SCALIA'S IRONIC SWAN SONG: *D.C. V. HELLER* AS FAINT-HEARTED ORIGINALISM

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SCALIA'S IRONIC SWAN SONG: *D.C. V. HELLER* AS FAINT-HEARTED ORIGINALISM

A Thesis

by

Robert J. Suhrie

Spring 2018

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DEDICATION

To those who bestowed upon us the duty and privilege of a constitutional republic. May we endeavor to keep it.

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ABSTRACT

SCALIA'S IRONIC SWAN SONG: *D.C. V. HELLER* AS

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by

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The 2008 Supreme Court decision in *D.C. v. Heller* declared, for the first time in the Court's history, that the 2nd Amendment to the Constitution guarantees an *individual* right to own a firearm regardless of one's affiliation with a militia. In another first for the Court, Justice Antonin Scalia's majority opinion has been called the most originalist decision in the Court's history. This thesis finds that the Court in *Heller* rewrote the 2nd Amendment using contemporary benchmarks and assumptions about its scope and purpose. This has led some scholars to suggest that Justice Scalia engaged in judicial activism and based his interpretation on the idea of a "living Constitution." Such allegations, this thesis argues, are, in fact, true.

One of the most enduring aspects of Scalia's legacy will be his advocacy of originalism and his belief that the text in question should be interpreted according to the public understanding of its meaning at the time of its adoption. But when *Heller* is

examined according to this dictum Scalia's findings have much more in common with present-day beliefs about the 2nd Amendment. While *Heller* has the accouterments of an originalist inquiry, it also has many of the trappings of the judicial activism that Scalia has railed against throughout his tenure on the bench. The long-term effect will almost certainly be that originalism is further impugned. And as the politicization of judicial appointments increases, gun rights may one day be at the peril of the political makeup of the courts.

CHAPTER I

INTRODUCTION

> *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.*
>
> —The Second Amendment

The impact of majority opinions of Supreme Court Justices typically outlive their authors. Such will no doubt be the case with Justice Antonin Scalia's controversial opinion for the Court in *District of Colombia v. Heller.* With Scalia writing the majority opinion, the Supreme Court in *Heller* held a Washington D.C. law prohibiting the residents of Washington D.C. from possessing a handgun unconstitutional under the 2nd Amendment right "to keep and bear Arms." The other most important components of the law required that all firearms in the District of Columbia be registered but forbade the registration of handguns, and required that permissible weapons such as long guns held by district residents had to be kept either unloaded and dissembled or bound by a trigger lock. These provisions were also held to be unconstitutional violations of the 2nd Amendment. (*D.C. v. Heller*, 554 U. S. Supreme Court, page 1, 2008).

Scalia died less than eight years after the Heller decision was released on June 26th, 2008. Of all important majority opinions that Scalia wrote, this one may be the most controversial, revolutionary, and long lasting. Ironically, given the argument of this thesis, it also seems to be one most likely to be celebrated as his most formidable originalist ruling.

Establishing the revolutionary and controversial quality of Scalia's opinion in *D.C. v. Heller* is easily achieved. As Scalia mentions in his opinion for the Court, it represented the "Court's first in-depth examination of the 2nd Amendment" (*D.C. v. Heller*, 554 U. S. Supreme Court, 63, 2008; Amar 2008, 122 **)**. Remarkably, that examination did not come until 218 years after passage of the 2nd Amendment.

Furthermore, the Court's landmark decision did what no other court case implicating the 2nd Amendment did: it held that all Americans possess an *individual* right to keep and bear arms as a result of the protections in the 2nd amendment. To understand fully the importance and novelty of this conclusion, we should also recall that the text of that amendment is arguably ambiguous, relentlessly contested, and, to many, downright paradoxical in its wording (Wilkinson 2009, 13). By the time that *Heller* was adjudicated, two profoundly different interpretations of the 2nd Amendment, which still control popular debates about its meaning, had developed (Kopel 2002; Neily 2008; Perkins 2009; Whittlesey 2008). Placing strong emphasis on the long dependent clause that makes up roughly half of the amendment, one interpretation suggests that the right to bear arms guaranteed by the 2nd Amendment refers only to a *collective* right of a state to arm its militia. The petitioners in *Heller,* Justice Stevens and the other Justices in the dissenting opinion, and proponents of gun control, are adherents of the collective rights interpretation. They claimed that the 2nd Amendment should be read and understood strictly in a military context. The 2nd Amendment, according to this ruling, allows the states to form a militia for the purpose of national defense. This militia is composed of a particular group of citizens of the individual states, and is to be held under strict control by the states and by the federal government. In this interpretation, the militia is thought of as something akin to today's National

Guard units. Most important, this collective interpretation maintains that an individual right to own firearms is not to be found within the language and purpose of the 2nd Amendment.

In direct contrast to the "collective right" or "militia right" interpretation, a second interpretation of the amendment's meaning that had developed by the time of *Heller* holds that it protects the individual right of citizens of the United States to own guns. This position was represented in *Heller* by the respondent, Mr. Dick Heller, and an army of gun rights advocacy groups such as the National Rifle Association, who wrote *amicus curiae* briefs for the Court opposing the collectivist viewpoint. Proponents of this interpretation argue that "the people" spoken of in the 2nd Amendment represent all Americans regardless of their affiliation with a militia. As such, the 2nd Amendment's phrase declaring a "right of the people to keep and bear arms" codifies the right of *individual* citizens to own guns without having to join a militia.

Both sides of this debate have frequently promoted distorted interpretations of the intentions of the Framers of the 2nd Amendment and its purpose. Scalia's opinion in *D.C. v. Heller* is so important—and so controversial—because it decisively and unambiguously sided with proponents of the view that the 2nd Amendment protects a private, individual right to gun ownership. This is the interpretation conservatives had longed for, and now celebrate, and liberals had feared, and now loath. It is also the interpretation that the Supreme Court had never ventured.

D.C. v. Heller was also intensely controversial because Scalia and the Supreme Court majority reached its conclusions based on originalism. At least as controversial as the *Heller* decision itself, originalism refers broadly to methods of constitutional interpretation that hold that the Constitution should be interpreted based upon its "original meaning" or "original

understanding." Although this foundational premise sounds simple and straightforward enough, debates over originalism began in the first Congresses under the new Constitution almost 220 years ago and have proven that there is nothing about originalism that is either simple or straightforward. The last forty years of intense argumentation about originalism—representing its most recent recrudescence—has created a sprawling, voluminous, and still rapidly expanding scholarly commentary on its viability, but settled nothing about the common claim that it is the sole legitimate method of constitutional interpretation.

As if this is not enough, by the time of the *Heller* decision, Scalia was at once the most polarizing figure in recent Supreme Court history and one of the most ardent exponents and defenders of originalism. Over his years as an Associate Justice, Scalia developed a reputation for particularly unkind characterizations of his colleagues' decisions and reasoning. Scalia's majority opinion in *Heller* is no different. He holds at one point that "Justice Stevens flatly misreads the historical record," at another that he provides "absolutely no evidence" for one of his arguments, and, perhaps most unkindly of all, holds that Stevens' reasoning is simply "grotesque" (*D.C. v. Heller*, 554 U. S. Supreme Court, 30-31, 2008). More importantly for our purposes, *Heller* is perhaps the most vivid of all of Scalia's opinions of his variation of originalism. In scholarly presentations of his version of originalism, Scalia has maintained that constitutional interpretation should be based upon how an average, yet informed, citizen living at the time of the Constitution's ratification would have understood its language and purpose (Tushnet 2008). This, as we will see, is a particular variation of the "new originalism" developed in response to intense critiques of originalism made during the 1980s and 1990s. Applying his method of what might be called "textualist" (Rossum 2006, 27) or "linguistic" originalism in

Heller, Scalia held not only that the 2nd Amendment provides Americans with an *individual* right to own a firearm unconnected with service in a militia. He went even further, declaring that local municipalities cannot prevent residents from possessing a handgun within their home for the *purpose of self-defense*. More specifically, Scalia argued that the underlying purpose of the 2nd Amendment is to protect the pre-existing right to own firearms for the purpose of self-defense. It is Scalia's identification of self-defense as the underlying purpose of the 2nd amendment that makes his ruling so misguided (Sangero 2010).

This thesis will examine and challenge Scalia's opinion in *D.C. v. Heller*. It is driven by a novel perspective and argument. Stated concisely, my argument is that Scalia was correct to approach interpretation of the 2nd Amendment by ascertaining its original meaning. Heller is also correct in recognizing the right of individuals who are not part of a militia to own firearms. The Court is correct yet a third time in acknowledging a natural right of self-preservation or self-defense and a pre-existing right emanating from our English heritage to bear arms. The right of self-preservation was embraced by the enlightenment thinkers who had great influence on the Founders. Hobbes, Locke, Montesquieu, and Beccaria all acknowledged the inherent, natural right of self-preservation and thus, in turn, of using whatever means necessary to resist an attacker, including bearing arms. Speaking for the Court, Scalia might have argued that a right to self-defense could be implied from the context of the amendment and contemporary beliefs about its purpose. Such a finding would certainly betray his maxim that judges should not engage in judicial activism, but it would have been more intellectually honest.

By arguing instead that the purpose of the 2nd Amendment was to provide Americans with a right to gun ownership to defend themselves against bodily harm and protect their homes,

however, Scalia engaged in the egregiously bad application of the proper method of interpreting the Constitution. His supposedly "originalist" reading leads to an incorrect conclusion, and is problematic for anyone who wishes to accurately understand the language, context, and purpose of the amendment. Contrary to the conclusion stated in Scalia's majority ruling, the sole purpose of the 2nd Amendment was to allow for the arming of a militia for the purpose of resisting the tyranny that might result from a standing army held by the national government. Historically, this was the purpose underlying the Anti-federalists' desire to have a Bill of Rights that protected a right to bear arms. Put differently, this was the purpose that Federalists had conceded in drafting the 2nd Amendment. The debates about the Amendment "focused on one concern, and one concern only—the desire to ensure the preservation of the local militia as the preferred option to a politically dangerous standing army" (Merkel 2009, 356-57). Despite's Scalia's interpretive gymnastics, the 2nd Amendment does not allow Americans the right to own a firearm for the purpose of hunting or self-defense within their home. Such a right would not have been doubted by the public that ratified the 2nd Amendment. Nevertheless, this is simply not the right that is legally codified in the 2nd Amendment. The problem for Scalia (and for 2nd Amendment purists of his stripe) is that the right of self-defense is not *included* in the text of the amendment.

Scalia first acknowledged that the purpose of the 2nd Amendment included providing citizens with a method for resisting tyranny. Nevertheless, he then briskly dismissed this function in order to adopt his interpretation that it protected a right to self-defense. In doing so, Scalia relegated the 2nd Amendment's original purpose to the annals of 18th Century America. In its place, he asserted a new objective: self-defense. Scalia's ruling reflects the contemporary proclivity towards handguns and their prominence as the chosen instrument for home protection.

Addressing the law being considered in *Heller,* Scalia notes that "The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose," and that "the American people have considered the handgun to be the quintessential self-defense weapon" (*D.C. v. Heller*, 554 U. S. Supreme Court, 56-57, 2008). After discussing their practicality for self-defense in the home, Scalia proclaims "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" (Ibid., 57-58). With Scalia at the helm, the Court in *Heller* thus rewrote the 2nd Amendment using contemporary benchmarks and assumptions about its scope and purpose. This realization has led some scholars to suggest that Scalia engaged in judicial activism and based his interpretation on the idea of a *living constitution*. Such allegations are, in fact, true. While *Heller* has the accouterments of an originalist inquiry, it also has many of the trappings of the judicial activism that Scalia has railed against throughout his tenure on the bench.

At this point I should also clarify what I am ***not*** arguing in this thesis. I am not attempting to determine the role of the 2nd Amendment in America today. Nor am I advocating some necessity of the right of Americans to arm themselves for some future confrontation with their government. Furthermore, my intention is not to parse the specific meaning of each clause, phrase, and word of the amendment except to the extent that is necessary to consider whether the right is collective or individual, whether it pertains to a remedy against tyranny, and whether it bears any relation to a protection of the right of self-defense. Lastly, this paper does not attempt to consider the influence of the 2nd Amendment in promoting gun violence in America. Suffice it

to say that I recognize the epidemic of violence in America and that firearms are a significant component of that violence.

Instead, my aim is to refute Scalia's interpretation of the original understanding of the 2nd Amendment, and consider how it bears upon the Framers's beliefs about tyranny, the right to keep and bear arms, and self-defense. That goal is pursed by addressing a series of questions. What role did the concept of self-defense have in the adoption of the 2nd Amendment? Is Scalia correct in asserting that self-defense is the underlying purpose behind the Amendment? Is the 2nd Amendment still relevant in today's society, and if so, to what extent? Addressing these questions leads to compelling understanding of the original purpose of the 2nd Amendment. The 2nd Amendment, this thesis argues, should be read in light of the Anti-Federalist's fears that a powerful central government could usurp the rights of the individual states. As such, the 2nd Amendment establishes the right of the people to bear arms to constitute their own militias in opposition to a standing army under the control of the national government (Lund 2009; Merkel 2009; Williams 2008).

The veracity of this interpretation and the (perhaps even bolder) claim that Scalia's ruling rests more on the reasoning of proponents of a "living constitution" than originalism is built across five chapters. After this initial introductory chapter setting forth my argument and the organization of the thesis, chapter two charts the recent history of originalism from "intentionalism" (the belief that the Constitution should be based on the original intentions of the Framers and ratifiers) to "public understanding" originalism (which bases interpretation of the Constitution on how its clauses and amendments were understood by the public during ratification). I also identify some of the arguments that have been set forth against originalism by

its opponents and how these arguments led to adaptions by proponents of originalism and to the articulation of a "new originalism." This chapter culminates with a discussion of Scalia's "linguistic" and "textualist" originalism as a response to criticisms of originalism and a variation of the new originalism.

Chapter three provides a lengthy summary and analysis of Scalia's majority opinion in *D.C. v. Heller*. This summary examines Scalia's historical and contextual analysis of the meaning of key words and phrases in the 2nd Amendment. It also examines Scalia's discussion of the relationship of its "prefatory clause" (the dependent clause reading "a well-regulated Militia, being necessary to the security of a free State") to its "operative clause" establishing the legal command of the amendment and enumerating the contours of the protection provided for "the right of the people to keep and bear Arms" without government infringement. Emphasis is placed on the shift in Scalia's majority opinion from these historical and linguistic considerations to his transition to contemporary arguments in favor of defense as constituting the primary purpose of the argument. This analysis supplies support for my claim that Scalia's ruling is not, in any meaningful sense at least, an originalist ruling.

Chapter four examines the abundant and deeply divided scholarly commentary on Scalia's opinion and my analysis of the strengths and weaknesses of the arguments of these commentators. A final chapter further sharpens my interpretation and criticism of Scalia's opinion and explores the implications and the realized and future effects of Scalia's ruling. Scalia's majority opinion, I conclude, reaches the right conclusion in setting forth the 2nd Amendment as protecting an individual right to gun ownership. But as an inadequate and

perhaps even inauthentic use of the originalism, it also sets a perilous example that may have unintended effects and unforeseen consequences.

One of the most enduring aspects of Scalia's legacy will be his advocacy of originalism and his belief that the text in question should be interpreted according to the public understanding of its meaning at the time of its adoption. But when *Heller* is examined according to this dictum Scalia's findings have much more in common with contemporary beliefs about the 2nd Amendment. The long-term effect will almost certainly be that originalism is further impugned. And as the politicization of judicial appointments increases, gun rights may one day be at the peril of the political makeup of the courts. Hard cases, so the axiom goes, produce bad precedents. *D.C. v Heller*, this thesis argues, was a hard case that has produced a bad precedent. The deepest irony of Scalia's majority opinion is thus that his much-celebrated swan song may inadvertently create a faulty line of 2nd Amendment jurisprudence and discredit his beloved method of constitutional interpretation.

CHAPTER II

SCALIA'S "NEW ORIGINALISM"

The prominent constitutional scholar Mark Tushnet states that "*Heller* has been described, accurately enough, as the most originalist opinion in recent Supreme Court history" (Tushnet 2008, 609). Cass Sunstein, an equally prominent constitutional theorist, claims that "*District of Columbia v. Heller* is the most explicitly and self-consciously originalist opinion in the history of the Supreme Court" (Sunstein 2008, 246). In fundamentally challenging the scholarly consensus on which these quotes rest, by suggesting that Scalia's majority opinion is an originalist ruling by name only, this thesis requires an account of what it means to be an originalist and what it meant to Scalia.

A concise history of the recent debate over originalism and its evolution from the claims of an "old originalism" to a "new" one is an essential starting point for understanding Scalia's originalism and his general defense of it. Scholars disagree about when the "old" originalism began and ended, but most place its beginning in the 1960's and see it giving way at the turn of the century to a new approach and new set of claims (Whittington 2004, 599). Dissatisfaction with the Warren Court in the 60's set the stage for the old originalism (Ibid.). Campaigning for the 1968 presidential election, Richard Nixon, in response to the Warren Court's expansion of the rights of criminal defendants, "prominently pledged to appoint only 'strict constructionists who saw their duty as interpreting law and not making law'" (Ibid., 600). At this same time, prominent jurists such as William Rehnquist, a Nixon appointee, and Robert Bork began to advocate use of the Framers' and ratifiers' *intentions* as a guide to constitutional

interpretation and a means of restraining the Warren Court's "innovative rulings" (Whittington 2004, 599). In 1971, Bork wrote an article that is considered by some to be the beginning of "contemporary originalist theory" (Solum 2011, 6). Bork suggested that deference to the "text and history" of our founding period, and to the "[v]alue choices… attributed to the Founding Fathers, not the Court" was needed in order to stay the Court from "construct[ing] new rights" (Whittington 2004, 600).

As it was set forth by Rehnquist, Bork, and others, the old originalism held that the original intentions of the Framers and ratifiers provided the authoritative and legally binding meaning of the Constitution. This proposition was then backed with an array of concerns and arguments. Originalists decried the undemocratic character of judicial activism, often by accusing their opponents of wanting to establish the Justices of the Supreme Court as a body of unelected and unaccountable "Platonic guardians." Conversely, they contended that originalism is democratic because it enforces the understanding of the Constitution at the time that the sovereign people adopted the document and channels decision-making about controversial moral and political questions not clearly addressed within the text of the Constitution into the state legislatures or into the directly elected branches of the national government. Originalists emphasized the historical hegemony of originalism as a mode of constitutional interpretation and derided their opponents as advocates of an endlessly morphing "Living Constitution" that empowered judges to transform the founding charter to reflect changing public conventions or their own political ideologies.

While these claims soon became almost a standard chorus, opponents of originalism launched an intense counterattack against them that challenged the very possibility of a

jurisprudence of original intent. Three main criticisms were set forth. First, opponents of originalism claimed that it is impossible to assemble a consensus or universal intention or understanding held by the Framers and ratifiers of the Constitution (Barnett 2006, 8). Understanding an intention as a mental state that accompanied the passage or ratification of a law, the most sophisticated and effective critics of the old originalism emphasized the number and complexity of pre-interpretative decisions that originalism requires, and the necessity of recourse to controversial moral and political theories in addressing them. Even beginning to account for the range of mental states that accompany the enactment of a law or Constitution, Paul Brest and Ronald Dworkin pointed out, requires addressing such prior questions as "Who will be counted as Framers?" "Are we to conceive of the Framers' intentions as abstract principles or concrete expectations and practices?" and "How are we to aggregate the intentions of the Framers?" Answering these and numerous other background questions necessary to construct a working conception of originalism, critics of originalism argued, requires the adoption of controversial moral and political theories and the abundant exercise of judicial discretion. Nevertheless, avoiding recourse to moral theory and the exercise of undue discretion was, according to originalists, the most distinctive advantages of their approach (Brest, 213-217,1980; Dworkin, 38-57, 1985).

The criticism that originalism could not meet its claim to supply consensus interpretations of specific clauses also pointed to the integrity of the documentary record surrounding the drafting and ratification of the Constitution. For example, critics of originalism pointed out that, while *Madison's Notes of the Convention* provide excellent insight into the sentiments and ideas of those at the Constitutional Convention, they comprise "less than ten

percent of the total proceedings" (Barnett 2006, 8). If the documentary record of the debates at the Convention is sparse and possibly fabricated, critics of originalism continued, an even smaller percentage of the debates surrounding ratification of the Constitution and the Bill of Rights is recorded. Records of debates regarding the Bill of Rights, critics conclude, are scant for the House, and are nonexistent for the Senate (Barnett 2006, 8).

Second, critics of originalism maintained that the Founders themselves "rejected reliance on original intent" (Ibid.). James Madison, one critic of originalism points out, placed a distinction "between the public meaning of a state paper, a law, or a constitution, and the personal opinions of the individuals who had written or adopted it" (Powell 1985, 935). This distinction was also applied by Madison to the Constitution (Ibid., 936). Furthermore, according to originalists' critics, Madison was aware that his "knowledge of the views held by the delegates to the Philadelphia and Virginia conventions [could act] as a possible source of 'bias' in his constitutional interpretations" (Ibid.). Madison even went as far as to caution "a correspondent against an uncritical use of *The Federalist,* because 'it is fair to keep in mind that the authors might be sometimes influenced by the zeal of advocates'" (Ibid.).

Lastly, critics of originalism argued that this method of constitutional interpretation imposes the "dead hand" of past interpretations on contemporary Americans (Barnett 2006, 8). As Daniel Farber puts it, "the ratifiers had no claim at all to represent those of us alive today, so it is unclear how their majority vote can override the will of current majorities: 'We did not adopt the Constitution, and those who did are dead and gone'" (Farber 1988, 1099). According to opponents of originalism, even some of the Founders, including Jefferson, Webster, and Paine

"doubted the legitimacy of attempting to govern unborn future generations" (McConnell 1997, 1127).

The "new originalism" developed as a project to "clarify," recalibrate, and defend originalism against these charges set forth in what Keith Whittingon has called the "academic rout" of originalism (Whittington 1999). Scalia has played a "key role" in the popularization of this refurbished originalism (Solum 2011, 15). During the last thirty years, Scalia, Whittington, and other "new originalists" have sought to develop a workable conception of originalism and continued to distance the "new originalism" from several features that characterized the "old originalism."

More specifically, if the first iteration of originalism evolved to place emphasis on the intent of the Framers in guiding "constitutional interpretation" (Solum 2011, 8), originalist theory had by the 1980s "gradually moved to the view that the 'original meaning' of the Constitution was held to be captured in the 'original *public meaning*' of the text [emphasis added]" (Solum 2011, 1). As developed over the last twenty years, most versions of the "new originalism" now seek to understand how those "assembled in the state ratifying conventions" would understand the meaning of the text (Whittington 2013, 380). This focus on the original public meaning of the text, new originalists hold, "better captures the public authority of the text" (Ibid., 381). The reason the Constitution is respected as the supreme law of the land is because it was ratified and accepted as such "by the people, not by virtue of its drafting history or the superiority of the virtue or intellect of James Madison and his brethren" (Ibid.). As Whittington puts it, "The goal of constitutional interpretation is not to capture what James Madison meant but to capture what the constitutional text means" (Ibid.).

For his part, Justice Scalia contributed important writings to the development of the new originalism, but as we will see in the next chapter has a somewhat different approach than most. In his 1988 series of lectures dedicated to Chief Justice William Howard Taft entitled "Originalism: The Lesser Evil," Scalia "began the now-widely-accepted shift from basing constitutional interpretation on the intent of the framers to relying instead on the original public meaning of the text" (Barnett 2006, 7). In this lecture, Justice Scalia laments the amount of "opinions that have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean" (Scalia 1988, 1). What approach, then, should judges use in interpreting the law? For Scalia, there is but one choice. The "main danger in judicial interpretation of the Constitution," as Scalia describes it, "is that the judges will mistake their own predilections for the law" (Ibid., 5). Originalism provides the solution for this danger. According to Scalia, "Originalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself" (Ibid.).

In 1997, Scalia then offered a second contribution with his book, *A Matter of Interpretation: Federal Courts and the Law*. In this book, Scalia outlined his beliefs about how the judiciary should interpret statutory law and the Constitution. Specifically, Scalia argued that the "*unexpressed* intent of legislators must not bind citizens [emphasis original]" (Scalia 1997, vii). That "Laws mean what they actually say, not what legislators intended them to say but did not write into the law's text for anyone (and everyone so moved) to read" (Id.). Scalia's "philosophy is called textualism, or originalism, since it is the original meaning of the text—applied to present circumstances—that should govern judicial interpretation of statutes and the

Constitution" (Scalia 1997, vii) Ralph Rossum sums it up most succinctly:

> Scalia pursues a textualist or original-meaning jurisprudence that accords primacy to the text and tradition of the document being interpreted and that regards it as the duty of the judge to apply the textual language of the Constitution or statute when is it clear or the traditional understanding of the text—what it meant to the society that adopted it—when it is not. (Rossum 2006, 51).

Scalia's fervor for originalist interpretation stems from his belief that common law methods or a living constitution interpretation give judges too great a role in policy making, thereby compromising the democratic process (Sunstein 1997, 530). Common law practices "introduce a high degree of unpredictability, increasing judicial discretion and at the same time depriving others, citizens as well as legislators, of a clear background against which to work" (Sunstein 1997, 530). As Scalia puts it, common law is "…not a reflection of the people's practices, but is rather law developed by the judges" (Scalia 1997, 4). Also of concern to Scalia is his belief that these decisions are made by judges who are (in most cases) not elected, and that the judiciary is the least accountable branch of government (Sunstein 1997, 531).

Accordingly, Justice Scalia believes that there must be standardized rules and practices in how law is interpreted and how legal decisions are made (Ibid., 530). It is the lawgiver, according to Scalia, not the interpreter of the law, who should be given deference in the role of policy making (Ibid., 535). Furthermore, Scalia held that a common-law method of adjudicating limits democracy in the sense that it prevents "elected officials from engaging in new experiments" (Ibid., 537). For Justice Scalia, there are two primary concerns in his promotion of originalism: "a strong commitment to rule-bound justice," and the belief that discretion should reside in "democratically elected officials," not with the judiciary (Ibid., 566).

In his book, Scalia outlines what he calls "…the (few) generally accepted concrete rules of statutory construction" (Scalia 1997, 16). One of these rules is that "[w]hen the text of the statute is clear, that is the end of the matter" (Ibid.). He does this in response to the practice of judges interpreting "the intent of the legislature" (Ibid.). Scalia argues that what the legislature *says* via statute is what matters, not what their intentions were (Ibid.). According to Scalia, "Government by unexpressed intent is… tyrannical. It is the law that governs, not the intent of the lawgiver" (Ibid., 17). Scalia's great fear about interpreting the *intentions* of the legislative body is summed up as follows: "The practical threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field" (Ibid., 17-18).

For Justice Scalia, the text of the law is of paramount concern: "The text is the law, and it is the text that must be observed" (Ibid., 22). He does however concede that some degree of interpretation [discretion] is necessary, but that one can still be "a textualist in good standing" (Ibid., 23). For example, Scalia recognizes that there may be "broader social purposes that a statute is designed, or could be designed, to serve;" and that one must not be "too hidebound to realize that new times require new laws" (Ibid.). Instead, a textualists' guiding principle should be "the belief that judges have no authority to pursue those broader purposes or write those new laws" (Ibid.). According to Scalia, "[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means" (Ibid.). However, Scalia also notes that "while a good textualist is not a literalist, neither

is he a nihilist. Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible" (Scalia 1997, 24).

Scalia also addresses the role that legislative history should play—or rather, should not play—in judicial review. Legislative history, according to Scalia is "the statements made in the floor debates, committee reports, and even committee testimony, leading up to the enactment of legislation" (Scalia 1997, 29). Rather, "the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statutes meaning" (Ibid., 29-30). In criticizing the practice of interpreting legislative history, Scalia concludes that "legislative history is ordinarily so inconclusive" that it becomes a redundant waste of time (Ibid., 36). Moreover, Scalia is unable to recall in his previous nine terms wherein he used the practice, or if it would have made a difference in the outcome of a decision (Ibid.).

Most broadly, *A Matter of Interpretation* includes Scalia's defense of an approach to constitutional interpretation that uses contemporaneous usages of the phrases and words to establish their original meaning. Scalia begins by asserting that "In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear" (Ibid., 37). For Scalia, the litmus test for the meaning of a statute or the Constitution is "the original meaning of the text, not what the original draftsmen intended" (Ibid., 38). The conflict in interpreting the Constitution "is not that between Framers' intent and objective meaning, but rather that between *original* meaning (whether derived from Framers' intent or not) and *current* meaning" [emphasis original] (Ibid.).

Like proponents of the "old originalism," Scalia is concerned about the growing body of constitutional interpreters who have embraced the "Living Constitution" method and presents linguistic textualism and appeals to tradition as its alternative. "Living constitutionalism," he argues, results in "a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and 'find' that changing law" (Scalia 1997, 38). This new iteration of common law has become "infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures" (Ibid.). Scalia's ultimate fear is that "the Court will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that the Constitution might mean what it *ought* to mean" [emphasis original] (Ibid., 39).

Foreshadowing his own majority decision in *Heller*, Scalia cites the 2nd Amendment as an example of what might become of the right to bear arms if a "Living Constitutional" interpretation is used to interpret it in the future: "we value the right to bear arms less than did the Founders (who thought the right to self-defense to be absolutely fundamental), and there will be few tears shed if and when the 2nd Amendment is held to guarantee nothing more than the state National Guard" (Ibid., 43). With this fear expressed by Scalia in mind, one wonders if Justice Scalia took particular delight in authoring the opinion that would dispel the notion that the 2nd Amendment was merely a collective right.

What might be even more ironic, given Scalia's recourse to contemporary standards in *Heller*, is his speculation about what constitutes the "guiding principle" (Ibid., 45) behind Living Constitutionalism: "What is it that the judge must consult to determine when, and in what direction evolution [of law] has occurred? Is it the will of the majority, discerned from

newspapers, radio talk shows, public opinion polls, and chats at the country club?" (Scalia 1997, 45). As we will see, the irony here is that in *Heller*, Justice Scalia *does* "consult" contemporary Americans' popular beliefs about the purpose of the 2nd Amendment. In *Heller*, he derives its authority more from concurrent interpretations and beliefs about the Amendment than from the meaning one living in the 18th century would have taken from its text.

Still, whatever his own hypocrisies, originalism is, Scalia forcefully holds, the best method of interpreting the Constitution. If nothing else, the originalist has a firm starting point: "I do not suggest, mind you, that originalist always agree upon their answer…. But the originalist at least knows what he is looking for: the original meaning of the text" (Scalia 1997, 45). The alternative, as Scalia foresees it, is fraught with tremendous danger; a Constitution that changes according to the whims of the majority, for the "appointment and confirmation process will see to that" (Ibid., 47). According to Scalia, this would be "the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all" (Ibid., 47).

Most important, as we will see in the next chapter, Justice Scalia employs the new originalism's method in *Heller* in maintaining that he is seeking the original public meaning of the phraseology of the 2nd Amendment at the time of its adoption. In doing so, Scalia applies a methodology he has helped to create and popularized in his highly visible articles and books. As early as 1986, Scalia had suggested that he "'ought to campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning…'" (Konig 2009, 1301). Twenty-two years later, Scalia turned to the doctrine of original meaning in *D.C. v Heller* to

justify the decision that has solidified his reputation among conservatives as one of the most, if not the most, brilliant justices of the 20th century.

CHAPTER III

REVOLUTIONARY ORIGINALISM: SCALIA'S MAJORITY OPINION IN *D.C. V. HELLER*

Justice Scalia's opinion for the Court in *D.C. v Heller* is a misguided *tour de force*. Scalia defends his preferred method of constitutional interpretation and applies it to reach an understanding of the 2nd amendment that the Supreme Court had never previously ventured. Cloaked in the conservative garb of originalism, the majority opinion of *Heller* thrusts aside previous rulings on the 2nd Amendment to reach a ruling that, contrary to what Scalia suggests, cannot be reached from precedents. In a final paradox, this revolutionary originalist ruling, this affront to *stare decisis,* was made in a ruling that conservatives consider one of the most important in recent Supreme Court history and by a Justice that they hold as an exemplary defender of the Constitution.

For our purposes, Scalia's majority decision is most constructively analyzed as a series of five claims that build upon each other to culminate in a Court's holding that the Washington D.C. law prohibiting residents from possessing a handgun and requiring that any gun in their home be dissembled or bound by a trigger lock is unconstitutional. A schematic outline of Scalia's opinion takes the following form:

1. The Meaning of the 2nd Amendment (understood as its original public understanding): "The 2nd Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home."

    a. The contemporaneous meaning of the "Operative Clause" including "The Right of the People" and to "Keep and Bear Arms."

    b. The contemporaneous meaning of the "Prefatory Clause" including a "Well-

Regulated Militia" and the "Security of a Free State."

2. The Relationship of the Prefatory and Operative Clauses (supporting the claim that the prefatory clause does not limit or expand the scope of the operative clause. Most important, the prefatory clause does not limit the operative clause to the protection of the right of a militia to be armed.

3. Analysis of the Right to Keep and Bear Arms in State Constitutions before and after the ratification of the 2nd Amendment, Post-Ratification Commentary on it, Pre-Civil War Case Law on the 2nd Amendment, Post Civil War Legislation, and Post Civil War Commentary on the 2nd Amendment (all supporting the claim that the 2nd amendment protects an individual right to gun ownership).

4. Analysis of Supreme Court precedents on the 2nd Amendment (supporting the claim that the Court's finding that the 2nd Amendment protects an individual right to gun ownership for self-defense comports with or at least is not foreclosed by previous Supreme Court rulings.

5. The Scope of the 2nd Amendment (establishing that the Supreme Court's ruling in this case does not prohibit all regulation of gun ownership, especially the kinds of weapons that individuals may own).

6. The Court's findings about the Meaning of the 2nd Amendment establish that the Washington D.C. law in question is unconstitutional.

Because my claim is that Scalia has offered a perverse and erroneous (non) originalist ruling, the analysis below concentrates on Scalia's historical interpretations of the central phrases in the 2nd Amendment (Nos. 1-4 above). We will later consider the scope of the 2nd Amendment.

Scalia's Analysis of the Original Meaning of the Second Amendment

Scalia begins his opinion for the Court by reminding readers of his premise that the Constitution and its amendments must be interpreted as it was "written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning" (*D.C. v. Heller*, 554 U. S. Supreme Court, 3, 2008). This "normal" or

"natural" meaning, according to Scalia, excludes "secret or technical meanings" that would have been unfamiliar to those living during "the founding generation" (*D.C. v. Heller*, 554 U. S. Supreme Court, 3, 2008). The originalist would, however, interpret a phrase as being "idiomatic" or as a key of art if that could be established. It is important to note that Scalia explicitly defends the central proposition of the new originalism that the public understanding of the 2nd amendment is its legally dispositive or enforceable meaning (Ibid., 32).

Nevertheless, Scalia does not, like many "new originalists," search for the "principles embodied in that text" of the Constitution by examining the ratification debates and the legislative history of amendments to the Constitution (Whittington, 2006, 1-2). Instead, with regard to the 2nd Amendment, he uses an array of historical materials to determine the meaning of four discrete phrases in the prefatory and operative clauses of the 2nd Amendment. These include the phrases "The Right of the People" and to "Keep and Bear Arms" in the operative clause and a "Well-Regulated Militia" and the "Security of a Free State" in the prefatory clause. Scalia then puts the meanings of these phrases together to come up with an original meaning of each clause and the 2nd Amendment in general.

In Table 1 on the following page, we see the four distinct clauses of the 2nd Amendment. This table provides a comparison between the clauses in the 2nd Amendment and Justice Scalia's understanding of these clauses. The left hand side of the column contains the text of the clause as it appears in the 2nd Amendment. On the right hand side is Scalia's understanding of the original meaning of each clause. The clauses are presented in the order that they appear in Scalia's analysis of their meaning in *Heller*.

Table 1: The Four Distinct Clauses of the Second Amendment as Defined in *Heller*

Clause	Original meaning
"The Right of the People"	"Nowhere else in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual right. What is more, in all six other provisions of the Constitution that mention "the people," the term unambiguously refers to all members of the political community, not an unspecified subset." "We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans."
"Keep and Bear Arms"	"No party has apprised us of an idiomatic meaning of "keep Arms." Thus, the most natural reading of "keep Arms" in the Second Amendment is to "have weapons." "At the time of the founding, as now, to 'bear' meant to 'carry.' When used with 'arms,' however, the term has a meaning that refers to carrying for a particular pourpose-confrontation."
"Well-Regulated Militia"	"[T]he adjective 'well-regulated' implies nothing more than the imposition of proper discipline and training."
"Security of a Free State."	"The phrase 'security of a free state' meant 'security of a free polity,' not security of each of the several Sates as the dissent below argued..."

Source: District of Columbia v. Heller, 554 U.S. (2008).

Scalia concentrates first on the operative clause. The most prominent "feature" of this clause, he concludes, is its codification of a "right of the people" (*D.C. v. Heller*, 554 U. S. Supreme Court, 6,2008). This phrase is also used in the First Amendment and the Fourth Amendment. Very similar language is also used in the Ninth Amendment (Ibid.). Scalia draws attention to the distinction that in each of these instances the rights recognized as belonging to "the people" are "unambiguously" individual despite the collective denotation and connotation of the term (Ibid.). According to Scalia, these rights are not "'collective' rights, or rights that may be exercised only through participation in some corporate body" (Ibid.). "The people" are also mentioned in the preamble, Article I, and the Tenth Amendment. All three of these "arguably refer to 'the people' acting collectively—but they deal with the exercise or reservation of powers, not rights" (Ibid.). Thus, according to Scalia's analysis, the "rights" attributed to "the people" are exclusively individual in nature (Ibid.).

Having begun to make his case that the protection afforded by the 2nd Amendment is an individual right, Scalia turns next to the meaning of the "the people" mentioned in the amendment and more broadly in the Constitution. According to Scalia, the six other times the Constitution mentions the people (the First, Second, Fourth, Ninth, and twice in the Seventeenth Amendment), all refer to the public as a whole (Ibid.). The term "'the people' . . . unambiguously refers to all members of the political community, not an unspecified subset" (Ibid.). This is contrasted with the phrase "the militia," whom Scalia declares are "a subset of 'the people,'" consisting of all able-bodied males within a certain age group (Ibid., 7). Scalia's analysis further advances his "strong presumption that the 2nd Amendment right is exercised individually and belongs to all Americans" (Ibid.).

Continuing in his analysis of the operative clause, Scalia proceeds to the meaning of the phrase "to keep and bear arms." Beginning with the term "arms," Scalia cites three dictionary definitions: one from 1773, one from 1771, and one from 1828 (*D.C. v. Heller*, 554 U. S. Supreme Court, 7, 2008). These definitions declare that "arms" can be weapons of either offense or defense, and are not exclusive to firearms (Ibid.). Nor are these arms exclusive to military use or deployment (Ibid.). Furthermore, Scalia attempts to refute the straw man argument (though he does not specify whose argument it is) "that only those arms in existence in the 18th century are protected by the 2nd Amendment" (Ibid.). This claim, according to Scalia, "borders on the frivolous" (Ibid., 8). The 2nd Amendment's protections, Scalia contends, extend "prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding" (Ibid.).

Scalia next looks at the meaning of the terms "keep arms" and "bear arms" (Ibid.). Beginning with the word "keep," Scalia consults definitions from founding-era dictionaries and one contemporary dictionary. His conclusion is that the phrase "keep Arms" in the 2nd Amendment means to "have weapons" (Ibid.). In addition, Scalia notes that this phrase is not contingent upon membership in a militia, stating that "'Keep arms' was simply a common way of referring to possessing arms, for militiamen and everyone else" (Ibid., 9). The phrase "bear" means the same thing it meant "[a]t the time of the founding," namely to "carry" (Ibid., 10), but when used in conjunction with "arms," the act of carrying is "for a particular purpose—confrontation" (Ibid.).

At this point, Scalia makes the dubious assertion that the "natural meaning" (though he neglects to mention how this became the natural meaning) of the term "bear arms" is not

exclusive to carrying arms while serving "in a structured military organization" or in "an organized militia" (*D.C. v. Heller*, 554 U. S. Supreme Court, 11, 2008). In particular, Scalia cites Justice Ginsburg's dissent in a 1998 Supreme Court case (*Muscarello v. United States*), and various state constitutions from the 18th and early 19th centuries as evidence for this reading. Justice Ginsburg's definition of "carrying a firearm," quoting the 6th edition of *Black's Law Dictionary* (1998), means to "'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person'" (Ibid., 10). However, Scalia also quotes various founding era state constitutions and their use of the term "bear arms." Scalia notes that the phrases "bear arms in defense of *themselves* and the state [emphasis added]" or "bear arms in defense of *himself* and the state [emphasis added]" are present in these state constitutions, indicating that the right therein is not exclusive to service in "an organized military unit" (Ibid., 11).

Next, Scalia engages in a rebuttal to the Petitioners' argument and Justice Stevens' dissent regarding the phrase "bear arms." Scalia calls attention to what he deems the "idiomatic meaning" of the term (Ibid.). Citing an amicus brief for *Heller,* the idiomatic meaning of "bear arms" is "significantly different from its natural meaning," and means to "'to serve as a soldier, do military service, fight' or 'to wage war'" (Ibid.). According to Scalia this idiomatic meaning applies "only when followed by the preposition 'against,' which was in turn followed by the target of the hostilities" (Ibid.). The example given by Scalia is from the Declaration of Independence, which states: "He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms *against* their Country . . . . [emphasis added]" (Ibid.). Otherwise the phrase

“bear arms” meant in the 17th century what it means now, which is what Justice Ginsburg said it means in *Muscarello*—to “carry” (*D.C. v. Heller*, 554 U. S. Supreme Court, 13, 2008).

The Petitioners and Justice Stevens argued that “bear arms” implies the carrying of arms (rather than the idiomatic meaning of waging war), but only while serving "in the service of an organized militia” (Ibid.). Scalia responds by asserting that this “hybrid definition” (Ibid.) is found nowhere in any dictionary, nor has the Court “been apprised” of such a meaning to have existed during “the time of the founding” (Ibid.). Continuing, Scalia notes that the Petitioners point out that the term “bear arms” was frequently used in a military context in the sources that were used in their research (Ibid., 12-13). Scalia counters by arguing that many of the resources the Petitioners rely upon deal with topics that were strictly discussions about “the standing army and the militia” (Ibid.).

Scalia also notes that other terms such as “‘carry arms,’ ‘possess arms,’ and ‘have arms’” are also mentioned in these same resources, yet “no one thinks that those other phrases also had special military meanings” (Ibid., 13-14). Scalia cites research showing that the phrase “bear arms” was also used in non-military contexts (Ibid.). Scalia then chides Justice Stevens for ignoring instances where a qualifier is attached to the phrase “bear arms:” For Justice Stevens, the phrase seems idiomatic for those serving in the militia; for Scalia, the phrase appears to be a colloquial phrase for the purpose of self-defense or hunting:

> The amici also dismiss examples such as "bear arms . . . for the purpose of killing game" because those uses are "expressly qualified." Linguists' Brief 24. . . . If "bear arms" means, as we think, simply the carrying of arms, a modifier can limit the purpose of the carriage ("for the purpose of self-defense" or "to make war against the King"). But if "bear arms" means, as the petitioners and the dissent think, the carrying of arms only for military purposes, one simply cannot add "for the purpose of killing game." The right "to carry arms in the militia for the purpose of killing game" is worthy of the mad hatter. Thus, these

> purposive qualifying phrases positively establish that "to bear arms" is not limited to military use (*D.C. v. Heller*, 554 U. S. Supreme Court, 15-16, 2008).

Lastly, in his assessment of the phrase "bear arms," Scalia looks at Justice Stevens' claim that Madison's original draft of the Amendment was couched in a military context, including a clause that excluded conscientious objectors from service in the militia. Madison's original version, Stevens had observed, included a clause to exempt conscientious objectors from serving in a military capacity (D.C. v. Heller, 554 U. S. Supreme Court, 16, 2008). According to Justice Stevens, the conscientious objector clause is strong evidence that the amendment is solely related to military confrontation (Ibid.). Scalia counters by suggesting that Madison's clause was intended to protect anyone opposed to using arms for any confrontation—be it in military service *or* self-defense (Ibid., 16-17). "It was not meant to exempt from military service those who objected to going to war but had no scruples about personal gunfights" such as Quakers (Ibid.). Scalia responds further by saying that interpreting the meaning of "an adopted provision" (the 2nd Amendment) from one that was removed (Madison's conscientious objector clause) is "perilous," and that this exemption applied not to those who were opposed to military service, but was meant to protect those who were opposed to any sort of violence, such as those of the Quaker faith (Ibid., 16).

Scalia next responds to Justice Stevens' argument that the term "'keep and bear Arms' was some sort of term of art, presumably akin to 'hue and cry' or 'cease and desist.'" Here Scalia rejects Stevens' claim that this phrase can be read as a creating a singular right to "keep *and* bear arms [emphasis added]," rather than a right to "keep arms" and a right to "bear arms" (Ibid., 17-18). Scalia's evidence for rejecting this reading comes from examples from State constitutions of that era's right to assemble and petition, and also citing a 1780 debate in the

House of Lords where "Lord Richmond described an order to disarm private citizens (not militia members) as 'a violation of the constitutional right of Protestant subjects to keep and bear arms for their own defense'" (*D.C. v. Heller*, 554 U. S. Supreme Court, 18, 2008—citing *The London Magazine or Gentleman's Monthly Intelligencer,* 467, 1780). These examples illustrate, according to Scalia, that to "keep arms" is one right and to "bear" or "carry" them is another.

After declaring that the First, Fourth, and 2nd Amendment have "always been widely understood" to codify pre-existing rights (*D.C. v. Heller*, 554 U. S. Supreme Court, 19, 2008), Scalia cites the Court's decision in *United States v. Cruikshank* (1876), wherein the Court said the 2nd Amendment "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The 2nd amendment declares that it shall not be infringed . . . ." (Ibid.). In response to King Charles' II and King James' II employment of "select loyal militias" to disarm their political opponents, Englishmen obtained from William and Mary, via the English Bill of Rights, protections against Protestants being disarmed. Scalia notes that "By the time of the founding, the right to have arms had become fundamental for English subjects" (Ibid., 20). Lastly, attempts by King George to disarm the rebellious colonists caused the colonists to invoke their rights as English subjects to bear arms (Ibid., 21). As a result of this historical evidence, there is no doubt to Justice Scalia that the 2nd Amendment "conferred an individual right to keep and bear arms" (Ibid., 22). Scalia concludes his analysis of the operative clause and declares that by "putting all of these textual elements together" the meaning of the clause is to "guarantee the individual right to possess and carry weapons in case of confrontation" (Ibid., 19).

Scalia now pivots to his analysis of the prefatory clause, which reads: "A well-regulated Militia, being necessary to the security of a free State. . . ." Beginning with the militia, and citing *U.S. v. Miller* (1939), Scalia identifies the militia as ". . . all males physically capable of acting in concert for the common defense" (*D.C. v. Heller*, 554 U. S. Supreme Court, 22, 2008). Scalia equates this definition with founding era illustrations of the militia, including Madison's "near half a million of citizens with arms in their hands" (Federalist 46), and Jefferson's "[T]he militia of the State, that is to say, of every man in it able to bear arms" (Ibid.).

Scalia rebuffs the Petitioners' argument that the militia in the 2nd Amendment is the "state and congressionally-regulated military forces described in the Militia Clauses" of the Constitution in Article I, Section 8 (Ibid.). He declares that the militia was in existence *before* the Constitution was adopted (Ibid., 23). Congress has the power to call forth and "organize" part or all of the state militias for service, but Congress does not *create* the militia (Ibid.). Regarding the term "well-regulated," Scalia declares this "implies nothing more than the imposition of proper discipline and training" (Ibid.).

Continuing his analysis of the prefatory clause, Scalia asserts that the phrase "security of a free State" is not the security of the individual states, but the security of "a free polity" (Ibid., 24). Scalia provides evidence for this claim by referencing Joseph Story, William Blackstone, the Antifederalist "Brutus," and one contemporary source (Eugene Volokh), yet does not include any commentary from Federalists (the men who defended ratification of the Constitution). In quoting Story, Scalia notes that at the time of the founding "'the word "state" is used in various senses [and in] its most enlarged sense, it means the people composing a particular nation or community'" (Ibid.). Quoting Volokh, Scalia declares that in 18th century

political discourse the phrase "security of a free state" meant a "free country" (*D.C. v. Heller*, 554 U. S. Supreme Court, 24, 2008). Scalia concludes his interpretation of the prefatory clause by listing three reasons why the militia would have been thought to be "necessary to the security of a free state:" for "repelling invasions and suppressing insurrections"; it would render "large standing armies unnecessary"; and for the purpose of resisting tyranny (Ibid., 24-25, 2008).

Scalia's Claims About the Relationship of the Prefatory and Operative Clauses

Scalia now compares the relationship between the prefatory and operative clauses and asks whether the preface fits with "an operative clause that creates an individual right to keep and bear arms?" (Ibid., 25). Scalia's answer is: "it fits perfectly, once one knows the history that the founding generation knew and that we have described above" (Ibid.). Scalia argues that in order to render the militia ineffective, a tyrant need not eliminate the militia, he merely needs to deprive the militia access to arms (Ibid.). This would give a select militia or a standing army free reign in suppressing political opponents of the ruling body (Ibid.). Scalia cites the experience of pre-colonial Englishmen being disarmed, which prompted the inclusion of the right to arms in English Bill of Rights as evidence for this claim (Ibid.).

The question of whether to include the right of the people to keep and bear arms in the Constitution was not over its desirability, but rather over the question of the need to do so at all (Ibid.). Antifederalists (whom conservative readers of the 2nd Amendment have been criticized as relying too heavily upon) feared the new federal government's ability to raise a standing army and the threat it might pose to liberty (Ibid., 25-26). The potential for Congress to disarm or disband the militia, or create a select militia while disarming the general populace was

expressed by Pennsylvania Antifederalist John Smilie: "'[w]hen a select militia is formed; the people in general may be disarmed'" (*D.C. v. Heller*, 554 U. S. Supreme Court, 25, 2008). Federalists attempted to allay these concerns by pointing out that the Constitution did not grant the power to disarm the people, thus such action would not be possible (Ibid.). Therefore, according to Scalia, it was universally understood that a citizen militia, composed of all able-bodied adult males, would be preserved through the adoption of the right to keep and bear arms, and that this force would be able to "oppose an oppressive military force if the constitutional order broke down" (Ibid., 26).

In Scalia's estimation, the prefatory clause declares the purpose of the Amendment: "to prevent the elimination of the militia" (Ibid.). According to Scalia, self-defense and hunting were "even more important" reasons for the right to arms than was the preservation of the militia (Ibid.), but the reason the 2nd Amendment focusses on the arming of a militia is because it was the most susceptible to abuse by the new created Federal system (Ibid.). Contrary to Justice Breyer's claim (based upon the Amendment's preface) that self-defense was a "subsidiary interest" to the framers inclusion of a right to arms, Scalia asserts that "self-defense had little to do with the right's *codification*; it was the *central component* of the right itself" (Ibid.).

Scalia contends that while those who debated the Constitution believed that the right to arms for self-defense was of greater importance than preserving the militia, the threat that the new federal government might pose to the militia was of greater concern, and therefore included in the 2nd Amendment (Ibid., 26-27). If the 2nd Amendment is strictly about protecting a right for an individual to bear arms in the organized militia rather than the citizen militia, then Congress would therefore have the ability to create a select militia reminiscent of the kind that the Stuart

Kings used to suppress dissidents (*D.C. v. Heller*, 554 U. S. Supreme Court, 27, 2008). Thus, while self-defense was the "central component" of the right, it was a safeguard against the potential for tyranny that called for codifying the 2nd Amendment in the Bill of Rights (Ibid.). Justice Scalia appears to be making the argument that the Framers and the public believed that arms for self-defense and hunting were of more imminent need in the late 18th century, but in deference to these Antifederalist fears they chose to codify the unlikely but remotely prescient possibility of the federal government tyrannizing the new republic.

Scalia's argument and fidelity to the original public understanding thus seems to support the Court's self-defense purpose in *Heller*. However, Justices Stevens and Breyer both note that the Amendment's text is devoid of any mention of self-defense (*D.C. v. Heller*, 554 U. S. Supreme Court, Stevens Dissent, 16-17, 2008; Breyer Dissent, 36, 2008). Justice Stevens notes that the text of the Amendment "is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia" (*D.C. v. Heller*, 554 U. S. Supreme Court, Stevens Dissent, 16, 2008), and that if there were another interpretation of the Amendment "the burden would remain on those advocating a departure from the purpose identified in the preamble and from settled law to come forward with persuasive new arguments or evidence" (Ibid., 16-17). The proof Scalia presents supporting this conclusion is lacking and "falls far short of sustaining that heavy burden" (Ibid., 17). Instead, it would appear that Justice Scalia is giving undue attention to any self-defense motive that the Framers may have had in order to set up his contemporary interpretation of the meaning of the 2nd Amendment.

Analysis of the Right to Keep and Bear Arms in State Constitutions and Early 18th Century Commentary

Scalia next looks at what several state constitutions of the founding era have to say about the right to keep and bear arms, and finds that the Court's "interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the 2nd Amendment" (*D.C. v. Heller*, 554 U. S. Supreme Court, 27, 2008). Of the eleven states that adopted a constitution during the period between independence and the adoption of the Bill of Rights, Pennsylvania and Vermont included explicit language supporting an individual right to arms independent of service in a militia (Ibid., 28). Quoting Pennsylvania's *Declaration of Rights*, Scalia notes the individual language that it included: ". . . the people have a right to bear arms *for the defence of themselves* and the state . . . [emphasis original]" (Ibid.). Aside from differences in punctuation and capitalization, Vermont's declaration is the same as Pennsylvania's (Ibid.).

North Carolina and Massachusetts are the other two state constitutions which preceded the U.S. Constitution that included a right to arms. Scalia quotes North Carolina's statute "That the people have a right to bear arms, for the defence of the State. . . ." and Massachusetts statute "The people have a right to keep and to bear arms for the common defence…" (Ibid.). He acknowledges that these could be read to limit the right to service in a militia (Ibid.), and could be interpreted as expressing a collective right. However, regarding the North Carolina statute Scalia dismisses this possibility based upon "public-safety" interests (Ibid.). According to Scalia, this clause refers to individuals serving for the concern of the public good, and such an interpretation does not confine the statute strictly to militia duty.

Quoting Scalia on Georgia's 1770 public safety law: "Many colonial statutes required individual arms-bearing for public-safety reasons—such as the 1770 Georgia law that 'for the security and defence of this province from internal dangers and insurrections' required those men who qualified for militia duty individually 'to carry fire arms' 'to places of public worship'" (*D.C. v. Heller*, 554 U. S. Supreme Court, 28, 2008). Quoting a Massachusetts State Supreme Court 1825 decision: "The liberty of the press was to be unrestrained, but he who used it was to be responsible in cases of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction" (*D.C. v. Heller*, 554 U. S. Supreme Court, 29, 2008). Scalia's argument here is that were it not an *individual* right these statements would make no sense (Ibid.).

Scalia culminates this section of his argument by asserting that in the two decades following the ratification of the Bill of Rights, nine states adopted provisions similar to the 2nd Amendment. Seven of these used language that is explicitly individual in nature. Referring to a right to arms Indiana, Kentucky, Ohio, and Missouri use the phrase "bear arms in defence of themselves and the State" (Ibid.), though this happens years after the ratification of the 2nd Amendment. Alabama, Connecticut, and Mississippi phrase the right as the "right to bear arms in defence of himself and the State" (Ibid.). Maine and Tennessee used the same "common defense" language as Massachusetts in their right to arms clauses (Ibid.). Scalia concludes "[t]hat of the nine state constitutional protections for the right to bear arms enacted immediately [Justice Scalia fails to define "immediately"] after 1789 at least seven unequivocally protected an individual citizen's right to self-defense is strong evidence that that is how the founding generation conceived of the right" (Ibid., 30). The interpretation that the petitioners in the case

use "would thus treat the Federal 2nd Amendment as an odd outlier, protecting a right unknown in state constitutions or at English common law, based on little more than an overreading of the prefatory clause" (*D.C. v. Heller*, 554 U. S. Supreme Court, 30, 2008).

In addition to these inclusions of the right to keep and bear arms in state constitutions before and after ratification of the 2nd Amendment, Scalia also examines a variety of commentary on the meaning of the amendment, especially in the 19th century. Specifically, Scalia cites three legal scholars of the founding era that Scalia cites in defense of his claims about the 2nd Amendment: St. George Tucker, William Rawle, and Joseph Story. Each of these three commentators spoke about the 2nd Amendment in their published works. Their comments lend credence to Scalia's claims that the Amendment was more than a guarantee for states to form a militia. Each of them present arguments for an individual rights interpretation of the Amendment, and shed light on the concerns against standing armies.

Beginning with Tucker, Scalia cites a quote that illustrates three of the strongest pieces of evidence for his argument. Commenting on the 2nd Amendment, Tucker declares that the Amendment:

> … may be construed as the palladium of liberty. . . . The right to self-defence is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction (*D.C. v. Heller*, 554 U. S. Supreme Court, 33, 2008).

These three components, the protection of liberty, the natural right of self-defense (though when we read Tucker's assertion are left without a clear distinction of who is the subject of self-defense—the individual or the state), and the dangers of a standing army succinctly encapsulate the fears expressed by Antifederalists during the founding era. Tucker lived from 1752 to 1827,

served on the General Court of Virginia and the Virginia Supreme Court, and taught law at the College of William and Mary. Tucker therefore would be well acquainted with the sentiments and beliefs about the right to arms during the founding period.

William Rawle served as the State district attorney for Pennsylvania, and founded what has become the longest continuing law practice in the United States. In 1825 Rawle published comments on the 2nd Amendment, which Scalia considers in his rationale for his position on the Amendment. Rawle declares that "No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature" (*D.C. v. Heller*, 554 U. S. Supreme Court, 34, 2008). Rawle noted that the Amendment serves as a "restraint" on the attempts by either of these governing bodies to do so (Ibid.). Furthermore, Scalia calls attention to three positions of Rawle's: the belief that English game laws were contrary to the 2nd Amendment, Rawle's distinction between the people's right to bear arms and service in a militia, and the possibility that this right was liable to abuse at the expense of public peace such as unlawful assembly (Ibid., 35). According to Scalia these three instances indicate that Rawle viewed the right to bear arms as an *individual* right (Ibid.).

In 1811, at the age of thirty-two, Joseph Story was nominated to the Supreme Court by President James Madison. In 1833, Story published *Commentaries on the Constitution of the United States*. In this work Story discusses the English right to bear arms and equates it with the 2nd Amendment (Ibid.). Scalia argues that this comparison "would not make sense if the 2nd Amendment right was the right to use a gun in a militia, which was plainly not what the English right protected" (Ibid.). Scalia continues by claiming that Story cites both Tucker and Rawle in

support of his position, and notes that these two "clearly viewed the right as unconnected to militia service" (*D.C. v. Heller*, 554 U. S. Supreme Court, 36, 2008). Scalia cites another of Story's writings, *A Familiar Exposition of the Constitution of the United States,* which describes Story's observation on the methods used by tyrants to suppress dissenters: "One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia" (Ibid.). These instances illustrate the concerns about disarmament and standing armies that were of such great concern to the Antifederalists.

CHAPTER IV

SCRUTINIZING THE *HELLER* DECISION AS A FAITHFUL ADHERENT TO ORIGINALIST INQUIRY

We now turn to scrutiny of Justice Scalia's faithfulness to his beliefs about originalism. Thus far in this paper we have examined the background behind originalist constitutional judicial review, and have defined Justice Scalia's originalism. We have also reviewed the *Heller* decision, highlighting Scalia's methodology and key findings behind the Court's decision. In this chapter, I argue that Justice Scalia's originalism in *Heller* is an originalist inquiry that fails to live up to Scalia's own guidelines for judicial review. Among these are the prominence that the text of the law should play in its interpretation, and the context of the law in question. As was mentioned in Chapter II of this paper, Scalia notes that "The text is the law, and it is the text that must be observed" (Scalia 1997, 22). Moreover, Scalia writes that "Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible" (Ibid., 24). Lastly, regarding the context surrounding a law in question, Scalia argues that "In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—*though not an interpretation that the language will not bear* [emphasis added]" (Ibid., 37).

The reply to *Heller* by academia and legal scholars includes very prominent researchers and commentators from both sides of the political spectrum. Jack Rakove, Saul Cornell, Judge Harvie Wilkinson, Judge Richard Posner, Cass Sunstein and others have all been

critical of Scalia's majority opinion. Sanford Levinson asserts that Justice Scalia's methodology in *Heller* "provoked… wide interest and sometimes bitter controversy and castigation" (Levinson 2009, 318). This is no understatement. Some of the scathing rebukes hurled at Scalia include: "For a triumph of originalism, however, Justice Scalia's majority opinion ignores original meaning where it really counts" (Winkler 2011, 70); "…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" (Lund 2009, 1345); "In Heller, the lawyers who initiated the litigation won their test case, but Justice Scalia flunked his own test" (Ibid.); "Skeptics will be tempted to see Heller as a triumph of politics and a defeat for law. On their view, the Court's detailed exploration of text and history is a smokescreen for a position that has been pressed hard by interest groups and political activists, that the Republican Party enthusiastically endorses, and that Republican appointees are likely to find congenial" (Sunstein 2008, 273); "The new originalism, like the old, fails to deliver on its claim about eliminating judicial subjectivity, judgment, and choice" (Tushnet 2008, 617); "Heller encourages Americans to do what conservative jurists warned for years they should not do: bypass the ballot and seek to press their political agenda in the courts." (Wilkinson 2009, 1); "For anyone who previously doubted it, *Heller* should make clear that when it comes to the 2nd Amendment, even Supreme Court Justices are, at bottom, driven not by a dispassionate analysis of history or public policy but by ideology" (Bogus 2008, 264).

As previously noted in chapter three, In *Heller* Justice Scalia lays out the Court's guiding principle in interpreting the text of the Amendment: "'[t]he Constitution was written to

be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning'" (Heller 554 U.S. Supreme Court, 3, 2008). In determining the original public understanding, Scalia consults English history from the 17th century, dictionaries from the 18th century, the ratification debates, commentary from Blackstone, Joseph Story, St. George Tucker and William Rawle, both the Federalist and Anti-Federalist papers, and state constitutions before and after the adoption of the Amendment (Shaman 2008, 3) The Court also considers court decisions throughout the 19th and 20th century.

While Scalia may have embarked on an originalist expedition, the Court's conclusion is more in line with contemporary public opinion than 18th century beliefs about the purpose of the Amendment. In order to reach this conclusion Justice Scalia had to fashion an argument that resembles a "contorted" version of the original public understanding, and that those who framed and ratified the Amendment would not "recognize as their own handiwork" (Merkel 2009, 352). According to William Merkel, Scalia incorporated commentary and evidence not from prominent voices during the ratification process, but from persons who he considers to be "outlying, eccentric, discredited, and largely ignored… regarding private self-defense" (Ibid., 358). It is this evidence that Scalia exalts in order to support his beliefs about the understanding of the Amendment's text during the ratification era (Ibid.). Quoting Sanford Levinson, Jeffrey Shaman notes that both Justice Scalia and Justice Stevens have been ""'shamelessly selective'" in their historical interpretation of the Amendment. Shaman asserts that a judge's "own beliefs" can influence his or her interpretation of text in originalist inquiry (Shaman, 2008, 12).

Instead of an originalist review of the text, *Heller* reads more like a Living Constitution interpretation of the Amendment. *Heller* more closely resembles modern-day views about the "evolving" nature of gun rights (Merkel 2009, 355), and bases the "authority" for its conclusions on these "contemporary popular convictions" (Siegel 2008, 243). The idea of the Amendment being an individual right instead of a military-centered purpose is a "contemporary belief" (Sunstein 2008, 255). Justice Scalia appears to seek the original public understanding of the 2nd Amendment, but fails to do so (Sunstein 2008, 247). In actuality, *Heller* resembles the type of living constitutionalism that Scalia "often condemns" (Siegel 2008, 196): evidence from before and after the adoption of the Amendment, "common law-like reasoning," and "vast amounts of interpretive discretion" (Siegel 2008, 196). Rather than a discovery of late 18th century understanding, *Heller* is the result of contemporary efforts to define the meaning of the Amendment. For "decades" gun rights proponents, interest groups, and some in academia (Siegel 2008, 242; Sunstein 2008, 252-53, 266) have pursued an "aggressive social movement" (Sunstein 2008, 252-53) in an effort to garner public and judicial support for an individual right to own guns for "nonmilitary purposes" (Ibid.). The result is that "a robust individual right to use guns has become an entrenched part of American culture. Many Americans believe that this right is both fundamental and essential—as much so, in its way, as the right to freedom of speech" (Ibid., 270).

When examining the text of the Amendment it is clear that it is strictly expressed in a military-centered context. Speaking of the typical failings of originalist inquiry—that being the absence of "a single agreed or dominant understanding of constitutional text at the time of its creation" (Merkel 2009, 356)—Merkel notes that the 2nd Amendment "does not present this type

of dilemma…. The documentary record is clear, and opinion among historians… specializing in late eighteenth-century American political thought is overwhelmingly against Scalia" (Merkel 2009, 356-57). The debates about the Amendment "focused on one concern, and one concern only—the desire to ensure the preservation of the local militia as the preferred option to a politically dangerous standing army" (Ibid.). Merkel goes so far as to proclaim that "the Second Amendment presents the rare case where originalism, honestly and faithfully applied, could afford an unambiguous answer. The proposers, drafters, and ratifiers of the constitutional right to arms were not at all concerned with rights to gun possession for purposes such as self-defense or hunting (Ibid.).

The framers were considering the dangers posed by a standing army. Quoting Jack Rakove, Sunstein notes that "the purpose of the Second Amendment was merely to affirm 'the essential proposition —or commonplace —that liberty fared better when republican polities relied upon a militia of citizen soldiers for their defense, rather than risk the dire consequences of sustaining a permanent military establishment'" (Sunstein 2008, 256). Quoting Justice Stevens, Judge Harvie Wilkinson notes that "The Amendment was motivated by 'an overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the states' militias as the means by which to guard against that danger.'" (Wilkinson 2009, 19). Rather than self-defense, the ratification debates centered upon fears that the new federal government would disarm the militia (Lund 2009, 1373; Merkel 2009, 352-53) and fears about the dangers of standing armies (Merkel 2009, 367). According to Merkel, Justice Scalia errs in his historical analysis and conclusion that the Amendment was about preserving a right of self-defense: "[Justice Scalia] takes as an article of faith that the

Second Amendment was inspired by a desire to protect the right of private self-defense, even though this represents a strained reading of the text unsupported by the documentary record" (Merkel 2009, 360).

Another perplexing paradox regarding Scalia's methodology is his consideration of preambles. Justice Breyer's dissenting opinion, wherein he defends modern gun control legislation, cites several 18th century laws related to firearms such as storage requirements for powder and public nuisance laws regarding the discharge of firearms. Justice Scalia rejects Breyer's argument that a powder storage law enacted by the city of Boston is a clear indication that the founding generation believed the right to not be absolute (Cornell 2008, 635). His justification for dismissing Justice Breyer's claims is that Breyer (and the petitioners in the case) ignore the preamble to the law in question, "which described the reason for the law: the danger loaded guns posed to firefighters" (Cornell 2008, 635).

Yet when we read the 2nd Amendment's preamble and its focus on the militia, Scalia would suddenly not have us interpret preambles in such a narrow scope (Cornell 2008, 635). The glaring hypocrisy in this reasoning is quite astonishing. The prefatory clause, as Scalia has termed it, announces the purpose of the 2nd Amendement (*D.C. v. Heller,* 554 U.S. Supreme Court, 3, 2008). It specifically mentions "a well-regulated militia." Justice Stevens argued that the Framers' were "single-minded[ly] focused" on using arms "'in the context of service in state militias'" (Shaman 2008, 2). If we are free to ignore the preamble to Boston's gun storage law's emphasis on dangers posed to firefighters, we cannot on good faith ignore the 2nd Amendment's mention of a militia in its preamble.

If we are to take Justice Scalia at his word regarding originalism's focus on the public meaning at the time the adoption of the text in question, one must ask what the average voter living in the late 18th century would think regarding the 2nd Amendment's preamble. Would he believe, as Justice Scalia would have us understand, that the purpose of the Amendment was to protect the right of self-defense? Mark Tushnet suggests that the protection of the right of self-defense "is a collateral rather than a direct effect" (Tushnet 2008, 620). Instead, the voter would more likely have recognized the Amendment to be connected with militia service unless the text specifically mentioned self-defense (Ibid., 621).

Consider now Justice Scalia's definition for the phrase "bear arms." Scalia's interpretation for the meaning of "bear arms" is not found in 18th century sources, but from a brief mention in a late 20th century Supreme Court decision. Scalia declares that to "bear arms" is not limited to a strictly military context. What is his evidence that this phrase, written into the late 18th century document in question? It is an excerpt from a dissenting opinion by Justice Ginsburg written in 1998, which in turn cites an edition of *Black's Law Dictionary* from the same year (Siegel 2008, 196). The case in question was not even about gun rights, but "about sparing a convicted criminal who had not actually brandished or employed a gun during the course of the crime from enhanced sentencing requirements" (Merkel 2009, 368). This is hardly a good source to use if one were interested in an original understanding of the phrase in question (Ibid.).

Scalia also cites two 18th century dictionaries in his quest to show that the meaning of "arms" and "bear arms" as used in the Amendment was not always used in a military context (Merkel 2009, 367). Scalia finds that the terms have "a broad meaning, including those weapons

not designed for military use and not employed in a military capacity" (Malcolm 2009, 1387). Unfortunately, this justification comes at the expense of ignoring detailed and extensive linguistic amicus briefs submitted to the Court. These briefs reveal that "in a far more exhaustive survey of dictionaries of the times, bearing arms most commonly was defined with clear military resonance and illustrated by quotations military in character throughout the eighteenth century" (Merkel 2009, 367). Scalia also briefly mentions the 17th century English Bill of Rights and Blackstone's comments on the right to arms mentioned therein as evidence for his self-defense purpose (Ibid., 371), but his omission of any extensive ratification era evidence is striking for an originalist inquiry (Cornell 2008, 639; Merkel 2009, 371).

In printed materials of the day, the self-defense purpose is "a decidedly eccentric and outlying meaning" (Merkel 2009, 535-54) A study researching the instances of "bear arms" or "bearing arms" in over 120 newspapers from 1690 to 1800 revealed that 98% of the time the term was militia related (Ibid.). The same research study discovered that in over 96% of the time in books and pamphlets from the same time period these terms were "unambiguously military and collective, not private" (Ibid.). Based upon this research it is difficult to see how the self-defense purpose was at the forefront of the debate over the right to keep and bear arms during the founding era. Thus, it is difficult to accept Justice Scalia's emphasis on the right to self-defense based upon either the text of the 2nd Amendment or the public's understanding of that text. If the Amendment is about self-defense, why do we not see a majority of the discussion of bearing arms in self-defense during this time period?

The lawmakers of the period show a similar trend in the militia-centered purpose during ratification. Records of Senate debates were not taken before 1796, but we do have "official records of the Continental and U.S. Congresses between 1775 and 1791" (Merkel 2009, 353). Twelve house members in 1789 had spoken about the subject during ratification (Ibid.). While none mentioned the hunting or self-defense purpose (Ibid., 359-60), all of them "discussed militia and military-related issues, principally conscientious objection" (Ibid., 353.). An electronic search of Congressional records from 1775 - 1791 yielded "forty-one additional uses of the phrase 'bear arms' or 'bearing arms' in contexts other than discussion of the proposed Bill of Rights. In all but four instances the use is unambiguously military and collective" (Ibid.). Merkel notes that from the standpoint of historical inquiry, it is unusual that Scalia is unwilling to consult the debates in Congress about the meaning of the text of the Amendment during the ratification process, yet is comfortable consulting the English Bill of Rights (Ibid., 371).

There are some, though, who argue that those who ratified the Constitution intended that self-defense be recognized in the 2nd Amendment. The minority dissent by Pennsylvania to the ratification of the Bill of Rights is often used as evidence for this. In this dissent, a group of Anti-Federalists included the following language: "That the people have a right to bear arms for the defence [sic] of themselves and their own state, or the United States, or for the purpose of killing game, and no law shall be passed for disarming the people or any of them…" (*Pennsylvania Minority Dissent*). Indeed, Justice Scalia himself cites this text as being a "highly influential" proposal in the ratification debate (Cornell 2008, 629; Tushnet 2008, 615). However, Cornell notes that Scalia "provides little evidence to support this claim" (Cornell 2008, 629).

Instead, Cornell argues that the Framers often used the proposals presented during the ratification debates as "metric[s] for defining the most extreme proposals for amendments, not a marker of what the average reasonable man on the street thought about amendments" (Cornell 2008, 629). Moreover, no other ratifying convention "emulated" the Pennsylvania dissents sentiments during the ratification process (Ibid., 630). Cornell suggests that if we are sincere about ascertaining the original meaning of the text "we would accord relatively little weight to the voices of a minority of a single-state ratification convention, particularly when we know that Madison did not include the Dissent of the Pennsylvania Minority among his list of proposed amendments he submitted to the First Congress" (Ibid., 629).

If Scalia's assertion that the Pennsylvania dissent was "highly influential" to the Framers is correct, we should wonder why Justice Scalia is willing to "discount evidence" (Siegel 2008, 197) from the ratification process that Justice Stevens mentions in his dissenting opinion. Madison included a conscientious objector clause in one of his initial drafts of the Amendment. It read "A well-regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no one religiously scrupulous of bearing arms shall be compelled to render military service in person." The argument put forth in Stevens' dissent is that the phrase keep and bear arms in Madison's proposal is directly connected to military purposes (Ibid.). Scalia, however, dismisses this reasoning by claiming that "'[i]t is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process'" (Ibid.). Are we to believe that the conscientious objector version is of no consequence when it does not comport

with Scalia's conclusion, yet consider the Minority Dissents language even though it was not included in any version of Madison's Amendment?

It appears that Scalia is trying to pivot from a right of resistance to a right of self-defense. The lack of any supporting discussion or elaboration seems odd for someone who purports such a staunch adherence to originalism. Other than mentioning the codification of the right of resistance, Scalia abandons any substantive inquiry into its purpose or relevance (Williams 2008, 659). Why not discuss how a right to rebellion would fit in today's modern America (Ibid.)? Why make the right to resistance meaningless? If it was important enough to those who framed and ratified the Amendment, surely it requires at least some discussion (Ibid.). Perhaps it is because Scalia is building his case for transforming the 2nd Amendment into an individual right of self-defense despite any substantive discourse on the right to resistance that the Framers so dearly regarded (Ibid.). In Scalia's 2nd Amendment, the text is designed to prevent the government from infringing upon the right of the people to keep and bear arms (Neily 2008, 148), but "it was certainly not 'the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting'" (Ibid.). Yes, the Amendment does indeed contain arms-related language (Merkel 2009, 377), but "[i]t is a leap of faith, not a logical surmise or plain deduction from the text that pointedly links the right to the militia and not to hunting or to defense of the person or home" (Ibid., 376). Scalia, however, is simply unable to "cite any authority whatsoever" for this argument (Ibid.).

The Amendment was instead "motivated by 'an overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to

protect the States' militias as the means by which to guard against that danger'" (Wilkinson 2009, 19). The right to self-defense was simply not included by the framers and those who ratified the document. Madison's decision to exclude the *Pennsylvania Minority Report's* language expressing such codification of a right to self-defense (and hunting, for that matter) should be a strong indication that those involved in the ratification process were not oblivious to the notion of protecting self-defense, yet they still chose not to include it in the list of private rights.

Perhaps the framers did not believe that the right to self-defense would ever be denied by the government, and it was therefore not imperative to give it special recognition along with the other protections listed in the Bill of Rights. According to Williams, the difference for Scalia came down to whether a right to guns "'needed to be codified in the Constitution'" (Williams 2008, 651). Preserving the militia was deemed necessary of deliberate inclusion in the Constitution for fear of encroachment. Self-defense—as necessary a component of the Amendment it was—was not codified. The Framers were focused on the militia aspect "because of the risk of federal tyranny; no one really worried that the federal government would deny the right of self-defense So although that right was part of the 2nd Amendment, it was not the reason that the Framers felt the need to adopt it" (Ibid.). Yet, as Scalia puts it: "'[S]elf-defense had little to do with the right's codification; it was the central component of the right itself'" (Ibid., 652).

Without strong evidence (Id., 653) supporting Scalia's claim that self-defense was of paramount concern in adopting the Amendment even though the framers chose to focus on the tyranny aspect, we are left adopting a loose interpretative method if we are to believe Justice

Scalia's reading of the Amendment. In fact, many of the rights that one could argue are included under the banner of "natural rights" were not written into the Constitution. Few would suggest "that the federal government in 1790 could ban books, outlaw newspapers, or seize private property at will simply because those things were not specifically enumerated as rights…" (Neily 2008, 154). As previously mentioned, Madison's final version of the Amendment includes none of the explicit language addressing the fears posed by standing armies and the veneration of the right to self-defense (Wilkinson 2009, 19). Such an omission does not inspire confidence in the belief that self-defense was the primary purpose behind the Amendment.

Some of the proposals put forth by the states during ratification were about preserving the militia and the fears of a standing army (Ibid.), "while others were worded more broadly, and would have protected a right to bear arms unconnected to military service" (Ibid.). Yet Madison excluded these concerns from the text of the Amendment. As Wilkinson notes, the significance of this apparent oversight is enough for Justice Stevens to conclude that "[Madison] considered and rejected formulations that would have unambiguously protected civilian uses of firearms" (Ibid.). Among these are: Pennsylvania's references to self-defense and the killing of game; New York's proposal that "…the people have a right to keep and bear Arms; that a well-regulated Militia, including the body of the People capable of bearing Arms, is the proper, natural, and safe defence of a free State" and "That standing Armies, in time of Peace, are dangerous to Liberty, and ought not to be kept up, except in Cases of necessity; and that at all times, the Military should be kept under strict Subordination to the civil Power." New Hampshire's proposal which reads "*Twelfth*, Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." or Massachusetts proposal "[T]hat the said Constitution

never be construed to authorize Congress to ... prevent the people of the United States, who are peaceable citizens, from keeping their own arms" (*D.C. v. Heller*, 554 U. S. Supreme Court, Stevens Dissent, 24, 2008).

Scalia's use of post-enactment sources as support for his decision has also garnered much criticism. Among his "protracted survey of historical materials" (Shaman 2008, 1) are 19th century case law, including an 1843 North Carolina Supreme Court decision (Wilkinson 2009, 19-20), an 1856 speech by Massachusetts Senator Charles Sumner (Levinson 2009, 321), and legislation adopted after the Civil War (Wilkinson 2009, 19-20). One consequence in doing so is that selective reading "i.e. picking and choosing from a vast array of materials those that appear to support the preferred result" (Ibid.) becomes a potential hazard. As Reva Siegel notes, "The majority more than once discounts evidence drawn from the amendment's drafting history, appearing to favor evidence remote in time over evidence proximate in time to the amendment's ratification" (Siegel 2008, 197). Such methodology belies the integrity of the decision. Another consequence in using commentary and decisions from long after the ratification period is that the public meanings from one time may not be consistent with later periods. As an example, Tushnet notes how in just a few short years after the First Amendment was enacted its meaning radically changed:

> …we should be wary of the casual assumption, which pervades Justice Scalia's opinion in *Heller*, that conventional understandings are stable over long periods, to the point that we can learn something about what the founding generation understood the Second Amendment to mean by paying attention to what the Reconstruction generation understood it to mean. Because meanings are contested, they can and do change. Here we already have a pretty good lesson at hand in the history of the conventional understanding of the First Amendment's phrase, "law . . . abridging the freedom of . . . the press." Although, as always, the phrase's meaning was contested in 1789–91, it seems reasonably clear that the

> best judgment one can reach is that most reasonably well- informed ordinary citizens understood the phrase to mean "law imposing a prior restraint upon publication—but not a law imposing punishment after publication." And yet, within a decade, the conventional understanding shifted dramatically: By roughly 1800, the phrase was widely understood to mean "law imposing punishment for speech critical of the government (Tushnet 2008, 613).

Thus, the use of these broad sources in *Heller* has caused many to call in to question the degree of originalist interpretation invoked by Justice Scalia. The result is further support for those who claim his decision is more consistent "with common law rather than positive law claims" (Siegel 2009, 1415). According to Siegel, "There is more evidence in the majority opinion establishing the existence of a common law right of self-defense than there is demonstrating that such a right was constitutionalized by the Second Amendment's eighteenth-century ratifiers" (Ibid.).

Another instance where Scalia is accused of engaging in a living constitution interpretation is his acceptance of contemporary gun laws. As Adam Winkler notes, "Heller also strays from originalism in what is, for practical purposes, the most important part of the opinion. In a paragraph near the end of the opinion, the Court lists a number of 'longstanding prohibitions' on guns that, despite the individual right to bear arms, remain good law" (Winkler 2011, 71). Among these are laws preventing felons from owning guns, bans on possessing guns in schools and government buildings, and laws regarding the sale of firearms (Ibid.). Yet the 2nd Amendment makes no mention of these prohibitions (Ibid.). What original sources does Scalia cite for these regulations? None. There is not a single historical reference to support the constitutionality of these laws, other than they are "longstanding" (Ibid., 72), nor does Scalia provide a definition or timeline in determining how "longstanding" a prohibition need be in

deciding its legitimacy (Lund 2009, 1356-57). Winkler cites this as evidence that Scalia is engaging in a living constitution interpretation by invoking these laws; it's hard to imagine them withstanding originalist scrutiny as these laws are twentieth-century creations (Winkler 2011, 72-73). They are "simply offered with no discussion whatsoever about how these exceptions comply with the Founders' understanding of the right to keep and bear arms" (Ibid.).

Winkler isn't the only one to notice the oddities in Scalia's acceptance of modern-era gun control laws. Lawrence Solum notes that, in response to Scalia's acceptance of these laws, "it seems unconnected to the originalist methodology that formed the basis of the main holding in *Heller*" (Solum 2009, 972). Wilkinson quotes Justice Breyer's assertion that "the Court does not explain why these restrictions are embedded in the Second Amendment" (Wilkinson 2009, 22). Nelson Lund chides Scalia for his seeming adoption of a living constitution interpretation, and his poor historical analysis. According to Lund, Scalia's assertion that the 2nd Amendment's scope is limited to those in common use is provided with "exactly zero historical support" (Lund 2009, 1364). If Scalia's embrace of contemporary gun regulations is not based on a historical analysis, then where does he find his support for the gun laws that he lists? He looks to contemporary public opinion. Rather than a legitimate historical exposé, Scalia's *Heller* is "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" (Lund 2009, 1355-56). Handguns are protected by the 2nd Amendment because they are overwhelmingly chosen by Americans for self-defense (Winkler 2011, 70). Thus, the "fickle dynamics of contemporary consumer choices" are the basis for Scalia's assertion that "'a complete prohibition of their use is invalid'" (Ibid.).

Why would an opinion that claimed to be originalist countenance laws that have no basis in the original public understanding of the 2nd Amendment? Surely the irony of an originalist decision relying on a living constitution interpretation was not lost upon the Court. Two reasons have been put forth. First, as Winkler argues, the Court's legitimacy would have come into question. Had the Court pronounced these restrictions unconstitutional, "public respect for the Court would have been sorely tested" (Winkler 2011, 73). Perhaps, in a poetic twist of fate, Scalia's brand of originalism in *Heller* was necessary to preserve the "public legitimacy" (Ibid.) of the Court's decision. Gun control proponents may not like Heller's outcome, but they can take solace in the fact that the Court is willing to uphold contemporary gun regulations although they are a modern-day creation, and were not in existence in the 18th century. Gun rights proponents would have much to holler about as well had Scalia been more faithful to the militia clause; imagine if the Court had insisted that the 2nd Amendment require public assembly for government inspection of private arms to "[include] on a census of available militia weapons" (Ibid.).

Instead, the public is certainly willing to "[sanction] certain familiar forms of gun control regulation because they are familiar, reasoning from tradition and contemporary common sense, rather than original understanding" (Siegel 2009, 1417), and we should not have expected the Court to do "otherwise" (Neily 2008, 147). As Wilkinson astutely puts it, "The *Heller* majority seems to want to have its cake and eat it, too—to recognize a right to bear arms without having to deal with any of the more unpleasant consequences of such a right" (Wilkinson 2009, 22-23). The second reason postulated as to why the Court overlooked these prohibitions in its originalist inquiry is to secure the fifth vote necessary for a majority decision. Had Scalia not

included these various regulations, he might not have convinced Justice Kennedy to sign on (Levinson 2009, 322; Solum 2009, 972).

In the end, Justice Scalia might "have been more intellectually honest" to abandon his strict adherence to originalist thinking, and instead locate the right to self-defense within the notions of "ordered liberty" and "the traditions of our people" (Cornell 2008, 639), or perhaps within the vague boundaries posed by the Ninth Amendment. By declaring that the 2nd Amendment "gradually evolved into an individual right over the course of American history" (Ibid.), or some similar explanation, Scalia could have spared himself and the Court the scathing rebukes levied against *Heller*. In order to do so, however, Scalia would have needed "to abandon his originalist rhetoric" (Ibid., 640) and his position as the Court's arbiter of originalism. One can only speculate whether the tradeoff for such an act of deference might have been a more favorable judgment of *Heller* by posterity (Ibid.).

CHAPTER V

HELLER AND THE FUTURE OF SECOND AMENDMENT JURISPRUDENCE

So, is *Heller,* and Scalia's inconsistent standard of review something to lament? It depends not only on what side of the gun rights debate you are on, but also what degree of discretion you believe courts and judges should have in their interpretation of the Constitution. If you value gun rights and believe that the 2nd Amendment was adopted to guarantee an individual right to keep and bear arms, rather than to preserve a collective right for state militias, then the *Heller* decision should be celebrated. However, if you believe, as an originalist would believe, that the Constitution's provisions were fixed at the time of adoption, and that the fixed meaning constrains judges from interpreting the Constitution in light of their own value judgements or according to popular opinion, the *Heller* decision will find you wanting. In addition to Heller placing gun rights on less than solid ground, questions remain about the extent of the right to bear arms. *Heller* stopped short in answering whether the right to self-defense extends outside of one's home, and what types of modern arms are protected.

I am grateful to the Court for answering the question of whether there is an individual right to own a firearm. For far too long I believe the inaccurate collectivist interpretation of the 2nd Amendment has been allowed to be promulgated, yet has now been rightly put to rest. What I am not grateful for is the manner in which it was done. We cannot ignore the text and purpose of the Amendment (a militia-centered remedy for tyranny) because the need is anachronistic or inconvenient. Such an endeavor is not being honest with the Constitution and our principles as a

constitutional republic. Nor is it consistent with our commitment to the due process of law. We don't just change the meaning of the Constitution because we don't like it; the framers gave us a method for amending it, and that process should be honored, if for no other reason than the integrity of the document.

The language and hence the meaning of the 2nd Amendment is framed *prima facie* in a military context, and expresses the Anti-Federalists' fears of a standing army (Amar, 1998). Indeed, two state constitutions antecedent to the U.S. Constitution (Pennsylvania and Vermont) *did* include explicit language regarding the right of "the people … to bear arms for the defence [sic] of themselves…" (Kopel, 2002). Yet the mention of individual self-defense was excluded by the Framers in the ratified version of the 2nd Amendment, raising the question: if the 2nd Amendment's purpose is to guarantee the right of personal self-defense aside from, why omit this from the Constitution?

I am persuaded that self-defense against an invader in one's home is not consistent with the original reason for including the right to keep and bear arms in the Bill of Rights. I suggest that the 2nd amendment and its purpose be viewed as an instrument—a remedy, if you will—included by the Framers of the Constitution (and demanded by those opposed to the ratification of the Constitution) for dealing with a tyrannical federal government. The amendment lays out 1) a purpose: *the security of a free state* (a defense against tyranny); 2) the remedy for the problem of tyranny: *a well-trained, well-armed, well-disciplined militia*; 3) those whom the militia is comprised of: *the people*; and 4) the means to fulfill this obligation: *the right of said people to keep and bear arms*. This interpretation is acknowledged by Justice Scalia in

his majority opinion. However, by the time Scalia concludes his decision, the 2nd Amendment has morphed into something altogether different than what the original text asserts.

In the aftermath of *Heller, w*here does this newly recognized right to individual firearm ownership and self-defense leave the most ardent segment of 2nd Amendment originalists? While a Supreme Court decision recognizing the right of self-defense may have been a much hoped for affirmation for 2nd Amendment enthusiasts and die-hard "gun nuts," the Court's reasoning leaves the foundation of this right on less than solid ground. That's because it's difficult to base such a right solely on the text of the amendment. A private right to keep and bear firearms was almost certainly assumed by those living in the 1780's. By its extension a right of self-defense may also have been assumed. This belief was so ingrained in the culture of that period that it did not even warrant specific protection in the Constitution (Wills 1995), and was therefore omitted. Yet even though *Heller* has declared gun ownership to be an individual right, questions about the scope of this right remain unsettled by the Court.

In 2009, shortly after the *Heller* decision, the Court incorporated the 2nd Amendment against the states in *McDonald v. Chicago.* This was the most recent Supreme Court ruling about the 2nd Amendment. The Court denied hearing *Peruta v. California*, a case that looked at the constitutionality of carrying a handgun in public for the purpose of self-defense. Justice Clarence Thomas wrote a dissenting opinion to the Court's decision denying certiorari, which Justice Neil Gorsuch joined. In his dissent, Thomas chided the 9th Circuit Court's *en banc* methodology in reaching their decision (*Peruta v. California*, 582 U. S. Supreme Court, 3, 2017). Justice Thomas argued that the panel erroneously only considered whether the 2nd Amendment

protects the right to carry a *concealed* handgun, instead of considering whether it protects a right to carry a handgun regardless of concealed or openly (*Peruta v. California*, 582 U. S. Supreme Court, 3, 2017). Invoking *Heller*, Thomas quipped "I find it extremely improbable that the Framers understood the 2nd Amendment to protect little more than carrying a gun from the bedroom to the kitchen" (Ibid., 5). Moreover, regarding whether the extent of the right to bear arms stops at one's doorstep, Thomas believes that "the time has come for the Court to answer this important question definitively" (Ibid., 6). The Court's reticence to answer the question of whether the right to carry a gun outside of the home is protected is indeed cause for concern for those who believe that 2nd Amendment protections extend outside one's home.

Regarding the question of firepower, the Court has also chosen to avoid settling this issue. The Court denied certiorari to the case of *Friedman v. Highland Park*, a case which sought to overturn the city of Highland Park, Illinois' ban on semi-automatic firearms (commonly referred to as "assault weapons") and magazines which can accommodate more than ten rounds. In a dissenting opinion authored by Justice Thomas and joined by Justice Scalia, Thomas argued that the Seventh Circuit's findings were contrary to *Heller* and *McDonald* (*Friedman v. Highland Park*, 577 U. S. Supreme Court, 2-5, 2015). The Circuit Court asked whether the weapons in question "were common at the time of ratification," whether "they have some reasonable relationship to the preservation or efficiency of a well-regulated militia," and "whether law-abiding citizens retain adequate means of self-defense" (Ibid., 2-3). Justice Thomas refuted each of these arguments based upon explicit language in *Heller* that contradicts the Circuit Court's conclusions. Specifically, *Heller* found that "'the 2nd Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence

at the time of the founding.' 554 U. S., at 582" (*Friedman v. Highland Park*, 577 U. S. Supreme Court, 4, 2015), that Heller's "scope is defined not by what the militia needs, but by what private citizens commonly possess. 554 U. S., at 592, 627–629" (Ibid.), and that "*Heller* asks whether the law bans types of firearms commonly used for a lawful purpose—regardless of whether alternatives exist. 554 U. S., at 627–629" (Ibid., 5). With the Court unwilling to grant certiorari in the face of such glaring contradictions, one wonders if the Court will make a decision anytime soon about what types of weapons the 2nd Amendment protects.

Thus, with the Court's reluctance to clarify the questions about the constitutionality of carrying guns in public and about firepower, and its transition from a remedy for tyranny to the right of self-defense within one's home, it is hazardous for gun rights enthusiasts to invoke this right of self-preservation on 2nd Amendment grounds and upon the *Heller* decision. From all appearances, the Framers' choice in the wording of the Amendment seems to be exclusively for the purpose of preserving a free polity. Pro-gun zealots may have wanted much more with regards to the outcome of the case; a vindication of the right to resist tyrants with arms *and* the right to defend one's home against local criminal violence would have epitomized a *tour de force* for their cause. However, as it is written, the 2nd Amendment cannot support both of these conclusions without reading a substantial amount of presumption into its text. Self-defense, as Scalia has defined it, is simply not mentioned in the 2nd Amendment. *Heller's* self-defense argument is based not on the text of the Amendment, but rather on the popularity of handguns in contemporary "American society" (*D.C. v. Heller*, 554 U. S. Supreme Court, 56, 2008).

Heller represents a point where the "triumph of originalism" may signal its demise because it reveals the shortcomings in originalist theory and practice (Shaman 2010, 98). Shaman describes *Heller* as a "fundamental failure of originalism; based on an illusion and dismissive of reality" (Ibid., 108). In *Heller*, Justice Scalia has practiced an "aggressive brand of originalism" (Ibid.; Wilkinson 2009, 4) that exhibits the problems with originalism's methodology (Shaman 2010, 108). In *Heller*, Scalia's "lopsided" (Ibid., 107) historical inquiry produces a new constitutional right that the Court had not recognized before (Ibid.; Wilkinson 2009, 13). The ambiguous text in the 2nd Amendment was then used to "strike down" a law that was enacted through legislation designed (ostensibly) to protect the citizens of the District of Colombia (Wilkinson 2009, 13). The Heller decision more accurately represents a partisan decision by those opposed to gun control (Shaman 2010, 108) in a narrow 5-4 majority of the four conservative members of the Court and the "swing vote" of Justice Kennedy. *Heller* is a decision based upon a flawed historical inquiry which avoids "immersion in Founding-era debates" (Sunstein 2008, 257), and which both the majority and dissent use to selectively impose their own beliefs about the purpose and meaning of the 2nd Amendment (Shaman 2010, 101). So egregious in its fidelity to the idea inherent in originalism of judicial restraint is *Heller,* that it has been likened to the bane of conservative ideology—the *Roe v. Wade* decision (Wilkinson 2009, 1).

One of the components of originalism is its faithfulness to the text of the law in question. Both *Roe* and *Heller* display "an absence of a commitment to textualism" (Wilkinson 2009, 1-2). In *Heller*, as in *Roe*, the Court used discretion in finding an outcome that was not supported by the constitutional text, and in so doing nullified the proclamations of the

democratically elected representatives of the people (Wilkinson 2009, 3). *Heller* demonstrates that while original intent may purport to ascertain the original intent of constitutional interpretation it is none-the-less susceptible to "judicial subjectivity" (Wilkinson 2009, 4); originalism fails in this instance to place a constraint on judges' wishes (Ibid., 7). The result is "a real risk that the Second Amendment will damage conservative judicial philosophy as much as the Due Process Clause damaged its liberal counterpart" (Ibid., 13). Whereas conservative justices like Scalia once strongly advocated judicial restraint as a barrier against judicial activism, Heller signals that even the most stalwart critics of selective interpretation are not opposed to implementing it when it is expedient to do so. Conservatives won the argument this time, the other side will inevitably win too (Ibid., 24), all while the integrity of these future decisions is further eroded.

The damage done is not limited to the theory of originalism. The democratic process and the American people are also at risk in the wake of decisions such as *Heller*. When questions like the ones posed in *Heller* are not answered with a clearer consensus and sound reasoning, the Court should give "deference to democratic processes" (Ibid., 16). Only in situations where there is no room for ambiguity should the courts "overrule" democratically instituted policies (Ibid., 2). Decisions that appear to reflect the personal ideology of the judiciary erode public confidence in the courts (Ibid., 16). At the same time *Heller* sends the message that the political makeup of the courts matters more than the legislative process (Ibid., 1). After Scalia's death, the Court experienced its longest vacancy since the inception of the nine-judge panel. The Republican-controlled Senate argued that the seat should not be filled until after the 2016 presidential election. Moreover, the Senate abandoned the 60-vote threshold in order to ensure

the appointment of Justice Gorsuch. Such partisan gamesmanship makes the increased politicization of Court appointments strikingly apparent.

The message sent to the voters thus becomes: you don't need to bother with the arduous task of electing representatives who will pass legislation that suits you, when you can elect representatives who will pack the courts with like-minded jurists whose decisions may be far more enduring than the laws on the books. As Wilkinson notes, "[t]he time may have passed when judicial process matters," and the decisions of the Court are of paramount importance (Wilkinson 2009, 1) at the cost of precedent and the integrity of the methodology behind the decision. Do we really want a Court based on whether the justices' robes have a "D" or an "R" on the back of them? Do we want to discard the legislative process in favor of placing our system of laws in the hands of nine ideologues? The cost of such a trajectory is that future decisions may not go the way one who favors a politicized bench might hope, and we surrender "the right of the American people to decide the laws by which they shall be governed" (Ibid., 24).

Scalia has been one of the most ardent ambassadors for originalism. He has called the belief that the Constitution and its meaning evolves over time a "'canard'" (Barnett 2006, 85). In a speech in 1988 at the University of Cincinnati as the William Howard Taft Constitutional Law Lecture Scalia questioned the consistency of the conclusions reached by those whom he called "nonoriginalists" (Scalia 1988). He asked somewhat rhetorically whether constitutional meaning could be determined from the ideas of political philosophers such as Locke or Rawls, "or perhaps from the latest Gallup poll?" (Ibid.). Recognizing that "that it is

often exceedingly difficult to plumb the original understanding of an ancient text" (Scalia, 1988) Scalia cites the example of the ratification debates and the amount of effort one would have to undertake in researching these records (Ibid.). Thus, it should give us pause when we find in *Heller* that Scalia consults contemporary understandings and opinions about the *2nd* Amendment, and ignores much of the ratification era materials in his quest to discern the original understanding of the *2nd* Amendment.

It should then come as little surprise that Scalia has noted that "in a crunch I may prove a faint-hearted originalist" (Ibid.). Scalia was referring to the hypothetical situation wherein a state had passed a law allowing public lashing, or branding one's right hand "as punishment for certain criminal offenses" (Ibid.). While such consequences might have been acceptable in "1791," Scalia concludes that "any federal judge—even among the many who consider themselves originalists" would uphold the law "against an Eight Amendment challenge" (Ibid.), noting that any "practical theory" of originalism must be prepared to accept "that reality" (Ibid.). What then does an originalist do in this situation where adherence to the original understanding of a law in question becomes a "medicine that seems too strong to swallow" (Ibid.)? According to Barnett, and in admonition of Scalia, you "[p]unt" (Barnett 2006, 12)—you adopt a faint-hearted brand of originalism. Scalia is simply willing to jettison originalism when it does not achieve his desired result (Ibid., 16).

Does Scalia's willingness to abandon originalism when it leads to outcomes too abhorrent for today's society discredit originalism as a method of constitutional interpretation? Just as in the case where punishments that might have passed public scrutiny in 1791 would not

be deemed sustainable in the 21st century, the romanticized Anti-Federalist beliefs about the 2nd Amendment promulgated by interest groups and certain sects of patriotic Americans also fail to comport with mainstream contemporary values. Neither Scalia nor the Court could go along with an opinion legitimizing a right to rebel against the perceived slights of a despotic government. While we can debate whether originalism is worthy of refutation, or whether Scalia is even an originalist (Barnett 2006, 13), we can perhaps agree that he is a selective originalist. Rather than an indictment against the legitimacy of originalism, what Scalia has done in *Heller* is highlighted its most glaring shortcoming—in a "crunch" originalism's fidelity to the values of bygone eras and the legitimacy of its outcomes in an ever-changing society is difficult to achieve. I believe Williams has most succinctly encapsulated this paradox: "Heller offers a Second Amendment cleaned up so that it can safely be brought into the homes of affluent Washington suburbanites who would never dream of resistance—they have too much sunk into the system—but who might own a gun to protect themselves from the private dangers that, they believe, stalk around their doors at night." (Williams 2008, 642).

This is the dilemma that 2nd Amendment purists face: if they accept and herald the Court's decision, contemporary arguments in favor of the right to resist tyranny become little more than a romanticized afterthought reminiscent of the Revolutionary period. It is safe to say that an affirmation by the Court of the right of citizens to engage in armed conflict with a despotic American government will never come to fruition. However, should gun rights enthusiasts reject the Courts decision because of Scalia's marginalization of a right to resist tyranny, they would be sacrificing a decision that "takes certain policy choices off the table,"

namely "the absolute prohibition of handguns held and used for self-defense in the home" (*D.C. v. Heller*, 554 U. S. Supreme Court, 64, 2008).

The principled 2nd Amendment proponent will, even if only for the sake of nostalgia, pine for absolute adherence to the Amendment's Anti-Federalist intention of establishing a check against a standing army and the potential threat from the government and its standing army. The pragmatist may acknowledge this purpose, but recognizes that achieving a broad contemporary consensus embracing such a radical position is most assuredly a bridge too far. I believe this is evinced in Scalia's *Heller* opinion, and his transition from a militia-centered 2nd Amendment towards a self-defense purpose. The *Heller* decision has its flaws, but it's arguably the best possible outcome for gun rights enthusiasts. In this struggle, gun owners would be wise to take whatever pro-gun decisions they can get even if the outcome is not perfect. Any chair in a bar fight will do.

While it's not feasible in this paper to present an exhaustive case for doing so, an argument for the right of self-defense is perhaps better suited to protection under the Ninth Amendment to the Constitution. The 2nd Amendment, as written, debated, and adopted, does not address the right of personal self-defense. I believe this right is best found within the natural rights within the Ninth Amendment. The right of an individual to defend his or herself against an assailant within their home is indeed a right consistent with the natural rights of man.

Finally, I argue that the present-day context and role of the Amendment cannot be reliably debated until the question regarding the Founders' purpose in adopting it is settled. The ambiguity of the text, combined with the partisan rhetoric and arguments put forth in defining its

meaning, pose significant obstacles in achieving a definitive consensus. An honest debate about the *future* of the 2nd Amendment must begin with an accurate understanding of the Founders' original intent in drafting and adopting it, and a concluding acquiescence of that purpose from either the *collective right* group or those in the *individual right* camp. The two competing theories cannot be reconciled. The 2nd Amendment either limits gun ownership to those who serve in state controlled militias, or affirms a natural right of individuals—who may or may not be members of state militias—to keep and bear arms for the purpose of resisting tyranny.

What Justice Scalia has bequeathed to us in *Heller* is a 2nd Amendment that comports with contemporary beliefs about who the 2nd Amendment right to keep and bear arms belongs. It is essentially the status quo with regards to gun rights; individual Americans have the right to own a firearm for the purpose of self-protection, but this right is not absolute and is subject to reasonable regulations. This is a far cry from the late 18th century fears of standing armies and tyrannical governments, but it is something that could be accepted (even if grudgingly) by those on both sides of the gun debate.

However, in bringing us this watered-down version of the Amendment, Justice Scalia has brought much scorn and ridicule upon his majority opinion, and has given fodder for those who dismiss originalism as a practical method of constitutional review. As one recognized as a preeminent supporter of originalism, Scalia's decision is remarkably similar to a living constitution form of interpretation. Scalia spends very little time referencing the opinions, arguments and debates from the ratification period in defense of his arguments. In fact, we find the ratification documents referenced far more in Justice Stevens' dissenting opinion. Instead,

Justice Scalia bases much of his decision on 18th and 19th century court cases, and today's public opinions about the role of gun ownership in America. Time will tell what the outcome for gun rights and gun control will be. In the long run, however, the judicial process and the theory of originalism have been sorely compromised in the wake of *Heller's* erratic application of the only legitimate approach to constitutional interpretation.

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