The End of Originalism

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I. ORIGINALISM

Originalism—the idea that the Constitution should be interpreted according to its original meaning—has engendered intense debate in modern times. There are those who believe that originalism is the only true method by which to interpret the Constitution, and those who believe that it is a spurious philosophy that distorts constitutional interpretation. In 2008, the Supreme Court decided *District of Columbia v. Heller*,[1] marking the first time that a majority of the Court agreed to an opinion decidedly originalist in its methodology.[2] Although *Heller* may be considered the "Triumph of Originalism,"[3] it may in time prove to be its downfall by revealing the failings of originalist philosophy.

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1. 128 S. Ct. 2783 (2008). For a fuller discussion on *Heller*, see *infra* notes 92–143 and accompanying text.

2. The vote in *Heller* was 5–4. *Heller*, 128 S. Ct. at 2783.

3. *See* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 191 (2008).

Originalism is based on the notion that the Constitution has a fixed meaning that does not change with the passage of time.[4] The proper role of the Supreme Court, therefore, is to interpret the Constitution by ascertaining its original meaning at the time it was first enacted.[5] As this view has it, the process of constitutional interpretation consists of a search or quest for the original meaning of the document, which operates as binding authority upon the judiciary. Consequently, the process of constitutional interpretation should function as an objective inquiry that precludes the exercise of judicial discretion. The Supreme Court is supposed to find meaning for the Constitution, not create it. According to this way of thinking, Justices who depart from the straight and narrow of originalism are engaged in an illegitimate pursuit, reading their personal values into the Constitution, rather than adhering to its original understanding.

There are two basic versions of originalism. The first or earlier version stresses the intent of the Framers as an authoritative source by which to ascertain original meaning. In fact, this version of originalism looks almost exclusively to the Framers' intent to determine constitutional meaning.[6] A second, somewhat later version of originalism seeks to determine the original *public* understanding of the document. On this account, the Framers' intent may be useful in ascertaining the original understanding of the Constitution, but only as part of a much broader array of sources. What matters is not so much the intention of those who drafted the document, but rather the understanding of the members of the public who adopted it.[7] The meaning of the Constitution, then, is determined by the public understanding of the document at the time of its adoption.

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4. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 37–41 (Amy Gutmann ed., 1997) [hereinafter Scalia, *Common-Law*]; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852–54, 862 (1989) [hereinafter Scalia, *Originalism*].

5. Scalia, *Common-Law*, *supra* note 4, at 37–41.

6. For a brief time, some early originalists shifted to a focus on the intent of the ratifiers of the document before dropping the focus on original intent, whether of the Framers or the ratifiers, in favor of a focus on original public meaning. *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 6 (2006). The early version of originalism focusing on original intent "largely passed from the scene by the early 1990s." Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 603 (2004).

7. Scalia, *Common-Law*, *supra* note 4, at 38; Whittington, *supra* note 6, at 609–11.

There are various approaches to originalism. Under the extreme approach, the only relevant factor in constitutional interpretation is the original meaning of the document at the time it was enacted.[8] According to this approach, the meaning of the Constitution is constant and does not change over time. Moreover, the Supreme Court is strictly bound to follow the original meaning of the Constitution and may not take into account other considerations.[9] Justice Scalia is one of the more—if not the most—prominent advocates of extreme originalism. He believes that the Supreme Court should interpret the Constitution strictly according to its original understanding and not ascribe evolving meaning to it.[10] As he sees it, changes in the world around us are of no relevance to the meaning of the document. Although Justice Scalia once claimed that in a crunch he may prove to be a "faint-hearted originalist," at the same time he expressed strong opposition to the idea that the Constitution may have evolutionary content, and he dismissed the notion that interpretation of the document may change from age to age as nothing more than a "canard."[11] Over the years, Justice Scalia has proven to be anything but fainthearted in his commitment to originalism. To the contrary, he has continued to insist that the Constitution be interpreted strictly according to its original understanding. This was evident most recently in *District of Columbia v. Heller*, when Justice Scalia maintained that although an originalist view of the Second Amendment may be outmoded in present-day society, the Court was bound to follow the original understanding of that Amendment.[12]

In contrast to the extreme view of originalism, a more moderate approach looks to original meaning as a starting point but allows that the meaning of constitutional provisions may be transformed as circumstances change over time.[13] Lawrence Lessig, for one, posits that

8. *See* Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1086–87 (1989).

9. *Id.*

10. *See* Scalia, *Common-Law*, *supra* note 4, at 38; Scalia, *Originalism*, *supra* note 4, at 861–65.

11. Scalia, *Originalism*, *supra* note 4, at 853, 864.

12. 128 S. Ct. 2783, 2822 (2008). For a more in-depth discussion on Justice Scalia's opinion in *Heller*, see *infra* notes 92–143 and accompanying text. See also Justice Scalia's dissenting opinion in *Lawrence v. Texas*, 539 U.S. 558, 598 (2003), in which he argues that constitutional rights must be deeply rooted in the nation's history and that "[c]onstitutional entitlements do not spring into existence" with changed circumstances.

13. *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

because meaning is a function of both text and context, the original meaning of a constitutional provision may be "translated" to accommodate contemporary circumstances.[14] So, for example, the extension of the Fourth Amendment exclusionary rule to state criminal proceedings in 1961 is viewed by Professor Lessig as a translation of the Fourth Amendment justified by a "transformed social and legal context."[15]

More recently, Jack Balkin has advocated an even more fluid version of originalism that transmutes it into a kind of living constitutionalism that allows each generation to make sense of the Constitution's words and principles in its own time.[16] Professor Balkin maintains that proper constitutional interpretation requires fidelity to the words of the text as understood in their original meaning and to the principles that underlie the text, but does not require fidelity to the "original expected application" of the text.[17] According to this view, constitutional interpretation is a never-ending process that produces change in constitutional doctrines, practices, and law.[18] Using this approach, Professor Balkin concludes that the constitutional right to abortion is consistent with the original meaning of the Fourteenth Amendment.[19] This is a very moderate species of originalism and, in fact, is the sort of jurisprudence that can be happily embraced by those who believe in a living Constitution, the meaning of which evolves over time so as to adapt to modern conditions.[20] Nonetheless, there are those who maintain that even the moderate view of originalism is unduly restrictive of constitutional interpretation because it binds the present meaning of the Constitution to past concepts, while not allowing for the recognition of new conceptions.[21]

While few, if any, originalists are as flexible as Professor Balkin, some originalists recognize that the correct application of constitutional meaning can change over time.[22] Even so, their emphasis is on the original understanding of the document, which strictly prescribes any evolution of its meaning. Staunch originalists, however, take it as an article of faith that the Constitution has a fixed meaning that does not

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14. *Id.* at 1171 n.32.
15. *Id.* at 1232.
16. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007).
17. *Id.* at 295–96.
18. *Id.* at 295–303.
19. *Id.* at 310–51.
20. *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620–30 (1999).
21. *See* Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 411–12 (1997).
22. *See* Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 383–91 (2007).

change with the passage of time. To a true believer, the original meaning of the Constitution functions as an historical constant that may only be changed by amending the Constitution itself.

It is important to note that originalism cannot explain the large body of constitutional doctrine that has developed over the years since the Constitution was adopted.[23] Although in earlier times there may have been a generally held belief that the Constitution had a fixed meaning dictated by the intent of its Framers,[24] this belief was little more than a myth that obscured the true nature of constitutional adjudication. Notwithstanding random statements of originalist import in various cases over the years,[25] the vast majority of Supreme Court decisions interpreting the Constitution have been nonoriginalist in their methodology.[26] In the words of Thomas Grey, it is "a matter of unarguable historical fact" that over time the Court has developed a large body of constitutional doctrine that does not derive from the original understanding of the document.[27] From its very inception, constitutional law has been a dynamic process of creativity.[28] Through the continual interpretation and reinterpretation of the text, the Supreme Court perpetually creates new meaning for the Constitution. Despite originalist myths to the contrary, in reality the meaning of the Constitution has been anything but constant.

As the twentieth century began, the Court increasingly abandoned originalist pretenses in favor of a more realistic jurisprudence.[29] By 1934, the Court had become openly dismissive of originalist theory, observing in *Home Building & Loan Ass'n v. Blaisdell* that the assertion

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23. *See* JEFFREY M. SHAMAN, CONSTITUTIONAL INTERPRETATION—ILLUSION AND REALITY 3–10 (2001).

24. *See* Howard Gillman, *Political Development and the Origins of the "Living Constitution,"* ADVANCE: J. AM. CONST. SOC'Y ISSUE GROUPS, Fall 2007, at 17, 18–19.

25. *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting) ("The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it." (citing Lake County v. Rollins, 130 U.S. 662, 670 (1889))).

26. *See* SHAMAN, *supra* note 23, at 3–10. Even Justice Scalia, a steadfast advocate of originalism, admits that many of the Court's decisions have been based on nonoriginalist theories of constitutional interpretation. *See* Scalia, *Originalism*, *supra* note 4, at 852.

27. Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 844 (1978).

28. *See* SHAMAN, *supra* note 23, at 3–10.

29. *See* Gillman, *supra* note 24, at 21–23.

that "the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them . . . carries its own refutation."[30] Similarly, twenty years later, in *Brown v. Board of Education*, the Court rebuffed originalist claims regarding the Fourteenth Amendment, explaining "we cannot turn the clock back to 1868 when the Amendment was adopted."[31] By this time, the Court had become decidedly nonoriginalist in word as well as deed, openly embracing the jurisprudence of a living Constitution.[32]

The Court's modern jurisprudence was not well received in all corners. In the 1970s, some commentators began to question what they saw as the more open-ended methodology of constitutional interpretation practiced by the Warren Court and later the Burger Court.[33] Critics of the Court charged that its decisions expanding individual rights and liberties amounted to illegitimate policymaking that had no basis in the Constitution.[34] As these critics viewed matters, the Justices on the Court were reading their own personal values into the Constitution, rather than interpreting the document, as it properly should be, by turning to the intent of the Framers.

A number of scholars, though, were quick to rise to the defense of nonoriginalist constitutional interpretation.[35] Moreover, they subjected the early version of originalism, which looked to the Framers' intent to ascertain original meaning, to devastating criticism, exposing a number of serious flaws in the originalist position.[36] As these debates over

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30. *Blaisdell*, 290 U.S. at 442–43.

31. 347 U.S. 483, 492 (1954).

32. See also *Harper v. Virginia Board of Elections*, stating that:

> In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.

383 U.S. 663, 669 (1966) (citation omitted).

33. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455 (1986); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 695 (1976).

34. *See* Whittington, *supra* note 6, at 599–603.

35. *See, e.g.*, ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION (1987); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982).

36. *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978); Grey, *supra* note 27; John E. Nowak, *Realism*,

constitutional jurisprudence unfolded, the composition of the Supreme Court was changing, and in time a new majority of justices on the Court saw fit to put a halt on the expansion of individual rights. Under the leadership of Chief Justice Rehnquist, the Court was increasingly predisposed to curtail the recognition of new rights or liberties and even to rescind some that were previously granted.[37] No longer politically necessary and seriously wounded by piercing criticism, the early version of originalism "largely passed from the scene by the early 1990s."[38]

In passing from the scene, however, the early version of originalism was replaced by a new form of originalism, one that deemphasized the intent of the Framers in favor of the original public's understanding of the Constitution as the source of its meaning.[39] As noted above, Justice Scalia is perhaps the most prominent advocate of the new originalism, but several scholars have taken up its cause as well.[40] Beyond that, originalism has gained a widespread acceptance in the sense that almost no one believes that the original understanding is completely irrelevant to contemporary constitutional interpretation.[41] That, however, is a far cry from the extreme version of the new originalism espoused by Justice Scalia and others asserting that the Constitution has a constant meaning determined by its original understanding.

With the appointment of Justice Scalia and later Justice Thomas to the Supreme Court, originalism has reappeared in that lofty venue. Both Justices have proven to be pertinacious advocates of an extreme variety of originalism that posits a fixed meaning of the Constitution as it was first understood. The originalism espoused by Justices Scalia and Thomas is a departure—and a radical one, at that—from the Supreme Court's well-established jurisprudence of a living Constitution. The radical nature of the sort of originalism promoted by these two jurists is most dramatically evident in those opinions of Justice Thomas suggesting that a large area of law concerning the Commerce Clause be

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Nihilism, and the Supreme Court: Do the Emperors Have Nothing but Robes?, 22 WASHBURN L.J. 246 (1983).

37. JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW, at xvi (2008).

38. Whittington, *supra* note 6, at 603.

39. *Id.* at 608–12.

40. *See, e.g.*, Barnett, *supra* note 20; Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007).

41. *See* Farber, *supra* note 8, at 1086.

overruled because it is based on nonoriginalist thinking.[42] To overrule, as Justice Thomas would have it, an extensive body of law that has developed over many years would be a decidedly unsettling undertaking that could have severe consequences for the legal system.[43] And to do so in pursuit of an originalist agenda would be an inordinate deviation from the constitutional jurisprudence that has guided the Court since the beginning of the twentieth century.

Despite the efforts of Justices Scalia and Thomas, originalism has not been a significant theme on either the Rehnquist Court or the Roberts Court.[44] The advocacy of originalism by both Scalia and Thomas has come almost exclusively in dissenting or concurring opinions that garnered little support from other Justices.[45] Indeed, it was not until the Court's decision in *District of Columbia v. Heller*[46] in 2008 that Justice Scalia was finally able to garner a majority of the Court—and only a 5–4 majority, at that—to sign onto an opinion emphatically taking an originalist slant.[47] *Heller* may represent the apogee of originalism and, because it exposes the fundamental flaws of originalism, may mark the beginning of its decline.[48]

Before discussing the more basic failings of originalism, it is interesting to note that in a certain sense the theory of originalism is self-defeating because in all probability the Constitution was not originally understood to have a constant meaning fixed at the time of its inception.[49] According to H. Jefferson Powell, historical research shows that the Framers did not expect their intentions to govern future

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42. *See* United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring); United States v. Lopez, 514 U.S. 549, 584–85, 601–02 (1995) (Thomas, J., concurring). In another area, Justice Thomas also has stated that he would be inclined to overrule a group of cases upholding a right of equal access to the criminal justice system because they are inconsistent with the Framers' intent. M.L.B. v. S.L.J., 519 U.S. 102, 138–39 (1996) (Thomas, J., dissenting).

43. "[T]he Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point." *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring).

44. Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 249 (2008).

45. *See, e.g.*, *Morrison*, 529 U.S. at 627 (Thomas, J., concurring); *M.L.B.*, 519 U.S. at 129–44 (Thomas, J., dissenting); *Lopez*, 514 U.S. at 584–602 (Thomas, J., concurring); Michael H. v. Gerald D., 491 U.S. 110 (1989) (Scalia, J., plurality opinion).

46. 128 S. Ct. 2783 (2008).

47. Sunstein, *supra* note 44, at 249.

48. See *infra* notes 92–143 and accompanying text for a fuller discussion of *Heller*.

49. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); *see also* Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

interpretation of the Constitution.[50] Ironically, then, originalism seems to be contrary to the original understanding of the Constitution.

There are, however, less ironic but more serious flaws to originalism, especially in its more extreme form. At the most fundamental level, originalism misperceives the nature of history by presuming that it has an objective meaning that can be discovered if one is only diligent enough to search through enough ancient material. Unfortunately, it is a mistake to think that the original meaning of the Constitution is an existential "thing" waiting to be unearthed from old records and documents.[51] As any good historian knows, interpretation of the past entails considerably more than rummaging around in old archives to find hidden materials. The astute historian Edward Hallett Carr explains that "[t]he belief in a hard core of historical facts existing objectively and independently of the interpretation of the historian is a preposterous fallacy."[52] Despite clichés to the contrary, historical events do not speak for themselves.[53] History can easily be misread if one is not careful to engage in thoughtful analysis of historical sources. Historical evidence often cannot be taken at face value; rather, it must be interpreted in light of its context, a complex, though necessary, exercise. Arthur Schlesinger Jr., winner of the Pulitzer Prize for History, observed that "all historians are prisoners of their own experience . . . [who] bring to history the preconceptions of our personalities and of our age."[54] The historian, he explains, "is committed to a doomed enterprise—the quest for an unattainable objectivity."[55]

The historian, therefore, is "necessarily selective" and the "element of interpretation enters into every fact of history."[56] Historical analysis entails creativity as well as discovery. "In truth the actual past is gone; and the world of history is an intangible world, *re-created imaginatively*, and present in our minds."[57] Even when done properly, historical analysis leaves a good deal of room for the historian to make value

50. *See* Powell, *supra* note 49.
51. *See* Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 477 (1981).
52. EDWARD HALLETT CARR, WHAT IS HISTORY? 6 (1961).
53. *Id.* at 6–8.
54. Arthur M. Schlesinger Jr., *Folly's Antidote*, N.Y. TIMES, Jan. 1, 2007, at A19.
55. *Id.*
56. CARR, *supra* note 52, at 6–7.
57. Carl L. Becker, *What Are Historical Facts?*, 8 W. POL. Q. 327, 333 (1955) (emphasis added).

judgments. The historian sees things from a particular point of view, according to a particular value system. Historical meaning may be conceived at various levels of abstraction, ranging from the specific to the general, which offer differing, yet equally valid (or equally invalid), visions of the past.[58] In essence, historical analysis is a selective enterprise through which one imagines the past and thereby shapes it according to his or her personal vision of reality.

True historians understand that the meaning of the Constitution does not reside in the past, and that any attempt to ascertain the original meaning of the Constitution necessarily entails reconstructing the past in one's mind.[59] Originalism, therefore, cannot eliminate the necessity of making value judgments to interpret the Constitution. Rather, it obscures the policymaking function of constitutional interpretation by pretending that the meaning of constitutional provisions can be recovered from historical annals. Thus, there is an insidious aspect to originalism in that it sneaks a judge's personal views into constitutional interpretation by pretending they are nothing more than the original understanding of the document. Originalism offers an illusion of objectivity by holding out the false hope that the meaning of the Constitution exists somewhere in the past.

Originalism can be a risky enterprise for judges prone to self-deception. In searching the historical record for original meaning, there is often a temptation to discover what one wants to discover.[60] A judge may think that he or she is finding the original understanding of a constitutional text, when in truth it is the judge's own beliefs that are being revealed. Earlier originalists, purportedly searching for the intent of the Framers of the Constitution, were prone to this failing[61] and later-day originalists have succumbed to the same temptation on a number of occasions.[62] It seems that some practitioners of originalism are inclined

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58. *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1067–87 (1990). Justice Scalia has asserted that in ascertaining original meaning of the Constitution, the Court should refer to "the most specific level" at which a right can be identified. Michael H. v. Gerald D., 491 U.S. 110, 128 n.6 (1989) (Scalia, J., plurality opinion). This overlooks that choosing any level of abstraction, whether specific or general, is in itself a value judgment. *See id.* at 138–40 (Brennan, J., dissenting). Moreover, rights may be specific or general depending on the perspective from which they are viewed; there is no way to determine the most specific level of abstraction. *See* Tribe & Dorf, *supra*, at 1067–87.

59. *See supra* text accompanying notes 51–58.

60. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 60 (1980).

61. *Id.*

62. *See* William P. Marshall, *Constitutional Interpretation: Reclaiming the High Road*, ADVANCE: J. AM. CONST. SOC'Y ISSUE GROUPS, Fall 2007, at 89.

to abandon their originalist principles when it suits their political purposes to do so.[63] Indeed, in a number of instances originalists can be seen ignoring the historical record when it conflicts with their political agenda.[64]

More principled originalists may endeavor to hew more faithfully to the historical record. Even so, they are engaged in an impossible quest: the attempt to find a predetermined meaning for the Constitution in the recesses of history. In truth, the meaning of the Constitution is not fixed in the past, or anywhere else, for that matter. When judges purport to engage in originalist interpretation, they recreate the past according to their own visions, including, it should be said, their own values. Originalist interpretation of the Constitution may provide a veneer of objectivity, but it is little more than a pretext that obscures the true nature of constitutional interpretation, which necessarily involves the exercise of judicial creativity.

While the open-endedness of history should not be enough to scare away the Supreme Court from historical analysis of the Constitution, the Court should understand that the meaning of the Constitution is not fixed in history and waiting to be found. Indeed, as Erwin Chemerinsky points out: "It is misguided and undesirable to search for a theory of constitutional interpretation that will yield determinate results, right and wrong answers, to most constitutional questions. No such theory exists or ever will exist."[65]

Even if one could somehow overcome the difficulties of reconstructing the original understanding of the Constitution, it still might not be sound to follow that path. There is, of course, the question, posed long ago by Thomas Jefferson, of whether one generation has a right to bind another.[66] To Jefferson, the answer was self-evident: "the earth

63. *Id.*

64. *Id.* at 91–92; *see also* Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1497 (2008) (pointing out that Justice Scalia's dissenting opinion in Troxel v. Granville, 530 U.S. 57 (2000), "simply dismissed the Ninth Amendment as nonjusticiable without any examination of the Amendment's text or original meaning").

65. Erwin Chemerinsky, *Constitutional Interpretation for the Twenty-First Century*, ADVANCE: J. AM. CONST. SOC'Y ISSUE GROUPS, Fall 2007, at 25.

66. As phrased by Thomas Jefferson:

> The question Whether one generation of men has a right to bind another, seems never to have been started either on this or our side of the water. Yet it is a question of such consequences as not only to merit decision, but place also, among the fundamental principles of every government. The course of reflection

belongs . . . to the living . . . [and] the dead have neither powers nor rights over it."[67] Perhaps, though, the more telling concern is not so much one of authority—not so much a question of whether the dictates of a past generation should bind the present generation—as it is a concern about transposition, that is, a question of whether past understanding of the Constitution can be meaningfully transposed from one generation to another. Whatever the original meaning of the Constitution may once have been, it was formed in the context of a past reality and in accordance with past attitudes, both of which have changed considerably since the Constitution was drafted. History is inherently evolutionary, and a true historical approach to interpreting the Constitution would not come to an abrupt end with the adoption of the Constitution in 1787. Rather, it would recognize the evolving nature of history as an ongoing source of meaning for the Constitution. It is simplistic and ahistorical to believe that the Constitution can be interpreted simply by reference to the original understanding of the document. To transfer that understanding, fashioned under past conditions and attitudes, to contemporary situations may produce sorry consequences that are contrary to the original understanding of the Constitution. Blindly following the presumed meaning of constitutional provisions formulated in reaction to past conditions and attitudes that have long since changed does not, in the end, achieve the original understanding. Nor is it very likely to be an effective means of dealing with contemporary problems. Adherence to the original understanding of the Constitution reduces the capacity of the document to be used to respond to the needs of modern society. Originalism, or at least the extreme version of originalism, is dysfunctional—an instance of cultural lag whereby the meaning of the Constitution is left dormant while the world around it changes.

Justice Brennan once observed that "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with

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> in which we are immersed here on the elementary principles of society has presented this question to my mind; and that no such obligation can be so transmitted I think very capable of proof.—I set out on this ground which I suppose to be self evident, "*that the earth belongs in usufruct to the living*": that the dead have neither powers nor rights over it.

Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 392 (Julian P. Boyd ed., 1958) (footnotes omitted).

67. *Id.* (emphasis omitted).

current problems and current needs."[68] Therefore, he maintained, whatever the Constitution may have meant in the past should not be the measure of what it means today.[69] As Woodrow Wilson once put it, "[t]he Constitution was not meant to hold the government back to the time of horses and wagons."[70]

Some scholars take this line of reasoning one step further by maintaining that the original understanding is inextricably locked to the past and cannot be transplanted to the present.[71] In other words, because the original understanding was formed in reference to a reality and ways of thinking that no longer exist, it cannot sensibly be applied to the present. The original meaning of the Constitution is inextricably bound to the past, and it is senseless to attempt to transpose it to the present or future. What the people of 1787 may have intended for their times is not what they may have intended for ours. Life constantly changes, and the reality and ideas that existed in 1787 are long since gone.

Consider, for instance, the authority granted to Congress by Article I of the Constitution to "regulate Commerce . . . among the several States."[72] Originally this was meant to allow Congress to regulate no more than interstate transactions, leaving it to each state to deal with internal transactions that had no impact beyond its borders.[73] In those days, however, it was much simpler to draw a line between commerce that was interstate and commerce that was internal to a state. There was not much of a national economy, and many transactions were purely intrastate. By the end of the nineteenth century, the situation was radically different[74] and is even more so today with the advent of globalization. Now there is an immense national and international economy that affects every locality. There is a vast network of commerce,

68. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986).

69. *Id.*

70. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 169 (1908), *quoted in* ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL 285 (1960).

71. *See, e.g.*, John G. Wofford, *The Blinding Light: The Uses of History in Constitution Interpretation*, 31 U. CHI. L. REV. 502, 511–23 (1964).

72. U.S. CONST. art. I, § 8, cl. 3.

73. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824).

74. *See* Robert L. Stern, *That Commerce Which Concerns More States than One*, 47 HARV. L. REV. 1335 (1934); Robert L. Stern, *The Commerce Clause and the National Economy, 1933–1946*, 59 HARV. L. REV. 645 (1946).

connecting its various elements to one another. Even transactions that occur entirely within one state's borders have repercussions in other states, not to mention other nations. These prodigious changes in our economy render the original understanding of the Commerce Clause all but irrelevant. The original understanding of "Commerce among the several States" was formulated when economic conditions were drastically different and makes little, if any, sense in reference to the contemporary era of a global economy.

Despite the vast changes that have transformed the nation's economy, Justice Thomas has suggested that the Supreme Court should abandon much of the existing constitutional doctrine concerning the Commerce Clause that has developed since the 1930s and in its place return to doctrine more consistent with the original understanding of the Commerce Clause.[75] This suggestion would render the Commerce Clause desultory, an eighteenth-century proviso adrift in a twenty-first-century world.

Brown v. Board of Education, the landmark decision in 1954 ruling that racial segregation in public schools violated the Fourteenth Amendment, offers another telling example of why, as the world around us changes, original meaning of a constitutional provision cannot be transplanted from one time to another.[76] As the Supreme Court explained in *Brown*, at the time the Fourteenth Amendment was adopted, public education was in a nascent stage.[77] In the South, there were relatively few public schools, and what schooling was available, for white students only, was conducted by private groups.[78] In some Southern States, education of African-Americans was prohibited by law, and throughout the South, few African-Americans received any education whatsoever.[79] In the North, while public schools were more prevalent, they were a far cry from what they would later become.[80] The curriculum was rudimentary, ungraded schools were common in rural areas, the school term was three months a year in many states, and "compulsory school attendance was virtually unknown."[81]

By 1954, of course, the situation was very different. As the Court pointed out in *Brown*, by the mid-twentieth century, education was

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75. *See* United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring); United States v. Lopez, 514 U.S. 549, 584–85, 601–02 (1995) (Thomas, J., concurring).
76. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
77. *Id.* at 489–90.
78. *Id.*
79. *Id.* at 490.
80. *Id.*
81. *Id.*

perhaps the most important function of state and local governments.[82] That compulsory school attendance laws had been adopted throughout the nation and vast sums of public money allocated to public schools demonstrated the nation's commitment to the importance of education in a democratic society.[83] Education was recognized as the "foundation of good citizenship," essential to the performance of basic public responsibilities.[84] Moreover, education was vital to foster socialization, to convey cultural values, and to prepare for later professional training.[85] A high school diploma, not to mention a college degree, was a requisite of entry to the job market, and more education led to higher paying, more fulfilling employment. In sum, it was doubtful that any child could be expected to succeed in life if he or she was denied the opportunity of an education.[86]

Given these momentous changes concerning education, the original meaning of the Fourteenth Amendment simply did not speak to the constitutional issue presented to the Court in *Brown* in 1954. As the Court itself said: "[W]e cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation."[87]

Brown vividly illustrates that history cannot always resolve the problems of today, and in fact, too literal a quest for past intentions may be counterproductive.[88] Whatever meaning the Constitution originally possessed is rooted in the past and cannot be readily transplanted to the present. Extreme originalism ignores that times change and that the validity of past beliefs may diminish. At its worst, originalism renders the Constitution "a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past."[89] Even in less dire

82. *Id.* at 493.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 492–93.
88. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring).
89. *See* Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).

renditions, originalism leaves the Constitution a passive thing, unresponsive to the reality in which it exists.

That is not to say that the past should be ignored; certainly there are valuable lessons to be learned from history. It is to say, however, that the original understanding of the Constitution should not be accepted as an infallible source that dictates the present-day meaning of the document. We should attempt to comprehend past constitutional history, insofar as we can, but should not allow it to rule us. As Chief Justice Warren said on the occasion of his retirement from the Supreme Court: "We, of course, venerate the past, but our focus is on the problems of the day and the future as far as we can foresee it."[90]

The Framers themselves seemed to be aware that they could not predict the future and therefore took the sensible course of formulating the Constitution in a way that would allow it to be adapted to changing conditions as time passed.[91] Unfortunately, those who rigidly cling to the myopic myth of originalism often ignore the sensibility of that course of action.

II. ORIGINALISM *IN EXTREMIS*: *DISTRICT OF COLUMBIA V. HELLER*

In 2008, the Supreme Court decided *District of Columbia v. Heller*, marking the first time that a majority of the Court—albeit a slim 5–4 majority—signed onto an opinion so decidedly originalist in its approach.[92] The opinion in *Heller*, written by Justice Scalia, may be considered the triumph of originalism but in time may prove to be its downfall, revealing, as it does, the deep fault lines that run through originalist theory.

In *Heller*, the Supreme Court ruled that the Second Amendment of the Constitution protects an individual right to possess a firearm unconnected with service in a militia and to use that firearm for traditionally lawful purposes, such as self-defense within the home. Accordingly, the Court went on to strike down a D.C. law that banned the possession of handguns.[93] Justice Scalia's opinion for the majority in *Heller* adheres faithfully to his rigid originalist philosophy. Much of

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90. Mr. Chief Justice Earl Warren, Retirement Address (June 23, 1969), *in* 395 U.S. VII, X (1969).

91. *See* Powell, *supra* note 49; Sherry, *supra* note 49.

92. *See* Sunstein, *supra* note 44, at 249.

93. The law also required that lawfully owned firearms be kept "unloaded and dissembled or bound by a trigger lock . . . unless they [were] located in a placed of business or [were] being used for lawful recreational activities." District of Columbia v. Heller, 128 S. Ct. 2783, 2788 (2008) (internal quotation marks omitted).

the opinion is devoted to an historical exposition of the Second Amendment, which was enacted in 1791, to show that it originally secured an individual right to possess firearms unconnected with service in a militia and that it proscribed laws that prohibit the possession of firearms commonly used for lawful purposes. The opinion surveys seventeenth-century English history, eighteenth-century American dictionaries, *Blackstone's Commentaries*, the *Journals of the Continental Congress*, *The Federalist Papers*, *The Anti-Federalist Papers*, early American political essays and treatises, state constitutional enactments adopted both before and shortly after the Second Amendment, and other sources from around the time of the American Revolution.[94] The opinion is thoroughly originalist; it looks exclusively to the original understanding of the Second Amendment and allows for no evolution of the Amendment's meaning. Changed circumstances have absolutely no bearing on Justice Scalia's analysis of the Second Amendment, and practical considerations are dismissed out of hand. All that matters to Justice Scalia is the original meaning of the Second Amendment at the time it was adopted in 1791.

After surveying the historical materials, Justice Scalia concluded that while the purpose of "codifying" the right to bear arms as a constitutional provision was to ensure the preservation of a well-regulated militia, this did not suggest that preserving the militia was the only reason for which Americans valued the right to bear arms; "most undoubtedly thought it even more important for self-defense and hunting."[95] As Justice Scalia read history, it was individual self-defense that was the "*central component*" of the Second Amendment right to bear arms.[96] Although admitting that the right to bear arms was not unlimited, Justice Scalia again turned to history, at this point to determine the permissible limits that may be placed on the right to bear arms.[97] He explicitly rejected use of a test that would balance the competing interests in the case and flatly refused to consider any empirical evidence that showed the need to regulate handgun violence.[98]

94. *Id.* at 2790–808.
95. *Id.* at 2801.
96. *Id.* (emphasis in original); *see also id.* at 2797 ("Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation.").
97. *Id.* at 2816–17.
98. *Id.* at 2821.

The Second Amendment, Scalia proclaimed, "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[99] That relevant circumstances concerning the Second Amendment may have changed over the years was of no moment to Scalia. He acknowledged the problem of handgun violence in the nation but deemed it irrelevant because "the enshrinement of constitutional rights necessarily takes certain policy choices off the table."[100] He allowed that an originalist view of the Second Amendment may be outmoded in present-day society where a standing army is well supplied with arms, where well-trained police forces provide personal security, and where gun violence is an extremely serious problem, but dismissed those considerations because "it is not the role of [the Supreme] Court to pronounce the Second Amendment extinct."[101]

It is interesting to compare Justice Scalia's opinion in *Heller* to the dissenting opinion that Justice Stevens entered. Like Justice Scalia, Justice Stevens engaged in an extensive examination of the historical record concerning the Second Amendment. He surveyed the debates at the Constitutional Convention, proposals from a number of state ratifying conventions, the English Bill of Rights, *Blackstone's Commentaries*, post-enactment commentary, nineteenth-century case law, and more. After assessing this material, Justice Stevens concluded, in contradistinction to Justice Scalia, that the Second Amendment protects the individual right to bear arms only in connection with military service and does not limit the authority of the government to regulate the nonmilitary use or possession of firearms. As Justice Stevens saw it, the preamble to the Second Amendment clearly states that the purpose of the Amendment is to protect the right of the people of each of the several states to maintain a well-regulated militia. Moreover, Stevens believes that the historical record emphatically confirms that "the Framers' single-minded focus in crafting the constitutional guarantee 'to keep and bear arms' was on military uses of firearms, which they viewed in the context of service in state militias."[102]

Justice Breyer entered a separate dissenting opinion asserting that whatever the original meaning of the Second Amendment may have been, it should mark the *beginning* of the constitutional inquiry, rather than its *end*.[103] In Justice Breyer's view, the constitutional issues raised

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99. *Id.*
100. *Id.* at 2822.
101. *Id.*
102. *Id.* at 2826 (Stevens, J., dissenting).
103. *Id.* at 2850 (Breyer, J., dissenting).

by the case could only be resolved by focusing upon practicalities—the purpose of the D.C. law in question, the problems that called it into being, and its relationship to its objectives.[104] Applying a balancing test that took into account extensive empirical evidence showing the magnitude of gun-related crime and violence, Justice Breyer concluded that the D.C. law, directed to the presence of handguns in high crime urban areas, was a constitutionally permissible legislative response to a serious, indeed life-threatening, problem.[105]

It should come as no surprise that both Justice Scalia and Stevens can undertake what appears to be a scholarly exegesis of the original understanding of the Second Amendment yet come to opposite conclusions as to what the Amendment means. As we have seen, the meaning of the Constitution does not reside in history, and when judges engage in originalist interpretation, they recreate the past according to their own visions, including, of course, their own values. While both the Scalia and Stevens opinions in *Heller* are replete with historical detail, neither exhibits "the subtlety, nuance, acknowledgement of counterarguments, and (above all) immersion in Founding-era debates" that is essential to good historical research.[106] To the contrary, both opinions traffic in "the worst kind of 'law-office history,' in which each side engages in shamelessly (and shamefully) selective readings of the historical record in order to support what one strongly suspects are pre-determined positions."[107] For all his professed love of history, Justice Scalia seems to be unaware of the complexities of historical research, and both he and Justice Stevens seem to be ignorant of the principle, "second nature to professional historians, that the historical record is complicated and, indeed, often contradictory."[108] In their zeal to persuade, "both Justice Scalia and Justice Stevens assert—laughably to a real historian—that the Second Amendment had only one meaning at the framing, and that that meaning was for all practical purposes universally shared."[109] Good historians know that matters are much more complex

104. *Id.*
105. *Id.* at 2854–66.
106. Sunstein, *supra* note 44, at 257.
107. Posting of Sandy Levinson to Balkin.blogspot, http://balkin.blogspot.com/2008/06/some-preliminary-reflections-on-heller.html (June 26, 2008).
108. *Id.*
109. Posting of Mark Tushnet to Balkin.blogspot, http://balkin.blogspot.com/2008/06/more-on-heller.html (June 27, 2008).

than this, and that the Second Amendment did not have a single meaning universally shared throughout the nation when it was enacted in 1791.[110]

Good historians also know that history is inherently evolutionary and the world around us changes. Whatever may have been the original understanding of the Second Amendment, that understanding was formulated over 200 years ago in a very different world where gun violence was not nearly as prevalent as it is today and where police forces provided minimal protection against crime and violence. As Judge Richard Posner recently pointed out, "[t]here are few more antiquated constitutional provisions than the Second Amendment."[111] Yet Justice Scalia is willing to cling to what he believes to be the original meaning of this antiquated provision, brushing aside the serious problem of gun-related crime in present-day society.

That relevant circumstances concerning the Second Amendment may have changed over the years is of no moment to Scalia. He acknowledges the problem of handgun violence in the nation but deems it irrelevant because "the enshrinement of constitutional rights necessarily takes certain policy choices off the table."[112] He allows that an originalist view of the Second Amendment may be outmoded in present-day society where a standing army is well supplied with arms, where well-trained police forces provide personal security, and where gun violence is an extremely serious problem, but dismisses those considerations because "it is not the role of [the] Court to pronounce the Second Amendment extinct."[113] All of this, of course, begs the question by assuming that the Second Amendment must be interpreted according to its original meaning. As Justice Stevens points out in his dissenting opinion, the constitutional right that the Court announced in its opinion "was not 'enshrined' in the Second Amendment by the Framers"; rather, it was set forth by the Court itself in a groundbreaking decision investing the Second Amendment with meaning that was not previously realized.[114]

Justice Scalia's refusal in *Heller* to consider present-day concerns was particularly troubling to Justice Breyer. In his dissenting opinion, Justice Breyer pointed out that Justice Scalia's originalist approach ignores an important question:

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110. *Id.*
111. Richard A. Posner, *In Defense of Looseness*, THE NEW REPUBLIC, Aug. 27, 2008, http://www.tnr.com/article/books/defense-looseness#.
112. District of Columbia v. Heller, 128 S. Ct. 2783, 2822 (2008).
113. *Id.*
114. *Id.* at 2846 (Stevens, J., dissenting).

> Given the purposes for which the Framers enacted the Second Amendment, how should it be applied to modern-day circumstances that they could not have anticipated? Assume, for argument's sake, that the Framers did intend the Amendment to offer a degree of self-defense protection. Does that mean that the Framers also intended to guarantee a right to possess a loaded gun near swimming pools, parks, and playgrounds? That they would not have cared about the children who might pick up a loaded gun on their parents' bedside table? That they . . . would have lacked concern for the risk of accidental deaths or suicides that readily accessible loaded handguns in urban areas might bring?[115]

These questions cannot be answered, Justice Breyer pointedly noted, simply by "combining inconclusive historical research with judicial *ipse dixit*."[116] Indeed, whatever may be revealed by historical research concerning the Second Amendment cannot answer the questions of today about how the Amendment should be interpreted and applied in light of current reality.

After concluding that the Second Amendment does protect an individual right to possess firearms unconnected with service in a militia, Justice Scalia allowed that the right secured by the Second Amendment, like most rights, was not unlimited.[117] From Blackstone through nineteenth-century cases, he noted, both courts and commentators explained that the right was "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[118] To determine what limits may be placed on the right to bear arms, Justice Scalia again turned to history, noting with approval that the Court had previously ruled in *United States v. Miller* that the Second Amendment protected possession of the sort of weapons that were "in common use at the time."[119] That limitation, Justice Scalia declared, "is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[120] Thus, the Scalia opinion recognizes a qualification to the right to keep and carry arms, which limits the right to the possession of commonly used weapons that are not especially dangerous or unusual.

Justice Scalia's reasoning in this instance is reminiscent of the reasoning in *Lochner v. New York*, which took a similar formalistic

115. *Id.* at 2870 (Breyer, J., dissenting).
116. *Id.*
117. *Id.* at 2816 (majority opinion).
118. *Id.*
119. *Id.* at 2817 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).
120. *Id.* (citations omitted).

approach based on what the Court believed to be common knowledge in order to limit the authority of a state to regulate working conditions.[121] In *Lochner*, the Court struck down a New York law setting maximum hours of work for bakers on the ground that it violated the constitutional right to liberty of contract protected by the Due Process Clause of the Fourteenth Amendment. In rejecting the State's assertion that the law was a permissible health measure designed to protect the well-being of bakers, the Court declared that it was commonly understood that the trade of a baker has never been viewed as an unhealthy one.[122] In both *Lochner* and *Heller*, the Court erects categories to delineate the scope of a constitutional right and the authority of the state to enact laws that limit the right. In *Lochner* the category was based on common understanding, while in *Heller* it is based on common usage. In either case, the Court sets forth formal categories that function to define the meaning of the Constitution.

The problem in *Lochner* was that in relying on its view of common knowledge, the Court ignored the reality of the situation. Whatever might have been the common understanding of the nature of the baking trade, empirical evidence had been presented to the Court, and cited in Justice Harlan's dissenting opinion,[123] showing that the occupation of baking did in fact pose significant health risks. In other words, the Court in *Lochner* ignored that there was a compelling reason to support the New York maximum hour law.

Along the same lines, the problem in *Heller* is that the Court, in relying on common practice at the time the Second Amendment was adopted, ignores the reality of the present situation. Whatever may have been the common practice concerning firearms in the eighteenth century, empirical evidence demonstrates a present-day need for gun control measures, such as the one adopted by the District of Columbia. In other words, the Court in *Heller* ignores that there is a compelling state interest to support the D.C. law banning handguns.

In fact, Justice Scalia's opinion acknowledges the serious problem of handgun violence in the nation but asserts that the Second Amendment "necessarily takes certain policy choices off the table," thus precluding laws that prohibit possession of handguns that may be used for self-defense in the home.[124] As Justice Scalia sees it, the Second Amendment precludes balancing because it "elevates above all other interests the

121. 198 U.S. 45 (1905).
122. *Id.* at 59.
123. *Id.* at 69–72 (Harlan, J., dissenting).
124. *Heller*, 128 S. Ct. at 2822.

right of law-abiding, responsible citizens to use arms in defense of hearth and home."[125] Hence, the opinion flatly refuses to take a balancing approach to determine the permissible limitations that may be placed on the right to bear arms.[126] Justice Scalia explicitly rejects the possibility of balancing and is sharply critical of its use.

Regarding balancing, Justice Scalia states that he "know[s] of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."[127] He insists that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad."[128] Hence, the Court "would not apply an 'interest-balancing' approach to the prohibition of a peaceful neo-Nazi march through Skokie."[129]

This simply is incorrect. Throughout its history, the Supreme Court has continuously shaped and reshaped the scope of constitutional rights, including enumerated constitutional rights, and for many years has done so primarily through a process of balancing interests.[130] Notwithstanding Justice Scalia's assertion to the contrary, the free speech provision of the First Amendment stands as a prominent example of the Court's use of balancing to define the scope of an enumerated constitutional right. Balancing became an important part of First Amendment jurisprudence at a relatively early date. Justice Holmes's clear and present danger test, first enunciated during World War I, is a form of balancing that weighs the need to restrict speech.[131] Later, the Court adopted a refined version of the clear and present danger test as part of the balancing calculus to determine when it is constitutionally permissible to regulate speech that may incite unlawful conduct.[132] In 1939, in striking down an ordinance that prohibited the distribution of leaflets on the ground that it violated the First Amendment, the Court explained that "the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the

125. *Id.* at 2821.
126. *Id.* at 2821–22.
127. *Id.* at 2821.
128. *Id.*
129. *Id.*
130. *See* SHAMAN, *supra* note 23, at 1–26.
131. The clear and present danger test was first used in *Schenck v. United States*, 249 U.S. 47, 52 (1919).
132. Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

substantiality of the reasons advanced in support of the regulation."[133] As a general matter, content-based regulations of speech are subject to a strict scrutiny balancing test that asks whether they are narrowly tailored to achieve a compelling state interest. Content-neutral regulations of speech are subject to an intermediate scrutiny balancing test that asks whether they are appropriately related to an important governmental interest. Although some First Amendment rules do not involve balancing, many of them do, and balancing plays a significant role in a great many First Amendment cases.

His opinion in *Heller* does not represent Justice Scalia's first attack on the balancing process. In a concurring opinion in *Bendix Autolite Corp. v. Midwesco Enterprises* decided in 1988, he argued that balancing should not be used to decide dormant Commerce Clause cases because "the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy."[134]

This is clever, but disingenuous. It misconceives the nature of balancing by casting it as a quantitative measure rather than a qualitative one. The balance or scale certainly is an appropriate analogy—or more precisely, an appropriate metaphor—that refers to the comparative assessment of individual and governmental interests. Justice Scalia should be well aware that the term "balancing" is not to be taken literally in the sense that interests are quantitatively weighed or measured against one another. Rather, balancing entails a qualitative weighing of interests to "appraise the substantiality of the reasons" relevant to the constitutionality of a law.[135] Balancing is a process that the Supreme Court has used for many years in many cases, including cases involving enumerated constitutional rights.

Justice Scalia's more serious objection to balancing is that it involves the making of value judgments, a task that Justice Scalia believes is beyond the competence of the courts and that should be left to the legislature. This criticism, though, seriously misperceives the true nature of the constitutional process. The truth is that constitutional interpretation, whether done through the process of balancing, the mode of originalism, or any other methodology, necessarily involves making value choices.[136] Despite persistent myth to the contrary, the fact is that

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133. Schneider v. State, 308 U.S. 147, 161 (1939).
134. Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).
135. *Schneider*, 308 U.S. at 161.
136. *See* SHAMAN, *supra* note 23, at 44–46.

constitutional interpretation is impossible without some choosing among values or policies. *Judging*, after all, is precisely that: making judgments or choosing among values.[137]

As explained previously, originalism does not obviate the necessity of making value judgments to interpret the Constitution.[138] Instead, it masks the policymaking function of constitutional interpretation by pretending that the meaning of the Constitution is dictated by its original understanding. Although originalism may present itself as value-neutral, in truth it is nothing of the sort; with originalism, value judgments are made covertly through the illusion of original meaning.

In contrast, balancing affords transparency and rationality to constitutional adjudication. Balancing is a realistic means of constitutional interpretation that acknowledges that constitutional decisionmaking necessarily entails the making of value judgments. Balancing brings those value judgments out into the open and directs that they be made in a considered, thoughtful way. The great value of balancing is that it brings purposefulness to the process of constitutional interpretation. Balancing is teleological; it calls for informed decisionmaking done in a purposive manner. While originalism obscures the policy questions generated by constitutional adjudication, balancing attempts to answer them through the exercise of reasoned judgment.

III. CONCLUSION

Justice Scalia's opinion in *Heller* is the sort of discourse that gives originalism an especially bad name. It takes a decidedly lopsided view of the historical record to advance a constitutional right that had never been recognized before. Given the serious flaws of his opinion, it was

137. See William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3 (1988), for a discussion on Justice Cardozo's view of a judge's role:

> Having admitted and demonstrated that judges inevitably confront value choices, Cardozo did not shrink from the implications of that admission. He rejected the prevailing myth that a judge's personal values were irrelevant to their decision process . . . .
>
> . . . He attacked the myth that judges were oracles of pure reason, and insisted that we consider the role that human experience, emotion, and passion play in the judicial process.

Id. at 4–5.

138. *See supra* text accompanying notes 51–65.

inevitable that Justice Scalia would be accused of abandoning principled analysis in favor of pursuing a political agenda. Indeed, critics on both sides of the ideological spectrum have accused Justice Scalia of exactly that. Critics on the left, pointing to Scalia's skewed historical lucubration, were quick to assert that the opinion was driven by a partisan agenda opposed to gun control.[139] Perhaps more telling, however, was that similar criticism came from a decidedly more conservative source, J. Harvie Wilkinson III, Circuit Judge of the United States Court of Appeals for the Fourth Circuit. In an article published in the *Virginia Law Review*, Judge Wilkinson likened the *Heller* decision to *Roe v. Wade*.[140] He asserted that both decisions show an absence of respect for constitutional textualism and the tenets of federalism, both represent a rejection of neutral principles, and both fail to show sufficient respect for legislative judgments.[141] As for the originalist analysis practiced by Justice Scalia in *Heller*, Judge Wilkinson said this: "While *Heller* can be hailed as a triumph of originalism, it can just as easily be seen as the opposite—an exposé of original intent as a theory no less subject to judicial subjectivity and endless argumentation as any other."[142] In Judge Wilkinson's view, the Scalia opinion in *Heller* amounts to an "aggressive brand of originalism" that "discard[s] the tenets of [judicial] restraint."[143]

Heller is indeed an aggressive brand of originalism, and one that exhibits the worst faults of that methodology. At its foundation, *Heller* succumbs to the illusion that the original meaning of the Second Amendment has an independent and objective existence that can somehow be magically recovered through diligent study of the past. In falling prey to this illusion, *Heller* perpetrates a pretense of objectivity that functions as a facade for policymaking. Moreover, *Heller* ignores that whatever meaning the Second Amendment may have had when it was adopted in 1791 cannot simply be transposed to the present. The refusal in *Heller* to consider that the world around us has changed renders the Second Amendment a senseless constitutional provision—an antiquated law adrift in a contemporary world. *Heller* reveals the fundamental failure of originalism; based on an illusion and dismissive of reality, originalism cannot sustain a viable constitutional jurisprudence.

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139. *See, e.g.*, Siegel, *supra* note 3, at 236–45; Levinson, *supra* note 107.
140. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009).
141. *Id.* at 254.
142. *Id.* at 256.
143. *Id.*