

THE SECOND AMENDMENT, *HELLER*,  
AND ORIGINALIST JURISPRUDENCE

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*District of Columbia v. Heller gave the Supreme Court an opportunity to apply a jurisprudence of original meaning to the Second Amendment's manifestly puzzling text. Notwithstanding the Chief Justice's decision to assign the majority opinion to Justice Scalia, the Court squandered the opportunity.*

*In a narrow sense, the Constitution was vindicated in Heller because the Court reached an easily defensible originalist result. But the Court's reasoning is at critical points so defective—and so transparently non-originalist in some respects—that Heller should be seen as an embarrassment for those who joined the majority opinion. It may also be widely (though unfairly) seen as an embarrassment for the interpretive approach that the Court purported to employ. Originalism deserved better from its judicial exponents.*

INTRODUCTION.....	1344
I. ORIGINAL MEANING JURISPRUDENCE, IN BRIEF.....	1346
II. THE THRESHOLD DISPUTE IN <i>HELLER</i> , IN BRIEF.....	1348
III. THE PURPOSE OF THE PREFACE.....	1349
IV. THE PREEXISTING RIGHT.....	1352
V. ACTIVIST DICTA.....	1356
A. Potential Abusers.....	1356
B. Gun Free Zones.....	1358
C. Commercial Transactions.....	1359
D. Concealed Carry.....	1359
E. Dangerous and Unusual Weapons.....	1362
VI. WHAT MIGHT A GENUINELY ORIGINALIST COURT HAVE DONE?.....	1368

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## INTRODUCTION

*District of Columbia v. Heller*<sup>1</sup> was a Second Amendment test case, brought by a group of libertarian lawyers on behalf of plaintiffs with respectable backgrounds and appealing reasons for seeking relief from the District of Columbia's extremely restrictive gun control regulations. The challenged statute prohibited almost all D.C. residents from possessing handguns, and required that all firearms be kept in an inoperable condition. This effort to disarm the citizenry had been in place for over thirty years, and was the most restrictive gun control law in the country. By a vote of 5–4, the Court held that both the handgun ban and the safe-storage regulation violated the Second Amendment, which protects at least the right to keep a handgun in one's own home and to make it operable for purposes of immediate self defense.

*Heller* turned out to be a test case in a different sense as well. With almost no relevant precedent to constrain its analysis, the Supreme Court had the opportunity to apply a jurisprudence of original meaning to the Second Amendment's manifestly puzzling text. The Chief Justice seized this opportunity when he assigned the majority opinion to Justice Scalia.

In recent decades, Antonin Scalia and other legal conservatives have used the principles of originalism as a powerful weapon for criticizing decisions that effectively amended the Constitution through judicial fiat.<sup>2</sup> But this has provoked counterattacks alleging that originalism gets deployed primarily as a weapon for selectively attacking decisions that political conservatives find objectionable on policy grounds.<sup>3</sup> This raises an important

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1. 128 S. Ct. 2783 (2008).

2. One response to these critiques has been that such judicial amendments are justified by the good results they produce. See, e.g., CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 73 (2005). I deny that judges are authorized to amend the Constitution, whether or not they are right to think an amendment is needed. Nor is it clear that judges can be expected to make amendments that are on the whole beneficial. See, e.g., John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J.L. & PUB. POL'Y 917 (2008).

3. See, e.g., Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 385 (2000) ("Justice Scalia uses [original meaning jurisprudence] selectively when it leads to the conservative results he wants, but ignores [it] when it does not generate the outcomes he desires."); Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 89 (1997) ("Scalia prefers a Constitution that authorizes the judiciary to protect certain libertarian rights."); Gene R. Nichol, *Justice Scalia and the Printz Case: The Trials of an Occasional Originalist*, 70 U. COLO. L. REV. 953, 968 (1999) ("[Originalism's] principal advocates relentlessly refuse to stick by it. Originalism works if they agree with the outcome dictated by history. If history does not lead them where they want to go, they simply reject it."); see also David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1423 (1999) ("Occasionally reaching 'liberal' results such as [invalidating bans on flag

question: Can originalism truly offer a principled alternative to “living constitutionalism”—one that constrains judicial willfulness and preserves the distinction between law and politics?

In *Heller*, the lawyers who initiated the litigation won their test case, but Justice Scalia flunked his own test. This was a near perfect opportunity for the Court to demonstrate that original meaning jurisprudence is not just “living constitutionalism for conservatives,” and it would have been perfectly feasible to provide that demonstration. Instead, Justice Scalia’s majority opinion makes a great show of being committed to the Constitution’s original meaning, but fails to carry through on that commitment.

I should note at the outset that I will give the *Heller* majority opinion the respect that I think it is due by treating it as what it purports to be, namely a legal opinion that presents the reasons for the decision. Accordingly, I will not speculate about compromises that the Justices may have reached among themselves in order to achieve consensus. For all I know, some of them may have said to themselves, in the manner of a U.S. Senator, “I’m joining this opinion, although it contains elements with which I disagree, because the good outweighs the bad.” But none of them said so publicly. Nor did any member of the *Heller* majority follow the common practice of writing a separate opinion concurring in part and concurring in the judgment. Justice Scalia’s opinion is presented as a reasoned interpretation of the law by a court, not as a political compromise, and I will leave others to speculate about logrolling and secret deals.

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In a narrow sense, the Constitution was vindicated in *Heller* because the Court reached an easily defensible originalist result. But the Court’s reasoning is at critical points so defective—and in some respects so transparently non-originalist—that *Heller* should be seen as an embarrassment for those who joined the majority opinion. It may also be widely (though unfairly) seen as an embarrassment for the interpretive approach that the Court purported to employ. Originalism deserved better from its judicial exponents.

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burning] has proven very useful to Scalia. He holds up the contrarian cases as proof that his methodology is politically neutral and constrains judicial discretion.”).

## I. ORIGINAL MEANING JURISPRUDENCE, IN BRIEF

All nine members of the *Heller* Court began by accepting the foundation of originalist theory: The Constitution is a written document that was publicly adopted as law, and it therefore means what its words meant to the relevant public audience at the time of its adoption. Originalist jurisprudence is the effort to use this interpretive principle to decide particular questions about what the Constitution requires and forbids.

On a large range of issues, almost everybody assumes that originalism is the proper way for courts to decide cases. Nobody claims, for example, that the minimum-age requirements for the President and Members of Congress should be measured by a base fifteen numbering system, even though this interpretation of the Constitution would have the salutary effect of keeping some immature people out of office; nor does anyone claim that a base nine system should be applied to the voting-age rule in the Twenty-Sixth Amendment, even though that would enable many mature and responsible teenagers to exercise the franchise. Similarly, nobody contends that the term “domestic violence” in Article IV refers to the infliction of physical injury on a member of one’s household, even though that is the way the term is most often used today. And nobody thinks that the term “arms” in the Second Amendment should be interpreted to mean the upper limbs of the human body, even though that would forestall legal challenges to gun control regulations that are strongly favored by many as a matter of social policy.

The serious challenges for originalism involve questions about its limits as a tool for adjudication.<sup>4</sup> Three main difficulties arise. First, it is sometimes hard to find adequate objective evidence of how the Constitution’s text would have been understood by the relevant audience at the time of adoption. Second, it is sometimes difficult to know how the commands in the text should be applied, consistent with its original meaning, to particular circumstances that the enacting public did not consider, and often could not have foreseen. Third, courts will inevitably make some decisions based on mistaken interpretations of the Constitution, and later courts will have to decide how much deference to give these precedents.

The last of these difficulties is something of a confounding variable inasmuch as it does not bear directly on the original meaning of most constitutional provisions. Originalists could logically argue that precedents should

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4. Recent decades have seen an outpouring of scholarly debate about the merits of various versions of originalism and non-originalism. A review of that debate is beyond the scope of this Article.

be given no weight at all: The Constitution is the law, indeed the supreme law of the land, and courts are always obliged to enforce the Constitution as they understand it rather than adhere to prior judicial mistakes. Some academic commentators have taken this position,<sup>5</sup> but no Supreme Court Justice has ever done so (at least not consistently), and there is strong evidence that the Vesting Clause of Article III implicitly incorporated a principle of *stare decisis*.<sup>6</sup>

That principle, however, does not absolutely forbid the overruling of prior decisions, and there has always been room for reasonable debate about the weight to be given to erroneous or questionable precedents in various circumstances.<sup>7</sup> One reason for regarding *Heller* as a particularly important test of originalism is that there were virtually no relevant Supreme Court precedents, and certainly none that could be considered dispositive.

With respect to the other two challenges for originalists, *Heller* was a good test case because the Second Amendment poses some genuine puzzles. Its text, for example, uniquely combines an explanatory preface and a command: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” What does the preambular reference to the importance of a “well regulated Militia” have to do with the “right of the people” to keep and bear arms? One usually thinks of constitutional rights as obstacles, not spurs, to regulation, and it is not immediately evident (at least to typical twenty-first century readers) why or how this right to arms would contribute to the establishment or preservation of a well regulated militia.

A different kind of puzzle arises from changes in the circumstances to which the constitutional provision must be applied. American society is dramatically different from the world in which the Second Amendment was

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5. See, e.g., Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).

6. See, e.g., THE FEDERALIST NO. 37, at 269 (James Madison) (Benjamin Fletcher Wright ed., 1961) (“All new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”); THE FEDERALIST NO. 78, at 496 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (“To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.”).

7. This need not lead to the conclusion that *stare decisis* is inconsistent with originalism or that originalists necessarily deploy *stare decisis* opportunistically, as a rhetorical device to defend decisions reached on other grounds. For somewhat different efforts to articulate an originalist theory of *stare decisis*, see, for example, Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001), and John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent* (Dec. 1, 2008) (unpublished manuscript, on file with author).

adopted. The militia organizations extolled by the founding generation have fallen into desuetude, and advances in the technology of weaponry have produced arms that are far more dangerous than those available in the founding era. Is it even possible, let alone prudent, to apply the Second Amendment's command to a modern society in which it could have radically different effects than would have been expected in 1791?

## II. THE THRESHOLD DISPUTE IN *HELLER*, IN BRIEF

The great threshold question when interpreting the Second Amendment concerns the relationship between the prefatory, or preambular, phrase and the operative clause. Different interpretations of this relationship have generated two opposing conclusions about the meaning of the text. Those who focus on the operative clause argue that the protected right is that of individual citizens to keep and bear their privately owned weapons. Those who focus on the Amendment's preamble argue that the protected right is the right of state governments to maintain military organizations, or at most a right of individuals to keep and bear arms while serving in such organizations. In *Heller*, Justice Scalia's majority opinion adopts the individual, or private-right, interpretation, while Justice Stevens' dissent adopts the collective-right, or military-service, interpretation.<sup>8</sup>

Reduced to the simplest possible summary, Justice Scalia's argument is as follows. The term "the right of the people" in the operative clause presumptively implies a private right, just as it does in the First and Fourth Amendments. The other key terms used in the operative clause—"keep and bear Arms"—were frequently used in nonmilitary contexts, so the operative clause does not imply that the right to arms is confined to military purposes. The right to keep and bear arms, moreover, was already well established before the Bill of Rights was adopted, and had never been restricted to military activities. The Second Amendment's preface, according to Justice Scalia, explains why this preexisting right was codified in the Constitution, but does not change the nature of the right that was thus codified.

Stripped to similarly concise essentials, Justice Stevens's argument is that the Second Amendment's operative clause strongly suggests a military

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8. Ordinarily, the Stevens position is called the collective- or states'-right interpretation. He rejects this label in the first paragraph of his dissent, agreeing that individuals have legal standing to vindicate the right. The insignificance of the label is shown by Justice Stevens' description of this nominally individual right as "the right of the people of each of the several States to maintain a well-regulated militia." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2822 (2008) (Stevens, J., dissenting).

purpose, especially through its use of the term “bear arms,” and certainly does not unequivocally identify an individual right to have and use weapons for such private purposes as self defense. The exclusively military purpose of the Amendment is confirmed, according to Justice Stevens, by the prefatory phrase and the legislative history, which together establish that the Second Amendment was meant to protect only “the right of the people of each of the several States to maintain a well-regulated militia.”<sup>9</sup>

Taken as a whole, Justice Scalia’s originalist arguments in favor of the private-right interpretation are overwhelmingly more powerful than Justice Stevens’ originalist arguments in favor of the military-service interpretation. I do not agree with all of the arguments that Justice Scalia advances, and he omits some arguments that I think would have strengthened his case. I also think that Justice Stevens could have made a better argument than he did for upholding the challenged regulations. But none of this detracts from the utterly one-sided character of the dispute. In order to keep this Article to a reasonable length, I will refrain from a detailed analysis of the arguments and counterarguments in the *Heller* opinions on this point, many of which I have discussed elsewhere.<sup>10</sup> In light of the criticisms that I will make below, however, I want to state as emphatically as I can that Justice Scalia’s important threshold conclusion is correct on originalist grounds: The Second Amendment does protect a private right to keep and bear arms for the purpose of self defense.

### III. THE PURPOSE OF THE PREFACE

The strongest parts of Justice Scalia’s opinion are those in which he analyzes the language of the Second Amendment’s operative clause and reviews the historical evidence showing that this language was originally understood to protect an individual, private right to keep and bear arms. But very little of that evidence speaks to the scope of the right, and Justice Scalia properly assumes that the right cannot possibly be unlimited.<sup>11</sup> So where do we look for the limits? One obvious place to look is the prefatory phrase, if for no other reason than that this phrase and the operative clause must be interpreted so as to form a consistent whole, as Justice Scalia acknowledges.

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9. *Id.*

10. The arguments and evidence that I have advanced in support of the conclusion reached by Justice Scalia are summarized in Nelson Lund, *D.C.’s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 GEO. MASON U. CIV. RTS. L.J. 229 (2008), and set forth in more detail in the articles cited therein at page 229, note \*.

11. See *Heller*, 128 S. Ct. at 2799.

Justice Scalia's effort to reconcile the two different statements in the text of the Second Amendment begins with his assertion that the language of the operative clause implies that it protects a preexisting right.<sup>12</sup> As a matter of linguistic analysis, this is fallacious. One could write a constitutional amendment, for example, that said, "The right to travel to Cuba shall not be infringed" or "The right to medical care at government expense shall not be infringed." Such language does not imply the preexistence of a right to travel to Cuba or a right to free medical care. Of course, there certainly was a preexisting right to keep and bear arms in 1791, and the Second Amendment can be read as referring to that right. But must it be so read?

Not if you interpret the Second Amendment's prefatory phrase as defining the purpose and therefore the scope of the right. In that case, you might conclude that the right to arms is protected only to the extent that it contributes to the maintenance of a well regulated militia. In order to invalidate the D.C. gun regulations, you would then have to show that the regulations are inconsistent with maintaining a well regulated militia, which would not be easy to do. Justice Scalia tries to avoid this challenge by asserting that the Second Amendment's preface tells us nothing about the scope or purpose of the right to bear arms, but merely explains why the right was codified in the Constitution.<sup>13</sup> This may be the best reading of the text, as I think it is, but Justice Scalia merely asserts his conclusion.<sup>14</sup>

Justice Scalia's explanation of the purpose of the codification, moreover, makes no sense. He asserts that "the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia."<sup>15</sup> This is false. The text of the Second Amendment refers to "a well regulated militia," not to "the militia." It is self evident that these are not synonymous terms, and Justice Scalia himself acknowledges as much when he distinguishes between an organized and an unorganized militia.<sup>16</sup> Building on his erroneous conflation of "a well regulated militia" and "the militia," Justice Scalia claims that the original Constitution and the Second Amendment both assume that "the militia" is already in existence, and that it means "all able-bodied men."<sup>17</sup> This is not exactly wrong,<sup>18</sup> but it

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12. *Id.* at 2797 ("The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'").

13. *Id.* at 2801 (stating that the Second Amendment's prefatory phrase "can only show that self-defense had little to do with the right's codification; it was the *central component* of the right itself").

14. For an argument supporting this conclusion, see Lund, *supra* note 10, at 236-45.

15. *Heller*, 128 S. Ct. at 2801.

16. *Id.* at 2800 ("Although the militia consists of all able-bodied men, the federally organized militia may consist of a subset of them.").

17. *See id.* at 2799-2800.

makes nonsense of Justice Scalia's claim that the purpose of codifying the right to arms was to prevent "elimination of the militia." The nation's able-bodied men would not be eliminated if the government were to disarm them or anyone else.<sup>19</sup>

Justice Scalia never even addresses the most difficult, and therefore the most important question: How could codifying the right to arms have been expected to preserve, promote, or prevent the elimination of a *well regulated*

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18. The text of the Constitution does appear to assume that there will be a militia that can be called upon when needed. It is also true that there was considerable sentiment at the time of the founding favoring a militia comprising most able-bodied men, and it is true that the preexisting state militia laws of the time generally assigned militia duties accordingly. Beginning only a year after the adoption of the Second Amendment, however, Congress assumed that Article I gave it the authority to exempt many able-bodied men from militia duties. See Act of May 8, 1792, ch. 33, 1 Stat. 271. Moreover, Congress has now included some women in the militia. See 10 U.S.C. § 311 (2006). Whatever truth there may be in the proposition, both abstract and imprecise, that the Constitution assumed the existence of a militia consisting of all able-bodied men, the Constitution also gave Congress virtually plenary authority to define the militia differently for all practical purposes. U.S. CONST. art. I, § 8, cl. 16.

The imprecision of Justice Scalia's definition is illustrated by the founding-era sources that he cites in its support. See *Heller*, 128 S. Ct. at 2799. One of the cited sources, a quote from a letter that Thomas Jefferson wrote in 1811, says just what Justice Scalia says: "[T]he militia of the State, that is to say, of every man in it able to bear arms." *Id.* (citing Letter From Thomas Jefferson to Destutt de Tracy (Jan. 26, 1811), in *THE PORTABLE THOMAS JEFFERSON* 520, 524 (Merrill D. Peterson ed., 1975)).

Justice Scalia also offers a Madison quotation from the *Federalist Papers*: "near half a million of citizens with arms in their hands." *Id.* (citing *THE FEDERALIST* NO. 46, *supra* note 6, at 334). This, however, is not a definition at all, but a description of the militia as it then existed and was organized, as the context clearly indicates. Madison is claiming that oppression by federal armies is little to be feared because they would be opposed by "a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves . . . and conducted by governments possessing their affections and confidence." *THE FEDERALIST* NO. 46, *supra* note 6, at 334.

The third source, Webster's 1828 dictionary, gives a definition that on its face is significantly different from Justice Scalia's: "the able bodied men organized into companies, regiments and brigades . . . and required by law to attend military exercises on certain days only, but at other times left to pursue their usual occupations." 2 *NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* 15 (New York, S. Converse 1828). This last definition, moreover, is the most relevant because it is a deliberate effort by a lexicographer to capture the generally accepted usage of the term.

Thus, while it is widely agreed that the militia should, and at that time did, include most able-bodied men, it is at best misleading to say that "the militia" means "all able-bodied men."

19. One might try to save Justice Scalia's opinion from absurdity by interpreting it to mean that the right to arms was codified in the Constitution in order to prevent the elimination of a "self-armed militia." But that is not what he says, and more importantly it is not what the Constitution says. The constitutional text refers to a "well regulated Militia," which does not necessarily mean "all able bodied men owning and/or bearing their privately-owned arms." Justice Scalia's only comment on this part of the constitutional text is his assertion that "the adjective 'well-regulated' implies nothing more than the imposition of proper discipline and training." *Heller*, 128 S. Ct. at 2800 (citations omitted). This is accurate enough, but it simply makes more conspicuous Justice Scalia's complete failure to explain how the codification of a private right to arms could contribute to the preservation of a *well regulated* militia.

militia? I believe there is a perfectly good answer to this question,<sup>20</sup> but no answer of any kind will be found in Justice Scalia's *Heller* opinion. And that is a very, very serious shortcoming in a judicial opinion that purports to rely as heavily as *Heller* does on textual analysis and originalist interpretive principles.

#### IV. THE PREEXISTING RIGHT

Let us assume, for the sake of argument, that Justice Scalia is right to say that the Second Amendment's preface means that the right to arms was codified in order to prevent the elimination of the militia. That does not by itself help decide the case that was before the Court. A handgun ban, let alone a handgun ban that applies only in D.C., would plainly not eliminate the militia. Even more plainly, D.C.'s safe-storage law for rifles and shotguns would not eliminate the militia, or even interfere with the ability of able-bodied men to perform militia duties. Justice Scalia tries to solve this problem by arguing that the purpose for which the right to arms was codified is completely irrelevant in determining the scope of the right. Rather, the scope or content of the constitutional right is the scope or content of the preexisting right that the Constitution codified, and modern laws that infringe that historically determinate right are unconstitutional.

Even if Justice Scalia failed to present good reasons for treating the Second Amendment's preamble as irrelevant in defining the scope of the protected right, his decision to do so could still be right, as I believe it was.<sup>21</sup> And the next step in his analysis looks like the purest and most faithful kind of originalism. All we need to do is check the historical sources to find out what the preexisting right was, much as Justice Scalia ably checked the historical sources to determine the meaning of various words and phrases used in the constitutional text. If a modern gun control statute would have infringed the historically identified preexisting right, it is unconstitutional, period.

That approach promises to eliminate the need for policy-driven interest balancing and easily manipulated multi-factor tests, and it rules out flighty living constitutionalizing. As Justice Scalia puts it:

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20. Stated as concisely as possible: A well regulated militia is one that is, among other things, *not inappropriately regulated*. The codification of the people's right to keep and bear arms in the Constitution served to prevent Congress from using its Article I authority to adopt inappropriate militia regulations that infringed on that right. For more detailed presentations of the arguments leading to this conclusion, see Brief of the Second Amendment Foundation as Amicus Curiae Supporting Respondent at 6–28, *Heller*, 128 S. Ct. 2783 (2008) (No. 07-290); Lund, *supra* note 10, at 235–45; Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 20–26 (1996).

21. I have explained why I think this conclusion is correct in the sources cited *supra* note 20.

Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. . . . Like the First, [the Second Amendment] is the very *product* of an interest-balancing by the people—which Justice Breyer would now conduct for them anew.<sup>22</sup>

This passage is almost enough to make an originalist stand up and cheer. But perhaps the cheering should be postponed until we examine how Justice Scalia's historical approach resolves the case before the Court. His discussion has two main elements. First, he makes a good historical case that the preexisting right to arms was considered important because it protected the ability of people to exercise their natural right of self defense. That natural right extends both to the people's right to oppose tyrannical governments and to the right of individuals to respond with force against threats from which the government fails to protect them, such as violent criminals. Second, Justice Scalia shows that none of the statutory limitations on the right to arms prior to 1791, of which there are not many examples, was remotely as restrictive as the D.C. statutes at issue in *Heller*.<sup>23</sup>

Because Justice Scalia successfully demonstrated that self defense was the purpose of the preexisting right, D.C.'s safe-storage regulation presented an easy case. A requirement that all firearms be disabled at all times constitutes an almost complete deprivation of the right to have firearms for self defense, and is therefore clearly unconstitutional.<sup>24</sup> But what about the handgun ban? Evaluating that regulation requires a more precise description of the scope of the preexisting right.

The most obviously originalist approach would ask what kind of gun regulations were accepted, or acceptable, in the late eighteenth century. These would include, presumably, those that were actually adopted (at least if they were widespread and noncontroversial) and those that would have been permissible according to well accepted legal principles at the time. But how

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22. *Heller*, 128 S. Ct. at 2821. Justice Breyer's opinion, joined by all four of the *Heller* dissenters, assumes for the sake of argument that the Second Amendment protects an individual right to have weapons for self defense. See *id.* at 2847 (Breyer, J., dissenting). Justice Breyer then balances the individual's interest in self defense against the government's interest in public safety, and concludes that D.C.'s regulations should be upheld. See *id.* at 2854–70 (Breyer, J., dissenting).

23. See *id.* at 2819–20 (majority opinion).

24. Even a court that was extremely deferential to the legislature recognized that this kind of regulation would go too far. See *State v. Reid*, 1 Ala. 612, 616–17 (1840) (“A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.”).

can we determine which laws that were never even considered would have been acceptable if they had been proposed?

One possibility, easily ruled out, is that the scope of the Second Amendment is coextensive with the constitutional right enshrined in the English Bill of Rights.<sup>25</sup> That right was expressly subject to abridgement by the legislature, and it belonged by its terms only to Protestants.<sup>26</sup>

A somewhat more plausible alternative might be the preexisting right that Americans enjoyed under their state constitutions. But most state constitutions did not include right-to-arms provisions.<sup>27</sup> And in the states that did have such constitutional provisions, how could we now determine the scope of the right they protected? The paucity of eighteenth century gun control laws might have reflected a lack of political demand rather than constitutional limitations. Since American legislatures had enacted scarcely any gun control statutes, there was little reason to wonder how far they could constitutionally go in restricting access to firearms, let alone reason for anyone to determine those limits with the legal precision needed to assess specific modern regulations like the D.C. handgun ban.

The remaining historical source that might define the scope of the preexisting right to arms is the common law as it was understood at the time, and as it had been modified by statutes before 1791. If the scope of the preexisting right to arms is to be determined solely by an historical inquiry, this is the most plausible place to look. The Second Amendment might have incorporated that law, much as the Seventh Amendment has been held to have “frozen” the law/equity distinction as it existed in 1791.<sup>28</sup> Modern gun control regulations would then be upheld only if they had close analogues in identifiable common law or statutory restrictions in place at that time, just as

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25. The English Bill of Rights provided that “the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law.” Bill of Rights, 1 W. & M., 2d Sess., c. 2 (1689) (Eng.).

26. Americans would have been familiar with the English constitutional right primarily through Blackstone’s description of it:

[T]hat of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the [English Bill of Rights] and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

WILLIAM BLACKSTONE, 1 COMMENTARIES \*143–44. Although this passage might be read as a hint that the constitutional right was broader than the one described in the English Bill of Rights, it need not be so read. Even if there is such a hint, the passage does not indicate how or how much any such broader right might have differed from the right as it was described in 1689.

27. Only four of the fourteen states in the Union in 1791 had right-to-arms provisions in their constitutions: Massachusetts, North Carolina, Pennsylvania, and Vermont. See *Heller*, 128 S. Ct. at 2802–03.

28. See, e.g., *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996).

modern causes of action are covered by the Seventh Amendment only if they are more like cases that in 1791 would have been tried at law rather than in equity.<sup>29</sup>

Whatever the merits of this line of analysis (to which I will return below), the *Heller* Court did not conduct this historical inquiry, or any other, in evaluating D.C.'s handgun ban. Instead, Justice Scalia announced the following conclusion:

The handgun ban amounts to a prohibition of an entire class of “arms” that is overwhelmingly chosen by American society for that lawful purpose [*viz.* self defense]. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,” would fail constitutional muster.

....

It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns *are* the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.<sup>30</sup>

This does not even purport to be an historical analysis. It consists entirely of a report (or supposition) about what arms Americans *today* prefer to keep for self defense, along with a few of the reasons that may make these preferences sensible. Is this a form of living constitutionalism, in which the scope of a constitutional right is defined largely by judicial perceptions of current social mores? Or is it the result of a covertly Breyer-esque judicial interest balancing, in which the Court has concluded that Americans should be allowed to keep handguns because their advantages over long guns outweigh their disadvantages? Whatever it is, this is not the result of an historical

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29. See, e.g., *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989).

30. *Heller*, 128 S. Ct. at 2817–18 (footnote and citation to opinion of the court below omitted) (emphasis added).

study of the scope of the preexisting eighteenth-century right to arms. And if Justice Scalia's explanation of the Court's handgun holding rests on any kind of originalist analysis at all, it is pretty well disguised.

## V. ACTIVIST DICTA

Originalism can face some tough challenges in resolving specific cases. If tough challenges can only be met with a quick and unacknowledged transition to living constitutionalism, or with a self-confident *ipse dixit*, this approach to constitutional adjudication deserves much of the scorn it has received from sophisticated academic critics.

Had Justice Scalia's *Heller* opinion done no more than feed these critics with its insouciant analysis of the D.C. handgun ban, that would be bad enough. Unfortunately, the Court compounded this sin with an astounding series of dubious obiter dicta pronouncing on the constitutionality of a wide range of gun control regulations that were not before the Court. Justice Scalia seems to promise an "exhaustive historical analysis" supporting these conclusions in future cases.<sup>31</sup> If that turns out to be anything like the analysis he used in ruling on the D.C. handgun ban, it will not be exhaustive and it will not be historical. In any event, one should not hold one's breath while waiting for these cases—lower courts routinely treat Supreme Court dicta as though they were holdings, and the Court routinely declines to review such decisions.

Because the *Heller* dicta will likely be treated as law for all practical purposes, it is worth asking how much basis they have in the original meaning of the Second Amendment. These dicta, moreover, throw some revealing light on Justice Scalia's failure to present an historical or originalist argument for striking down the D.C. handgun ban.

### A. Potential Abusers

"[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . ."<sup>32</sup> This certainly sounds unobjectionable, at least at first. But how

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31. *Id.* at 2816–17.

32. *Id.* In a footnote to the sentence containing this dictum and the dicta about sensitive places and commercial sales discussed below, the Court says, "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 2817 n.26. The Court does not say how strong the presumption is, but the opinion later refers to these restrictions as "regulations of the right that we describe as permissible," and calls them "the exceptions we have mentioned." *Id.* at 2821. And, at the very end of the opinion, the Court flatly declares: "The Constitution leaves the District of Columbia a variety of tools for combating [the

“longstanding” are these prohibitions? Justice Scalia either doesn’t know, or chose not to tell us. Apparently, however, the first general ban on the possession of firearms by felons was enacted in 1968.<sup>33</sup> Longstanding? This was 177 years after the adoption of the Second Amendment, and less than a decade before the D.C. handgun ban was enacted.

Aside from the absence of historical support for the claim that such prohibitions are consistent with the preexisting right to arms, they are inconsistent with what Justice Scalia himself calls its “core,” namely self defense.<sup>34</sup> On what understanding of that core does it make any sense to leave American citizens defenseless in their own homes for the rest of their lives on the basis of nothing more than a nonviolent felony like tax evasion or insider trading? It would make more sense to say that the government may *silence* these felons for the rest of their lives—regulatory crimes, after all, usually involve an abuse of speech, such as making false statements to the government or negotiating contracts that the government forbids. Such regulatory crimes have nothing at all to do with violence or the use of firearms.

It might have been possible for the *Heller* Court to elaborate a plausible historical analysis addressing the issue that Justice Scalia gratuitously raised. C. Kevin Marshall, for example, has examined the history of regulations restricting access to weapons by those convicted of crimes, both before and after the Bill of Rights was adopted. While acknowledging that this history cannot solve all line-drawing problems, Mr. Marshall makes a powerful case that the traditional understanding of the right to arms did not authorize much more than laws forbidding those convicted of *crimes of violence* to carry firearms *outside* their homes, and possibly also forbidding them to possess easily concealable weapons, at least for as long as the offender continued to present a credible threat of recidivism.<sup>35</sup>

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problem of handgun violence], including some measures regulating handguns . . .” *Id.* at 2822 (citing the page on which the Court had earlier endorsed the three Second Amendment exceptions). All of this suggests that the presumption is very strong indeed, if it can be overcome at all.

33. See C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 698–99, 735 (2009). Even limited bans on the possession of concealable weapons by violent felons were apparently not adopted until well into the twentieth century. See *id.* at 707–08.

It might be possible to interpret the sentence from *Heller* quoted in the text to refer only to those felon-in-possession laws that are in fact “longstanding,” and perhaps a court determined to read the dictum narrowly might adopt such an interpretation. That is, however, a highly unnatural reading of the sentence, and such a court would still be left to wonder how long a particular felon-in-possession law has to have been in existence to be “longstanding.”

34. *Heller*, 128 S. Ct. at 2818.

35. See Marshall, *supra* note 33, at 728–35.

Imputing this understanding of the right to the Second Amendment might not be unreasonable, but Justice Scalia's casual and sweeping dictum is a very long way from Mr. Marshall's analysis, both in method and in result.<sup>36</sup>

#### B. Gun Free Zones

*Heller* next endorses prohibitions on “the carrying of firearms in sensitive places such as schools and government buildings.”<sup>37</sup> Were Americans forbidden to carry firearms in schools and government buildings prior to 1791? Justice Scalia does not even pretend to make such a claim. Nor does he explain what makes these places “sensitive,” or how courts are supposed to go about determining the scope of this newly announced exception to the right to arms. Is a university campus more “sensitive” than a shopping mall across the street? Is a government-owned cabin in a national forest more “sensitive” than a public road or a privately owned hotel? Why or why not? Did the whole city of New Orleans become a “sensitive” place after Hurricane Katrina, thus justifying the government in forcibly disarming law-abiding citizens whom the government was unable to protect from roving bands of criminals?<sup>38</sup>

Maybe this dictum about sensitive places simply means that judges will decide whether the costs of allowing citizens to take their guns to certain places exceed the benefits. If so, it is not easy to see the difference between this approach and the Breyer analysis that Justice Scalia ridicules with the following observation: “The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.”<sup>39</sup> Well, there is one difference between Justice Scalia’s approach and Justice Breyer’s: Justice Breyer goes to the trouble of actually conducting a cost/benefit analysis.

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36. Unlike Justice Scalia, Mr. Marshall provides a great deal of historical evidence to support his conclusions. The result of his analysis of the evidence is that Justice Scalia’s broad endorsement of bans on firearms possession by all felons is unsupported. *Id.* at 696–98.

37. *Heller*, 128 S. Ct. at 2816–17.

38. See generally Stephen P. Halbrook, “Only Law Enforcement Will Be Allowed to Have Guns”: Hurricane Katrina and the New Orleans Firearm Confiscations, 18 GEO. MASON U. CIV. RTS. L.J. 339 (2008).

39. *Heller*, 128 S. Ct. at 2821.

### C. Commercial Transactions

The *Heller* majority next endorses “laws imposing conditions and qualifications on the commercial sale of arms.”<sup>40</sup> Once again, Justice Scalia presents no historical evidence about the nature or even existence of pre-1791 commercial regulations. Nor does he suggest any limit on the government’s power to impose “conditions and qualifications” on these commercial transactions. For all we are told here, Congress could place a prohibitively high tax on the sale of firearms, or create burdensome regulatory obstacles that would make it impractical for a commercial market to exist. If the Court means that it would approve only reasonable conditions and qualifications, it failed to say so, and it suggested no criteria by which reasonable restrictions could be distinguished from unreasonable restrictions.

### D. Concealed Carry

The Court introduces the three Second Amendment exceptions just discussed with the unimpeachable observation that the right protected by the Second Amendment is not unlimited, and with the historical claim that “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”<sup>41</sup> This appears to be an endorsement of yet another exception to the constitutional right.

Justice Scalia provides no evidence of any such prohibitions prior to 1791, and the nineteenth-century cases do not provide direct evidence of the scope of the preexisting right. Nor does Justice Scalia explain why or to what extent judicial decisions under state analogues of the Second Amendment would be relevant to the original meaning of the Second Amendment. Nor does he provide arguments to support his apparent assumption that the majority of nineteenth-century state cases were correctly decided.

Perhaps the “exhaustive historical analysis” alluded to by Justice Scalia will someday provide good answers to some of these questions.<sup>42</sup> A cursory look at the early leading cases, however, suggests that an exhaustive analysis is more likely to undermine his conclusion than to support it. The first court to consider the issue, for example, held that restrictions on concealed carry were unconstitutional, contrary to Justice Scalia’s suggested interpretation of

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40. *Id.* at 2817.

41. *Id.* at 2816 (citations omitted).

42. *Id.*

the Second Amendment.<sup>43</sup> This decision is especially significant both because it is nearest in time to the founding era<sup>44</sup> and because the state court assumed (just as Justice Scalia does) that the constitutional provision at issue codified a preexisting right. Later cases did uphold such laws, but they did not purport to adopt precodification understandings of the scope of a preexisting right to arms, and they rested on interpretive principles and conclusions that *Heller* itself rejects.<sup>45</sup>

The two state cases actually cited by Justice Scalia, moreover, offer little support for his conclusion. The first was an 1850 decision that involved the validity of an 1813 Louisiana statute making it a misdemeanor to carry a concealed weapon. The Louisiana court concluded:

This law became absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons, and to

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43. *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822), invalidated restrictions on the carrying of concealed weapons under a 1792 state constitutional provision commanding “that ‘the right of the citizens to bear arms in defense of themselves and the state, shall not be questioned.’” *Id.* at 90 (citation omitted). Justice Scalia was presumably familiar with this case, which he cited for a different point elsewhere in his opinion. See *Heller*, 128 S. Ct. at 2794 n.9.

44. Justice Scalia acknowledges that discussions long after the ratification of the Second Amendment “do not provide as much insight into its original meaning as earlier sources.” *Heller*, 128 S. Ct. at 2810.

45. The entire opinion in *State v. Mitchell*, 3 Blackf. 229, 229 (Ind. 1833), for example, reads as follows: “It was held in this case, that the statute of 1831, prohibiting all persons, except travelers, from wearing or carrying concealed weapons, is not unconstitutional.” This unexplained conclusion reveals nothing about the pre-1791 right to arms.

*State v. Reid*, 1 Ala. 612 (1840), upheld restrictions on concealed carry under a state constitution that provided: “Every citizen has a right to bear arms, in defence of himself and the State.” *Id.* at 614–15. The court rested its decision on the principle that “[b]efore the judiciary can with propriety declare an act of the Legislature unconstitutional, a case should be presented in which there is no rational doubt.” *Id.* at 621 (citation omitted). *Heller* rejects this interpretive principle. 128 S. Ct. at 2817 n.27.

*Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840), upheld a ban on the concealed carry of certain kinds of knives, which was challenged under an 1834 state constitutional provision that declared “the free white men of this State have a right to keep and bear arms for their common defence.” *Id.* at 156. The qualifying terminology at the end of the provision (“for their common defence”) is absent from the Second Amendment, and the Tennessee court rested its conclusion on the ground that these knives were not “such as are usually employed in civilized warfare, and that constitute the ordinary military equipment.” *Id.* at 158. *Heller* rejects a similar interpretation of the Second Amendment. 128 S. Ct. at 2815–16.

*State v. Buzzard*, 4 Ark. 18 (1842), upheld restrictions on concealed carry against challenges under the Second Amendment and an 1836 state constitutional provision that protected the right to keep and bear arms “for their common defense.” *Id.* at 26. One member of the court treated the state and federal provisions as though they were identical, and concluded that their purpose was only to enable the citizenry to resist would-be tyrants. See *id.* at 26–27. Another member of the court argued that the Second Amendment does not protect an individual right. See *id.* at 32 (Dickinson, J., concurring). A dissenting member of the court argued that the majority had effectively rendered the Second Amendment a nullity. See *id.* at 41–43 (Lacy, J., dissenting). *Heller* rejects the interpretations of the Second Amendment adopted by the *Buzzard* majority. 128 S. Ct. at 2797–99.

prevent bloodshed and assassinations committed upon unsuspecting persons. It interfered with no man's right to carry arms (to use its words) "in full open view," which places men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.<sup>46</sup>

In 1846, the Georgia Supreme Court declared that the Second Amendment was violated by an ambiguously worded statute that appeared to make it a misdemeanor to sell or use any handgun except a "horseman's pistol."<sup>47</sup> The court concluded:

We are of the opinion, then, that so far as the act of 1837 seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void* . . .<sup>48</sup>

These decisions reflected a belief that there would seldom be reason to conceal a weapon on one's person unless one had a criminal intent. The presumption of criminal intent may well have been sensible in a world where the open carry of weapons was common and socially accepted, as it may have been in Georgia in 1846 and Louisiana in 1850. But the world of 1791 may have been different, and America today is certainly very different.

It is far from evident that these two state courts would have approved concealed carry prohibitions in other circumstances, in which a presumption of criminal intent would be much less deserving of credence and in which a prohibition on concealed carry might operate to "deprive the citizen of his natural right of self-defence."<sup>49</sup> In some American jurisdictions today, for example, openly carrying a firearm might plausibly be thought to violate the ancient common law prohibition against "terrifying the good people of the land" by going about with dangerous and unusual weapons.<sup>50</sup> If courts were to conclude that open carry violates this common law prohibition (and thus is not within the preexisting right protected by the Second Amendment),

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46. State v. Chandler, 5 La. Ann. 489, 489–90 (1850).

47. Nunn v. State, 1 Ga. 243 (1846).

48. *Id.* at 251. The court appeared to imply that the ban on the sale of certain weapons was also invalid, although their sale was not at issue in the case and the court did not explicitly address that question.

49. *Id.*

50. WILLIAM BLACKSTONE, 4 COMMENTARIES \*148. For a discussion of the common law rule, see *infra* notes 54–64 and accompanying text.

after *Heller* has decreed that bans on concealed carry are per se valid, the constitutional right to bear arms would effectively cease to exist.

#### E. Dangerous and Unusual Weapons

“[We] read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right, see Part III, *infra*.”<sup>51</sup> The claims in both these sentences verge on the risible.

Beginning with the second of Justice Scalia’s two claims, the historical discussion in Part III of the *Heller* opinion asserts that the conclusion attributed to *Miller* “is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”<sup>52</sup> Note that Justice Scalia can claim at most that there is a tradition of prohibitions on the *carrying* of certain arms, not on their possession. That is quite different from his more general claim (attributed to *Miller*) that these weapons are not protected by the Second Amendment at all. But even the narrower point is wrong, or at best exceedingly misleading, as one can see by looking at the sources referenced in the long string cite that Justice Scalia offers in support of his assertion.<sup>53</sup>

- His first authority, William Blackstone, does use the term “dangerous or unusual weapons,” but Blackstone does not say that there is a general prohibition on carrying them: “The offence of *riding* or *going armed*, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land.”<sup>54</sup> Blackstone goes on to say that this practice was particularly prohibited by the fourteenth-century statute of Northampton, which Blackstone cites but does not quote.

That statute was worded more broadly than Blackstone’s summary of the common law, as it purported to command that no one go armed “by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere.”<sup>55</sup>

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51. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2815–16 (2008) (footnote omitted). The case referenced here is *United States v. Miller*, 307 U.S. 174 (1939), which I discuss below.

52. *Heller*, 128 S. Ct. at 2817.

53. *Id.*

54. BLACKSTONE, *supra* note 50, at \*148–49.

55. See JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 104, 184 n.36 (1994).

The statute does not appear ever to have been enforced except in accordance with the “terrifying” limitation articulated by Blackstone. When James II, for example, used the statute to prosecute a political opponent in a famous case, he was careful to charge the defendant with carrying a gun into church “to terrifie the King’s Subjects.”<sup>56</sup> In any event, King’s Bench recognized in that case a “general Connivance to Gentlemen to ride armed for their security,” and the jury acquitted the defendant.<sup>57</sup> Justice Scalia should have been aware of all this information, which was presented in one of the *Heller* briefs.<sup>58</sup>

- Justice Scalia’s next cite is to James Wilson’s *Lectures on Law*. Wilson essentially repeats Blackstone’s definition of the common law crime, noting that “there may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, *in such a manner*, as will naturally diffuse a terrour among the people.”<sup>59</sup>
- The same limited exception to the right to bear arms appears in Justice Scalia’s next authority, an 1815 New York treatise, which reports: “It is likewise said to be an affray, at common law, for a man to arm himself with dangerous and unusual weapons, *in such manner* as will naturally cause terror to the people.”<sup>60</sup>
- Justice Scalia’s next source is even more emphatic about the limited nature of this exception to the right to bear arms. An 1822 Kentucky treatise reports: “Riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the people of the land . . . . But here it should be remembered, that in this country the constitution guarranties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify the people unnecessarily.”<sup>61</sup>
- The next treatise, from 1831, repeats the standard, limited definition of a nonviolent affray, and adds a discussion of both the fourteenth-

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56. *Id.* at 104–05.

57. *Id.* at 105.

58. See Brief of the Cato Institute and History Professor Joyce Lee Malcolm as Amici Curiae in Support of Respondent at 15–19, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

59. 3 JAMES WILSON, *WORKS OF THE HONOURABLE JAMES WILSON* 79 (Bird Wilson ed., Philadelphia, Bronson and Chauncey 1804) (footnote omitted) (emphasis added).

60. JOHN A. DUNLAP, *THE NEW-YORK JUSTICE* 8 (New York, Isaac Riley 1815) (emphasis added).

61. CHARLES HUMPHREYS, *A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY* 482 (Lexington, Ky., William Gibbes Hunt 1822). Justice Scalia knew about the second sentence in this quotation, which he quoted elsewhere in the Court’s opinion. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2795 n.10 (2008).

century statute of Northampton and the narrowing constructions that statute had received in England.<sup>62</sup>

- An 1840 treatise reports, without further elaboration, that the statute of Northampton made it a misdemeanor to ride or go armed with dangerous or unusual weapons.<sup>63</sup>
- Finally, an 1852 treatise repeats the usual definition of an affray, adds a citation to the statute of Northampton, and concludes by reviewing a handful of apparently conflicting state decisions on the constitutionality of restrictions on the right to bear arms in public.<sup>64</sup>
- To the list of these treatises, Justice Scalia adds citations to four nineteenth-century state cases, introduced with a “see also” signal.<sup>65</sup> All four of these cases repeat the familiar definition of an affray, including the qualification involving terror to the people.

Only one of the four cases adds anything relevant to Justice Scalia’s claim, but that case affirmatively undermines his contention that the Second Amendment covers only weapons that are “typically possessed by law-abiding citizens for lawful purposes.”<sup>66</sup> In 1871, the Supreme Court of Texas interpreted the Second Amendment to cover only “the arms of a militiaman or soldier,” but this included all such weapons, including even “the field piece, siege gun, and mortar.”<sup>67</sup>

In sum, Justice Scalia educes exactly zero historical support for his claim that the original meaning of the Second Amendment covers only those arms that are in common civilian use at any given time.

That brings us to *Miller*, whose holding resembles that of the 1871 Texas court, and is by its terms directly contrary to Justice Scalia’s claim:

In the absence of any evidence tending to show that possession or use of a “shotgun having a barrel of less than eighteen inches in length” at this time has some reasonable relationship to the preservation or

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62. 1 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 271–72 (Philadelphia, P.B. Nicklin and T. Johnson, Boston, Lilly and Wait 1831).

63. HENRY J. STEPHEN, SUMMARY OF THE CRIMINAL LAW 48 (Philadelphia, John S. Littell, New York, Halsted and Voorhies 1840).

64. FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 726–27 (Philadelphia, James Kay, Jun. & Brother, 2d ed. 1852). Justice Scalia cites only the first page of Wharton’s discussion, which presents the standard definition of an affray, including the qualification “in such a manner as will naturally cause a terror to the people.” *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008).

65. *Heller*, 128 S. Ct. at 2817 (citing *O’Neill v. State*, 16 Ala. 65, 67 (1849); *State v. Lanier*, 71 N.C. 288, 289 (1874); *State v. Langford*, 10 N.C. (3 Hawks) 381, 383–384 (1824); *English v. State*, 35 Tex. 473, 476 (1871)).

66. *Heller*, 128 S. Ct. at 2816.

67. *English*, 35 Tex. at 476.

efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.<sup>68</sup>

Justice Scalia claims that reading this holding to mean that short-barreled shotguns are protected by the Second Amendment if they have military utility would involve “a startling reading of the opinion, since it would mean that the [1934] National Firearms Act’s restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare in 1939.”<sup>69</sup> Not very startling at all, once you recognize that *Miller* nowhere says or implies that the government is forbidden to place restrictions on protected weapons. And that *Miller* says nothing about what restrictions might be permissible. And that *Miller* does not foreclose the possibility that the government might be permitted to put more restrictions on some protected weapons than on others. Justice Scalia must have been startled by something that *Miller* did not say, which hardly justifies the Court in ignoring what *Miller* did say.

Rather than focusing on the obvious narrowness of the *Miller* holding, Justice Scalia argues that *Miller* implies that the Second Amendment does not protect arms unless they are typically possessed by civilians for lawful civilian purposes. He attempts to derive this implication from a statement of historical fact that appears later in the *Miller* opinion, and in a different context. Commenting on the meaning of the term “militia” at the time the Bill of Rights was adopted, *Miller* says, “[O]rdinarily when called for service these men [i.e. members of the militia] were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”<sup>70</sup> This is perfectly consistent with *Miller*’s plain insistence that the Second Amendment covers only weapons with military utility. It would not make much sense to expect men to appear for military service armed with weapons that have no military utility or are not commonly used for military purposes.

In an acrobatic but unexplained leap, however, Justice Scalia concludes that *Miller*’s holding refers *only* to weapons that are in common *civilian* use at the time. As a matter of historical fact, it may well be true that eighteenth-century civilians commonly kept for private purposes the same kinds of weapons that they were expected to bring with them when called for service

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68. United States v. Miller, 307 U.S. 174, 178 (1939) (citation omitted).

69. *Heller*, 128 S. Ct. at 2815.

70. 307 U.S. at 179.

in the militia. That is why the *Miller* Court could reasonably have thought this historical fact relevant to its conclusion that the Second Amendment does protect weapons that have military utility. But it cannot support Justice Scalia's bizarre conclusion that *Miller's* reference to weapons that are "part of the ordinary military equipment or [whose] use could contribute to the common defense" is actually a reference to weapons typically possessed by law-abiding citizens only for lawful *civilian* purposes.

It is possible that this weird and untenable reading of *Miller* was driven at least in part by Justice Scalia's mistaken belief that "[t]he judgment in the case upheld against a Second Amendment challenge two men's federal convictions for transporting an unregistered short-barreled shotgun in interstate commerce, in violation of the National Firearms Act."<sup>71</sup> If *Miller* had upheld convictions for violating these regulations, it might colorably be argued that the Court did so because short-barreled shotguns are outside the scope of the Second Amendment. In fact, the extremely concise *Miller* opinion plainly stated that *there had been no convictions*, and the Court remanded the case for further proceedings in which the defendants might well have established that short-barreled shotguns meet the legal test set out in its holding.

The notion that *Miller* concluded that short-barreled shotguns, let alone machineguns, are unprotected by the Second Amendment is an indefensible canard.<sup>72</sup> Justice Scalia's claim that there is an exception from the Second Amendment for weapons that are not in common civilian use was neither dictated nor supported by judicial precedent, and it has no basis in the historical sources he cites.

Justice Scalia's baseless assertion also makes no sense under originalist principles. Under the rule that he conjured from his misreadings of history and precedent, short-barreled shotguns and machineguns are per se excluded from protection by the Second Amendment. Why? Because they are not "typically possessed by law-abiding citizens for lawful purposes" today. Congress assured that this test could not be met when it imposed oppressive tax and regulatory burdens, beginning in 1934, that guaranteed such weapons would not be in common use. But for that congressional action, these arms

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71. *Heller*, 128 S. Ct. at 2814. Even if the Court alters this sentence when it publishes the opinion in the U.S. Reports, it won't be able to alter the fact that the mistake was made in the slip opinion that issued on the day of decision.

72. For a more detailed analysis of Justice Scalia's misrepresentations of *Miller*, and an argument that the *Heller* Court was not obliged to embrace *Miller's* interpretation of the Second Amendment, see Nelson Lund, *Heller and Second Amendment Precedent*, LEWIS & CLARK L. REV. (forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1235537](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1235537).

might be quite common today.<sup>73</sup> Thus, Justice Scalia's test empowers Congress to create its own exceptions to the Second Amendment, so long as the Supreme Court waits a while before it asks whether particular weapons are in common civilian use.

Suppose, for example, that the federal handgun ban imposed in the District of Columbia in 1976 had been applied by Congress to the entire nation that same year. If a case challenging the ban had not reached the Supreme Court until 2008, the ban would presumably have been upheld under the test that Justice Scalia invented in order to justify bans on machineguns and short-barreled shotguns. This result would also have been supported by Justice Scalia's use of the term "longstanding" to characterize felon-in-possession laws that did not exist until 1968.

Alternatively, suppose Congress decides now or in the future to adopt "laws imposing conditions and qualifications on the commercial sale"<sup>74</sup> of handguns, perhaps along the lines of the conditions and qualifications that have been used to suppress the market for short-barreled shotguns and machineguns. Given the large number of handguns already owned by civilians, it might take some time for handguns to become as rare as machineguns or short-barreled shotguns. But the government could presumably accelerate that process by purchasing handguns from their current owners, especially if onerous burdens (such as high taxes on ammunition) were placed on those who were reluctant to sell. Presto! A handgun ban would no longer be an unconstitutional law that "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose [of self defense]."<sup>75</sup>

Before composing a dictum that impliedly permits Congress to decide which arms are protected by the Second Amendment, Justice Scalia might have reflected on his own pointed comment earlier in the opinion: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad."<sup>76</sup>

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73. Properly configured and loaded with appropriate ammunition, short-barreled shotguns may be optimal weapons for home defense in many circumstances. If the government stopped suppressing them, they might become very popular.

74. *Heller*, 128 S. Ct. at 2817.

75. *Id.*

76. *Id.* at 2821.

The Court should have refrained from issuing dicta on an array of issues to which it had apparently devoted little thought and less research. One might have expected Chief Justice Roberts, at least, to insist on what he has called “the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more.”<sup>77</sup>

It is possible, of course, that *Heller*'s wide-ranging and unsupported dicta will someday be disavowed (or, in typical judicial fashion, “clarified”). *Heller* itself provides a model for doing so. Dismissing a comment about the Second Amendment in an earlier case, Justice Scalia says, “It is inconceivable that we would rest our interpretation of the basic meaning of any guarantee of the Bill of Rights upon such a footnoted dictum in a case where the point was not at issue and was not argued.”<sup>78</sup> The *Heller* dicta deserve the same dismissive treatment.

## VI. WHAT MIGHT A GENUINELY ORIGINALIST COURT HAVE DONE?

Perhaps the Court will someday provide an originalist rationale for *Heller*'s invalidation of the D.C. handgun ban—a rationale that *Heller* promised but did not deliver. Meanwhile, this case will stand as a monument to a peculiar kind of jurisprudence, which might charitably be called half-hearted originalism.<sup>79</sup>

Was there a better alternative? *Heller*'s successful effort at originalism begins and ends with its persuasive demonstration that the Second Amendment protects an individual and private right to keep and bear arms, at least for the legitimate purpose of self defense. The fundamental problem with the *Heller* opinion is its failure to admit that some questions about the original meaning of the Constitution cannot be answered on the basis of a bare textual and historical inquiry. The logic of Justice Scalia's theory that the Second Amendment codified a preexisting right would render virtually all modern gun control regulations unconstitutional because few regulations existed in 1791 (leaving everyone with the right to do anything that was not forbidden) and there is no historical record indicating what kinds of regulations that were not then adopted would have been considered permissible.

This interpretation of the original understanding of the Second Amendment is not altogether implausible. The Bill of Rights was originally

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77. *PDK Labs. Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).

78. *Heller*, 128 S. Ct. at 2816 n.25 (discussing *Lewis v. United States*, 445 U.S. 55 (1980)).

79. Compare Justice Scalia's well-known discussion of “faint-hearted originalism,” in which he suggests that most originalists would strike down laws providing for public flogging, even in the face of unequivocal evidence that such a punishment was not considered “cruel and unusual” in 1791. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861–62 (1989).

understood to apply only to the federal government, and the States were left completely free to adopt new gun control laws in light of changed circumstances or changes in public opinion. Oddly, however, nobody at the time appears to have asked whether the federal government would be restrained by the Bill of Rights in governing the territories or the federal seat of government. The D.C. handgun ban, of course, raises exactly this question.

It is now settled that the Bill of Rights applies in the District of Columbia, and the courts have little choice but to fashion a jurisprudence that answers new questions that went unasked at the time of the framing.<sup>80</sup> Justice Scalia's historical, preexisting-right approach cannot provide useful or reliable guidance on all these issues, and it is hardly surprising that he resolved the handgun issue without performing the historical analysis he promised.

This forces one to ask what courts should do instead. The alternatives can be roughly grouped into four main categories.

*Living Constitutionalism.* In its purest form, this approach simply replaces the written Constitution with the political preferences of contemporary judges, at least on matters that the judges consider sufficiently important. *Roe v. Wade*<sup>81</sup> is the most frequently cited example, but another excellent specimen is *Home Building & Loan Ass'n v. Blaisdell*,<sup>82</sup> in which the Court declared the original meaning of the Contracts Clause irrelevant. The dissenting opinion in that case advanced unrebutted historical evidence that the Clause was adopted primarily to prevent the state governments from adopting exactly the sort of debtor relief law that was challenged in *Blaisdell* itself.<sup>83</sup> The majority simply declared that times had changed, and that the Court was free to change the Constitution to fit the times.<sup>84</sup> This decision was especially egregious because there was not even a plausible argument that times had changed in a way that

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80. This point will assume even greater importance if the Court makes the Second Amendment applicable to the states under substantive due process, which is a likely outcome, given the existing incorporation precedents. For more detail, see Nelson Lund, *Anticipating the Second Amendment Incorporation: The Role of the Inferior Courts*, 59 SYRACUSE L. REV. 185 (2008) and Lund, *supra* note 20, at 46–55. One court has already reached this conclusion. See *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009).

81. 410 U.S. 113 (1973).

82. 290 U.S. 398 (1934).

83. See *id.* at 453–82 (Sutherland, J., dissenting).

84. The majority stated:

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.

*Blaisdell*, 290 U.S. at 44–43.

created a need for judges to amend the Constitution. The *Blaisdell* case arose as a result of a nationwide economic depression, and the Court did not even pause to consider that the Contracts Clause left unimpaired the power of Congress to adopt debtor relief laws pursuant to the Bankruptcy Clause.

*Judicial Deferentialism.* An alternative possibility is that courts might refuse to strike down any statute unless it is indubitably inconsistent with the Constitution. This approach—defended more than a century ago by James Bradley Thayer and more recently by Lino Graglia<sup>85</sup>—seems to have been followed by the Supreme Court, in substance if not always in form, in some areas of the law during some periods of our history. This might explain, at least in part, the absence of pre-twentieth-century decisions invalidating any statutes under the Free Speech and Free Exercise of Religion Clauses,<sup>86</sup> as well as some modern decisions that reject strong constitutional challenges to exceedingly questionable exercises of congressional power.<sup>87</sup>

This approach is like living constitutionalism to the extent that it does not treat the Constitution as binding law. The main difference is that it puts the power to amend the Constitution in the legislature rather than in the judiciary.

*Living Constitutionalism in Originalist Clothes.* A different approach is to read various vague and ambiguous constitutional provisions as warrants for courts to vindicate broad principles of justice and convenience. Taken to an extreme, this might authorize courts to treat the Constitution's Preamble as the critical text (much in the way that Justice Stevens treated the Second Amendment's preambular language). Thus, for example, if judges thought that legislative restrictions on abortion, bestiality, or the distribution of recreational drugs were unjust, they could strike them down on the basis of that text.

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85. See, e.g., James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631 (1993).

86. See, e.g., *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 439 (1911) (explaining that joining with others to call for a boycott is not speech but a "verbal act"); *Davis v. Beason*, 133 U.S. 333 (1890) (approving an Idaho territorial statute denying Mormons, polygamists, and advocates of polygamy the right to vote and to hold office); *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890) (upholding federal statute dissolving the Mormon church and providing for the seizure of all its property); *Ex parte Jackson*, 96 U.S. 727, 736–37 (1878) (upholding a federal statute that banned lottery material from the mail because Congress may deny access "for the distribution of matter deemed injurious to the public morals").

87. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (holding that the Interstate Commerce Clause authorizes Congress to regulate wages and hours of employees of local, municipally-operated mass transit system); *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding limits on contributions to political campaigns); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (upholding regulatory control over editorial decisions by broadcasters); *Wickard v. Filburn*, 317 U.S. 111 (1942) (permitting Congress to forbid the consumption of home-grown wheat on the ground that such consumption may affect interstate commerce).

Similarly, if judges thought that the general welfare required a President to be allowed a third term in office, or required that an important treaty be treated as valid without Senate ratification, they could rest such decisions on the text of the Constitution's Preamble. This would be practically indistinguishable from pure living constitutionalism.

A related variant is exemplified by Professor Jack Balkin's recent effort to argue, on originalist grounds, that the Fourteenth Amendment protects a right to abortion.<sup>88</sup> Abortion restrictions were commonplace in 1868, and Professor Balkin offers no evidence that the words of the Fourteenth Amendment would have been understood at the time to make these restrictions unconstitutional. Instead, he invokes select passages in the legislative history to support his conclusion that the Fourteenth Amendment stands for a general principle of "equal citizenship."<sup>89</sup> With this elastic principle in hand, Professor Balkin argues that a broad right to abortion is necessary to vindicate women's right to equal citizenship. The scope of that right turns out to be almost the same as the one generated through pure living constitutionalism in the *Roe/Casey* line of decisions.

Using Professor Balkin's interpretive technique, one could just as easily argue that state laws permitting abortions (except perhaps to save the life of the mother) are unconstitutional. Unborn children are a vulnerable and politically powerless minority, and laws allowing them to be selectively killed deprives them of the "equal protection of the laws" in a much more obvious way than abortion restrictions deprive women (an electoral majority) of equal citizenship. It may be true, as Professor Balkin argues, that the words of the Fourteenth Amendment would not have been thought applicable to the unborn when the Fourteenth Amendment was adopted, but it is no less true that those words would not have been thought to create a right to abortion.

An interpretive approach that can so readily produce such diametrically opposite results dissolves the distinction between originalism and living constitutionalism. A moderately clever and determined practitioner of such "originalism" should be able to get just about any result that a living constitutionalist might desire. And Professor Balkin's own presentation of his version of originalism comes asymptotically close to pure living constitutionalism: "[I]t follows from my [*i.e.* Professor Balkin's] arguments that there could be other constitutional principles [*i.e.* other than "equal citizenship"] embodied by the

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88. See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007).

89. This principle is composed of three sub-principles: prohibitions against class legislation, caste legislation, and subordinating legislation. *Id.* at 319–20.

Equal Protection Clause that no particular person living in 1868 intended but that we come to recognize through our country's historical experience."<sup>90</sup>

*Conscientious Originalism.* Professor Balkin's essay, misguided though I think it is, recognizes an important truth that Justice Scalia refused to acknowledge in *Heller*. The core of originalism is the proposition that text and history impose meaningful, binding constraints on interpretive discretion, but this does not mean that every legal question can be answered by identifying (or guessing at) what Professor Balkin calls the "original expectations" of the lawmakers. Unless one rejects originalism in favor of living constitutionalism or judicial deferentialism, some recourse to the purposes or principles of the Constitution's provisions is unavoidable.

That means that there will often be room for reasonable disagreements about the right way to resolve particular disputes about the original meaning of the document. The challenge for originalist theory, and for originalist jurisprudence, is to distinguish genuinely originalist interpretations from those that amount to living constitutionalism or judicial deferentialism dressed up in originalist clothing.

Without pretending to present an adequately elaborated interpretive theory, I would describe the approach that courts ought to follow as "conscientious originalism." When the Constitution's text—understood as the historical sources tell us it was or would have been originally understood—provides an answer to a legal question, that answer should be treated as binding (subject to whatever qualifications are imposed by an appropriately originalist doctrine of *stare decisis*). This will answer a great many constitutional questions, as for example whether the Second Amendment protects an individual and private right to arms or a State's right to maintain militia organizations. When there is such an answer, that is the end of the analysis.

When the text does not supply an adequately precise answer, a conscientiously originalist court has no choice but to decide the issue in light of the purpose of the provision as that purpose was understood by those who adopted it. This is not an algorithm, and it does not sufficiently describe what kinds of evidence should be considered or the relative weights that various kinds of arguments and evidence deserve. Nor is it enough to establish that any particular interpretation, like the Fourteenth Amendment abortion argument offered by Professor Balkin, is wrong. I offer it here only as a broad and crude indication

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90. Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 498 (2007).

of the approach that I think the *Heller* Court could have and should have employed in evaluating the constitutionality of the D.C. handgun ban.<sup>91</sup>

Unlike Section 1 of the Fourteenth Amendment, whose original purpose is quite difficult to identify with the precision needed for legal analysis, the Second Amendment was adopted for a distinct and easily intelligible reason. *Heller* accurately identified its purpose: to facilitate the right of the people to exercise their natural right of self defense. That includes the right to defend oneself against all forms of illegitimate violence, whether from criminals, foreign invaders, or tyranny. When the Second Amendment was adopted, the danger most to be feared from the new and untried federal government was that it would disarm the citizenry in order to pursue illegitimate political goals. That fear has now justifiably diminished, and changes in military technology have in any case vastly reduced the power of an armed citizenry to resist a modern army. For these reasons, the relative importance of the anti-tyranny and anti-invader functions of the Second Amendment have dramatically diminished as a practical matter in comparison with the importance of the anti-criminal function.

That does not imply that the purpose or meaning of the Second Amendment has changed, but only that the likeliest significant threats have changed. While an armed citizenry continues to create some deterrent to federal tyranny,<sup>92</sup> it is no longer possible for it to create as effective a deterrent as it could have created in the eighteenth century. No one could reasonably think that the Second Amendment requires that the ratio of federal military power to civilian (or state militia) military power remain fixed at its 1791 level, and no court could possibly impose such a requirement.

In 1791, a citizenry armed with weapons typically kept for ordinary civilian purposes might fairly rapidly have organized itself into a reasonably credible military force. Today, very few citizens would have both the money and the inclination to keep the extremely expensive weaponry employed by modern armies, even if the Second Amendment gave them the right to do so. Widespread ownership of anti-tank rockets and Stinger missiles, let alone tanks, fighter planes, and nuclear weapons, is simply not going to happen, no matter how the Second Amendment is interpreted. For that reason, granting citizens a right to have such devices would merely empower a tiny minority of the population to inflict unthinkable carnage on everybody else, and to

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91. Eugene Volokh's excellent contribution to this symposium adopts an approach that I think is generally consistent with conscientious originalism. See Eugene Volokh, *Implementing the Right to Keep and Bear Arms: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443 (2009).

92. For further detail, see Lund, *supra* note 20, at 56–58; Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 114–15 (1987).

seriously undermine the exercise of perfectly legitimate government authority. Such a result would be affirmatively inconsistent with the Constitution, which specifically authorizes the federal government to execute the laws of the Union and to suppress insurrections.<sup>93</sup> Nothing in the text or purpose of the Second Amendment requires or permits this result.

Nor does the Second Amendment require the virtual absence of regulatory restrictions on ordinary civilian firearms that existed in 1791. New regulations do not violate the Constitution just because they are new. In order to faithfully apply the Second Amendment to contemporary circumstances, the courts must instead evaluate restrictions on the right to arms in light of the purpose of the constitutional provision, which is to protect what its enactors considered the inherent or natural right of self defense. And contrary to the position Justice Scalia tried to take in *Heller*, that cannot be done without comparing the burdens of a challenged regulation on the individual's right to self defense with the regulation's public safety benefits. This balancing of burdens and benefits can be done overtly or covertly, but it cannot be avoided.

Justice Scalia showed one way to do it in *Heller*: simply announce the result. Or, what may be worse, announce that a handgun ban is unconstitutional because a large number of contemporary Americans have weighed the costs and benefits of keeping handguns in their homes, and decided to keep them. I think this approach is self-evidently wrong, at least in the sense that it is indistinguishable from living constitutionalism.

Justice Breyer's approach in *Heller* also seems manifestly wrong to me, at least to the extent that it amounts to judicial deferentialism. He performs an explicit cost/benefit analysis, but one that is dominated by deference to the judgments of elected officials.<sup>94</sup> The entire analysis is thus conducted in the shadow of a strong presumption of constitutionality, and one that could easily become effectively irrebuttable. This is how judges repeal constitutional provisions they dislike.<sup>95</sup>

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93. U.S. CONST. art. 1, § 8, cl. 15; art. 2, § 2, cl. 1, § 3.

94. See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783, 2852 (2008) (Breyer, J., dissenting) (advocating a standard of scrutiny in which "the Court normally defers to a legislature's empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity"); *id.* at 2859 ("[T]he question here is whether [empirically based arguments against the handgun ban] are strong enough to destroy judicial confidence in the reasonableness of a legislature that rejects them."); *id.* at 2860 ("[L]egislators, not judges, have primary responsibility for drawing policy conclusions from empirical fact."); *id.* ("[D]eference to legislative judgment seems particularly appropriate here, where the judgment has been made by a local legislature, with particular knowledge of local problems and insight into appropriate local solutions.").

95. Neither Breyer nor any other Justice consistently applies this presumption of constitutionality to individual rights that are enumerated in the Constitution. Ironically, Justice Breyer and the other *Heller* dissenters reject such a presumption of constitutionality when considering *unenumerated* rights

The approach most consistent with the original meaning of the Constitution would reverse Justice Breyer's presumption and require the government to provide an extremely strong public-safety justification for any gun control law that significantly diminishes the ability of individuals to defend themselves against criminal violence. In performing this analysis, doctrinal labels like "strict scrutiny" or "reasonable regulation" would be less important than judicial respect for the value of the inherent right of self defense and a correlative judicial skepticism about the wisdom of government officials who want to restrict the people's ability to exercise that right.<sup>96</sup>

Using this approach, it does not seem to me that the D.C. handgun ban presents an especially close question. The *Heller* parties and their many amici discussed the benefits and burdens of the handgun ban in considerable detail. The most plausible point made in support of the ban was that criminals prefer handguns over long guns because they are concealable, and criminals will have more opportunities to steal handguns if law-abiding citizens are permitted to keep them in their homes.<sup>97</sup> On the other side, the Court was provided with a great deal of theoretical and empirical evidence showing both that such bans do not (and cannot be expected to) significantly affect the supply of weapons available to criminals, and that many law-abiding people have good reasons to prefer handguns as instruments of self defense in their homes.<sup>98</sup>

Even without considering the effects that a handgun ban would have on the constitutional right to bear arms outside the home, the balance of constitutionally cognizable costs and benefits in *Heller* essentially boiled down to the government's interest in illusory or wildly speculative public-safety effects versus a substantial reduction in the ability of many citizens to defend themselves against criminal violence.

In light of the arguments and evidence presented in the briefs, Justice Scalia is right to say that the handgun ban would (or at least should) be struck down under "any of the standards of scrutiny that [the Court has] applied to

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that they like, such as the right to abortion. For an extremely vivid example, see *Stenberg v. Carhart*, 530 U.S. 914 (2000).

96. If any proof of the inefficacy of doctrinal labels on the standard of review were needed, one could simply read *Grutter v. Bollinger*, 539 U.S. 306 (2003), in which the Court applied strict scrutiny in a manner that is indistinguishable from rational-basis review.

97. See Brief for Petitioners at 49, 51, 53, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

98. See, e.g., Brief of Criminologists, Social Scientists, Other Distinguished Scholars and the Claremont Institute as Amici Curiae in Support of Respondent, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290); Brief of Int'l Law Enforcement Educators and Trainers Ass'n et al. as Amici Curiae in Support of Respondent, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290); Brief of Amici Curiae Southeastern Legal Foundation Inc. et al. in Support of Respondent, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

enumerated constitutional rights.”<sup>99</sup> While I agree with this conclusion, I also believe that the Court was obliged to provide a legal analysis, rather than an ipse dixit, and to do so in a way that could lay the foundation for a coherent and robust constitutional jurisprudence.

This would not have been very difficult. As Justice Scalia’s reference to the conventional standards of scrutiny suggests, the Court has done just this with respect to other provisions of the Bill of Rights. The case law dealing with free speech and the free exercise of religion provides a particularly good analogue.<sup>100</sup> In that area, the modern Court has conscientiously sought to respect the purposes of the First Amendment by defining the scope of the rights (both of which have a textual breadth comparable to that of the Second Amendment) in a way that permits the government to advance legitimate public interests without unduly compromising the rights at issue or unduly trusting legislative wisdom. No doubt there have been significant mistakes along the way, sometimes in construing First Amendment rights too broadly and sometimes too narrowly. Some of the Court’s opinions have been badly reasoned, and some of the mistakes may never be corrected. Nevertheless, the Court has exhibited a sustained commitment to the importance of these enumerated rights and a sustained resistance to governmental efforts to squelch them in the name of the general welfare.

Until it is repealed or amended through Article V, the Second Amendment requires courts to treat the right it protects with at least the same vigorous care that courts have exhibited in these First Amendment cases. With its generally sound analysis of the basic nature of the Second Amendment right, *Heller* took an important first step in that direction. The elaboration of a genuinely originalist jurisprudence, however, will require a majority of Justices who are willing to take the Second Amendment as seriously as they take the First, and to do so with respect to the specific issues that arise in particular cases. Judging from the *Heller* opinions, not a single member of the current Court takes originalism, or the purpose of the Second Amendment, quite that seriously.

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99. *Heller*, 128 S. Ct. at 2817–18.

100. Justice Scalia repeatedly recognized that these provisions of the Constitution require similar treatment. See, e.g., *id.* at 2791–92, 2797, 2799, 2821. For an early judicial recognition of this point, see *United States v. Sheldon*, 5 Blume Sup. Ct. Trans. 337, 346 (Mich. 1829).