Bingham

186. 410 U.S. 113 (1973).

187. U.S. CONST. amend. XIV, § 1, cl. 2.

188. 32 U.S. (7 Pet.) 243 (1833).

189. *Barron ex rel. Tiernan*, 32 U.S. (7 Pet.) at 250.

explicitly followed *Barron*, which he intended to have overruled, in copying the “no state shall” command of the original Constitution.¹⁹⁰

The subject of the relevant command—the “privileges and immunities”—included at a minimum the entire Bill of Rights. “Over and over [John Bingham] described the privileges-or-immunities clause as encompassing ‘the bill of rights’—a phrase he used more than a dozen times in a key speech”¹⁹¹ The Fourteenth Amendment’s Senate sponsor, Senator Jacob Howard, explained the Privileges or Immunities Clause’s incorporating scope:

To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal right guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech . . . [and] *the right to keep and to bear arms* The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.¹⁹²

As *Heller* noted, “With respect to the proposed [Fourteenth] Amendment, Senator Pomeroy described as one of the three ‘indispensable’ ‘safeguards of liberty . . . under the Constitution’ a man’s ‘right to bear arms for the defense of himself and family and his homestead.’”¹⁹³

This much should suffice for the “original intent” originalists of the *Heller* dissent. But the incorporating meaning of the Privileges or Immunities Clause was not restricted to the Fourteenth Amendment’s sponsors. It reflected the naturally understood public meaning of the text, as nobody disputed the Amendment would have such an impact, and indeed, the Amendment’s opponents feared that it would.¹⁹⁴ The Supreme Court wrongly interpreted the Privileges or Immunities Clause into oblivion in *The Slaughter-House Cases*,¹⁹⁵ but that decision is indefensible on originalist (indeed, on any) grounds.¹⁹⁶

190. Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 18–19 (2007).

191. AKHIL REED AMAR, *THE BILL OF RIGHTS* 182 (1998).

192. CONG. GLOBE, 39th Cong., 1st Sess. 2765–66 (1866) (emphasis added).

193. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2811 (2008) (citing CONG. GLOBE, 39th Cong., 1st Sess., 1182 (1866)).

194. See the discussion in Lawrence, *supra* note 190, at 22–27.

195. 83 U.S. (16 Wall.) 36, 73–74 (1873). In *The Slaughter-House Cases*, the Supreme Court held that only rights flowing out of United States citizenship are protected from state interference by the Privileges or Immunities Clause, such as the right to access the navigable waterways of the United States, or the right to diplomatic protection abroad. *Id.* at 79–80. There is no evidence that this was either the intent or original public meaning of the clause, and it is silly to suggest that violation of such rights prompted the Fourteenth Amendment or the Civil War that preceded it.

196. I will not here review the substantive due process arguments for incorporating the Second Amendment, although they are substantial and consistent with precedent. In arguing for incorporating

Nor are Judge Wilkinson's policy arguments against Second Amendment incorporation particularly convincing. These mostly boil down to the charge that incorporating the Second Amendment is especially bad because gun regulations are within the traditional police powers of the states.¹⁹⁷ But *all* rights, when incorporated, impact traditional state police powers. Take, for example, policing. The Fourth, Fifth, and Sixth Amendments all radically limit the powers of state officials to investigate, capture, and try criminals. The Eighth Amendment constrains what state officials might do with accused criminals when caught, and convicted criminals once convicted.

Judge Wilkinson's only allegedly federalism-based policy argument against a future incorporation decision is:

[T]he Second Amendment itself can be seen to embody federalist principles. Under this view, the Amendment was drafted as a means of protecting the sovereignty of the states by safeguarding the states' militias against federal disarmament.¹⁹⁸

Again, Judge Wilkinson gives himself away. This is not a neutral principle in action. This is simply acceptance of the city's interpretation of the Second Amendment. Of course, if the Second Amendment is only intended to secure the states some military autonomy against the federal government, rather than an individual right to keep and bear arms, the Supreme Court's rejection of the collectivist interpretation fails to respect principles of federalism. But this is outcome-based rationalization, not the deployment of interpretive principles. No judicial interpretive principle, held by conservatives or anyone else, holds that courts should transform provisions securing individual rights into federalist restrictions on federal authority *vis à vis* the states.

There exists no reason to treat the Second Amendment differently than other provisions of the Bill of Rights. For originalists and textualists applying the Fourteenth Amendment's language, the conclusion must then be the incorporation of the Second Amendment as against the states.

CONCLUSION

Modesty and humility are valuable judicial traits, so long as these are directed at the appropriate individuals: litigants, their advocates, fellow judges at all levels of the judicial hierarchy, court staff, and, indeed, the public

the Second Amendment as against the states, I litigate both the Privileges or Immunities and the Due Process Clause arguments.

197. Wilkinson, *supra* note 1, at 311–22.

198. *Id.* at 314.

at large. But with respect to the political branches, only politeness should suffice. Judges should remember that they alone are entrusted to “say what the law is,”¹⁹⁹ and to give practical effect to the Constitution. This is the original meaning of the Framers’ Constitution: to have courts, not politicians, secure our ultimate expressions of original sovereignty as written in a constitutional text.

They may be imperfect and occasionally err, but judges—including Judge Wilkinson—are the best we have. We do not provide them lifetime appointment and a constitutionally protected salary merely because they have distinguished themselves. We supply them these benefits because their distinction has earned them the solemn responsibility of safeguarding our rights. That job entails engaging the constitutional text seriously, and displaying a dose of the Framers’ healthy skepticism to products of mere political process. The Supreme Court, to its eternal credit, did just that in *Heller*.

199. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).