Heller and the New Originalism

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It's the same with men as with horses and dogs
Nothing wants to die[1]

I. INTRODUCTION

Heller[2] has been described, accurately enough, as the most originalist opinion in recent Supreme Court history.[3] But, it is said, the opinion embodies the "new" rather than the "old" originalism, and is all the better for that. The old originalism, embodied—again, it is said—in Justice Stevens's dissent, sought to determine what constitutional provisions meant by examining what their drafters and ratifiers thought they meant, or intended them to mean, or something like that. The old originalism was subject to withering criticisms, based on questions about the evidentiary basis for the imputed intentions and about the difficulties of aggregating what might have been disparate intentions or thoughts by framers and ratifiers, among others. The new originalism is said to avoid these difficulties because it seeks to determine what constitutional provisions were understood to mean by ordinary, albeit reasonably well-informed, readers of the terms at the time the terms were embedded in the Constitution.

The new originalism probably is not susceptible to precisely the same criticisms leveled against the old originalism, which is not to say that it is invulnerable to criticisms in the same family as those criticisms.[4] The new

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[1] TOM WAITS, *The Fall of Troy, on* ORPHANS: BRAWLERS, BAWLERS & BASTARDS (ANTI- 2006).

[2] Dist. of Columbia v. Heller, 128 S. Ct. 2783 (2008).

[3] For the claims enumerated in this paragraph, *see, e.g.*, Randy Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13.

[4] The new originalism can come in degenerate forms, which I do not address in this Essay. One place where degeneration sets in is in the acknowledgement that new originalists are looking for the common understanding of reasonably well-informed contemporaries. The degeneration takes the form, "What would a reasonably well-informed contemporary have understood the terms to mean? Well, just about what I understand them to mean, because [I can pretend that I have cleansed my mind of all post-adoption knowledge and then assert that] I am reasonably well-informed." In my view, this is Gary Lawson's version of the new originalism. For one presentation of Lawson's approach, see Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002).

originalism, like the old, presents a simulacrum of historical inquiry, because it is a lawyer's enterprise dressed up as a historian's. The lawyer's enterprise is sometimes derided as "law office history,"[5] but in my view, that epithet is misapplied to the lawyer's practice of originalism. As I have argued elsewhere, originalism—new or old—is not "history" and does not rely on historical evidence in the way that historians do.[6] Rather it is what I call "history-in-law," or history indexed to law rather than to the practice of history by accredited historians.

That observation, though, does not salvage originalism (new or old). The reason is that lawyers who defend originalism do so because of a particular account of the desiderata of an approach to constitutional interpretation. What we seek in such an approach, these defenders argue, is something that at the very least minimizes the role contested judgments play in constitutional interpretation, and at best allows us to settle on the single conventional understanding of constitutional terms at the time of their adoption. Doing so gives us a "rock-solid, unchanging Constitution," as Justice Scalia has put it,[7] and thereby insulates constitutional interpretation from the passing fancies of individual judges.[8]

Unfortunately, the new originalism cannot deliver on its promises, as *Heller* shows. The reason is simple: The new originalism's search for *the*—that is, the single—conventional understanding of constitutional terms is doomed, at least in the most interesting cases (defined, here, as ones where the tension between having a rock-solid Constitution and having one whose meaning is more fluid is the greatest). History is replete with, as one leading historian unconcerned with constitutional theory has put it, "contested truths."[9] These contests are precisely contests over conventional meaning.

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[5] The classic citation for this proposition is Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122.

[6] Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 914 (1996).

[7] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 47 (Amy Gutmann ed., 1997).

[8] I address here only this specific defense of the new originalism, and not, for example, defenses that, while acknowledging some difficulties with the new originalism, regard it as better than alternatives along various dimensions. My view is that the most important dimension is the one on which Justice Scalia focuses, that of judicial discretion, that—as I argue in this Essay—the new originalism is no better than the old along that dimension, and that the new originalism is in fact no better, though it is perhaps no worse, than other interpretive approaches along the other dimensions (a position I do not argue for here).

[9] DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 3–8 (1998). *See also* DAVID HACKETT FISCHER, LIBERTY AND FREEDOM (2005) (describing the various understandings of what constituted "liberty" and "freedom" in different regions of the United States throughout the nation's history).

That is, give me an interesting term used in a constitution, and I will find a bunch of people at the time of its adoption who understood it to mean one thing, and a bunch of other people who understood it to mean something else. Consider, for example, that the First Amendment refers to a "freedom" of speech while the Second refers to a "right" to keep and bear arms.[10] Would an ordinary citizen in 1789–91 have understood these different terms to imply that the government had greater (or lesser) power to regulate a "freedom" than a "right"? Without providing the evidence here, I will assert that, then as now, inquiry would disclose that some would understand the different terms to imply a different permissible regulatory scope and others would not.[11] It takes some sort of judgment to choose between—or, even worse, among—the contested meanings. And the new originalism fails in its effort to provide a rock-solid, unchanging Constitution at the point where judgment is exercised.[12]

What follows is a preliminary and short critique of the new originalism, which uses the majority opinion in *Heller* as a good example of the new originalism in action.[13]

II. SOME PRELIMINARY OBSERVATIONS

Before illustrating the core difficulty by examining some aspects of *Heller*, I need to clear away some underbrush. First, Justice Scalia says that original public meaning interpretation must attend to the understandings of "ordinary citizens,"[14] at least with respect to terms that had some reasonably well-understood common meanings.[15] Fair enough, but we also have to

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[10] U.S. CONST. amend. I; U.S. CONST. amend. II.

[11] I present this as an assertion about the facts that inquiry would disclose. It is a separate and interesting question why such contested meanings are so common, but addressing that question would take me into the domain of "fancy" theorizing, which I think unnecessary to raise questions about the claims made on behalf of the new originalism.

[12] In a companion essay on *Heller*, Mark Tushnet, Heller *and the Critique of Judgment*, 2008 SUP. CT. REV. (forthcoming 2008), I explore the question of judgment from a different angle.

[13] Obviously, if my criticisms of certain features of *Heller* seem to new originalists to have merit, the features can be characterized as weaknesses in execution or as departures from the new originalism. *See, e.g.*, *infra* note 35. Yet, the two topics I discuss seem to me at the heart of the originalist analysis in *Heller*, and if they illustrate weaknesses in execution or departures from the new originalism, the claims made about *Heller*'s originalism would be substantially undermined.

[14] 128 S. Ct. at 2788.

[15] Some such qualification is necessary so that we can use the interpretive approach when we have to interpret the Letters of Marque and Reprisal Clause. U.S. CONST. art. I, § 8, cl. 11. That Clause's terms may have had a "public" meaning to some relevant

understand that ordinary citizens at the time of the framing were different from today's ordinary citizens.[16] Only in part because they were in the midst of a constitutional transformation,[17] ordinary citizens in the 1790s were more attuned to relatively complex accounts of politics and constitutional design than today's are. The new originalists should therefore attempt to determine the original public meaning of constitutional terms, where "public" refers to a reasonably well-informed set of voters. So, for example, Justice Scalia assumes, correctly in my view, that the reasonably well-informed ordinary citizen in 1789–91 would have some knowledge about the way terms were used in a newspaper article published in New York in 1769, two decades earlier, and in a British parliamentary debate in 1780.[18]

Second, proponents of the new originalism acknowledge, or at least should acknowledge, that nearly everything examined by old originalists is relevant to the new originalist inquiry.[19] What a drafter believed a constitutional provision to mean is evidence of what at least one reasonably well-informed contemporary understood the provision to mean. Further, what a drafter believed a constitutional provision would *do* is similar evidence, to the extent that meaning resides at least in part in use.[20] For this reason, critics should not dismiss Justice Stevens's opinion as "old" originalism. To the extent that his terminology resonates with the old originalism, we can readily recast it in terms congenial to the new originalism.[21]

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community of specialists, and I attempt to capture the notion of specialization through the qualification "reasonably well-informed" when we move from the Letters of Marque and Reprisal Clause to the Second Amendment.

[16] That the voters who participated in the ratification of the Bill of Rights were all male and, with scattered exceptions, white is not particularly relevant to this discussion, though it is to others—such as those focusing on the normative import the original public meaning of constitutional terms should have today, given the nature of the then-public.

[17] This is a central point in BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS 67–70 (1991).

[18] *See* 128 S. Ct. at 2799 (New York newspaper), 2797 (parliamentary debate).

[19] *See* Richard Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. (forthcoming 2009), *available at* http://ssrn.com/abstract=1259867, 15 ("It is not surprising, then, that the practitioners of public meaning originalism tend to support particular interpretations with essentially the same kind of evidence we have always associated with the search for the original intentions . . . .").

[20] I do not mean here to invoke any fancy concepts in the philosophy of language, where the phrase "meaning is use" is (aha!) quite contested. My point is the much more modest one that we can gain some insight into what someone understands a term to mean by seeing how he or she uses it.

[21] The same point applies to dismissals of the work of professional historians on founding-era understandings of the Second Amendment. A related point, the exploration of which would again take this Essay too far afield: One of the things ordinary citizens

Third, and I think more consequential, 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.[22] Because meanings are contested, they can and do change.[23] 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."[24] 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."[25] 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."[26]

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understood themselves to be doing was creating a constitution and a set of rights that would endure for a reasonably long time. Their accounts of what constitutions and rights do are therefore relevant to any effort to discern the public meaning of specific terms (and might lead one to conclude that they were willing to let contests over meaning be resolved in the future). *See infra* note 50 and accompanying text.

[22] Justice Scalia's opinion devotes four of its thirty-five pages in the Supreme Court Reporter (nine of sixty-four in the slip opinion) to a discussion of cases and commentary from the 1840s through the end of the nineteenth century. 128 S. Ct. at 2807–09, 2811–12; District of Columbia v. Heller, No. 07-290, slip op. at 36–37, 39–41, 44–47 (U.S. June 26, 2008). I cannot help but wonder why the survey ends then instead of continuing into the twentieth century.

[23] That is perhaps the central useful insight that lawyers can derive from one of the classic historical works on conventional meanings, RAYMOND WILLIAMS, KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY (1985), the project of which is to identify how conventional understandings of important political concepts changed.

[24] U.S. CONST. amend. I.

[25] *See, e.g.*, LEONARD LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 203 (1960) (setting out the evidence showing the "prior restraint" understanding as of 1791).

[26] *See, e.g.*, LEONARD LEVY, EMERGENCE OF A FREE PRESS 200–01, 343 (1985) (setting out the evidence showing that a different understanding of the constitutional terms had developed in the 1790s and was well-established in the early 1800s). Justice Scalia hints at an originalist interpretation of the First Amendment in *Heller*, writing, "The First Amendment contains the freedom-of-speech guarantee *that the people ratified*, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views." 128 S. Ct. at 2821, (emphasis added). The evidence of original public meaning is largely to the contrary.

A not-entirely snarky observation: There is simply no basis whatever for the view that the First Amendment, as understood at the time of its adoption, prevented Congress

Another example is the term "commerce" in the clause giving Congress the power to regulate commerce among the states.[27] A prominent new originalist has argued that in 1789 the term was part of a threesome consisting of "commerce, agriculture, and manufactur[ing],"[28] and that the original public meaning of the term was therefore rather restricted in scope.[29] Yet, assuming that to be true, within a generation Chief Justice John Marshall was to offer a quite different interpretation, giving the term "a breadth never yet exceeded," as Justice Robert Jackson put it.[30] And that interpretation appears to have been consistent with the public meaning of the term in 1824, for, although there were controversies over the scope of congressional power then and thereafter, controversy did not attend the term's definition, at least until the late nineteenth century.[31] And, generally, the further from the time of adoption, the more likely it is that assertions

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from adopting laws regulating commercial speech. (For a brief discussion of how an "original public meaning" approach to interpreting the First Amendment might misfire, see *infra* note 42.) One can generate such rules out of doctrines themselves derived from an understanding of the Amendment as imposing substantive limits on congressional power, but not from the dominant conventional understanding as of 1789–91. Yet, as Mitchell Berman has observed, originalism (new or old) cannot provide the solid, rock-hard Constitution unless it is the exclusive method of constitutional interpretation. Mitchell N. Berman, *Originalism is Bunk* 10 (Dec. 30, 2007) (unpublished article, *available at* http://ssrn.com/abstract=1078933). With more than a single interpretive method available, either choice (and judgment) becomes necessary, or the originalist interpreter must specify the proper domains of originalism and its alternatives.

[27] U.S. CONST. art. I, § 8, cl. 3.

[28] Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 121 (2001).

[29] Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 862 (2003). *But see* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 13–50 (1999) (setting out an original-public-meaning argument different from Professor Barnett's). Incidentally, the disagreement among new originalists might be taken to establish my principal point in this Essay.

[30] Wickard v. Filburn, 317 U.S. 111, 120 (1942).

[31] The Jacksonian period saw controversy over congressional power to subsidize infrastructure development ("internal improvements") through the exercise of its power to tax and spend, and over whether a protective tariff was a permissible type of "regulation" under the Commerce Clause. *See* Merrill D. Peterson, *American System*, *in* 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 53 (Leonard W. Levy et al. eds., 1986). Controversy over whether a subject Congress sought to regulate fell within the term "commerce" did not arise until the late nineteenth century. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 16–17 (1895) (holding that the Sherman Antitrust Act could not be applied to the acquisition of a monopoly in manufacturing refined sugar because manufacturing fell outside the scope of the commerce power).

about the then-contemporary public meaning will not track the public meaning at the time of adoption.

Fourth, to the extent that *Heller* is an exemplary "new originalist" opinion, it shows at least that resisting historical judgment is exceedingly difficult. Justice Scalia refers to the "highly influential minority proposal in Pennsylvania."[32] As Justice Scalia observes, that proposal, describing as it did a right to own weapons for hunting, identified an individual right unconnected with militia service.[33] But exactly what are we to make of the phrase "highly influential"? I think there are two possibilities. First, a reasonably well-informed ordinary citizen would know that the Pennsylvania minority proposal was part of the background or context within which the phrase "keep and bear arms" was to be understood. The Pennsylvania minority proposal is here part of the Second Amendment's drafting background. Yet, if reasonably well-informed ordinary citizens would know of *that* part of the drafting background, they would also know of other aspects of the drafting background. In particular, they would know that early versions of the Second Amendment connected the right it created with an exemption from compulsory militia service by those conscientiously opposed to such service on religious grounds. On this reading, the reference to the "highly influential minority proposal in Pennsylvania" actually weakens the argument for the conclusion that the Second Amendment's terms had a single or uncontested conventional meaning when it was adopted.

Alternatively, the Pennsylvania minority proposal might have been highly influential in the sense that it led voters to support amending the Constitution to protect the right the minority proposal identified. On this reading a different set of difficulties arises. One might ask for evidence of the minority proposal's influence—some identification of those people who came to the asserted view. Looking at grammar and dictionaries will not help in that inquiry. Even more, one would want to know how those people reacted to the Second Amendment: Did they say, "I'm glad that Congress has proposed an amendment that addresses our concerns," or did they say, "Wait a minute, the terms of the proposed amendment are different from the terms in the minority proposal that led us to support amending the Constitution"? Here *influence* is a term referring to cause and social effects, not one referring to grammar or syntax. That is, it is a term appropriate for the old originalism. Apparently even an adherent of the new originalism cannot resist the temptation to scavenge for support through old-originalist inquiries.

Finally, and in some ways a summary of the preceding points, the new originalism is a *complicated* account of constitutional interpretation. It has many moving parts, and it is replete with distinctions that are hardly

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[32] 128 S. Ct. at 2804.

[33] *Id.*

intuitive,[34] whose precise application may lead to missteps.[35] The old originalism's great appeal was its apparent simplicity. Everyone understands the effort to figure out "what were they thinking?" because it is something we do all the time when we try to interpret intra-office memoranda or—classically—instruction manuals written in "English" by people whose first language is not English. I do not doubt that we could describe that interpretive enterprise as an effort to determine the original public meaning of the manual's language, where "public" is appropriately indexed. But the old originalism seems to do just fine, and in part that is why it made such headway in the academy and among the public. The new originalism's complexity, I suspect, means that the public meaning of the new originalism, so to speak, and even some of its judicial applications will be more old than new—the new originalism borrows credit from the old originalism, but I suspect that the debt will never be repaid. The new originalism will be the academic's version of what its adherents will regard as the bastardized originalism prevalent among the public and, generally, among those judges who engage in originalist analysis.[36]

III. THE CORE DIFFICULTY

The old originalism succumbed to a series of criticisms—about the difficulty of aggregating individual intentions, about the inevitable incompleteness of the historical record—whose combined effect was to undermine its claim that only it offered an interpretive approach that avoided judicial subjectivity, judgment, and choice. The new originalism will, I am confident, face the same core difficulty. Because the new originalism differs from the old, the criticisms will have a different content and form, but their

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[34] For example, some new originalists distinguish between *interpretation* and *construction*. For one explication of the distinction, see Randy Barnett, *Interpretation and Construction in* Heller, THE VOLOKH CONSPIRACY, Jul. 3, 2008, http://volokh.com/posts/1215106086.shtml ("[C]onstitutional interpretation is the method by which the semantic meaning of words is ascertained; constitutional construction is the method by which the meaning yielded by constitutional interpretation is applied to particular factual situations.").

[35] For an example, see *id.* (describing a part of Justice Scalia's opinion in which, according to Professor Barnett, Justice Scalia "does not completely appreciate the distinction between interpretation and construction").

[36] For a similar criticism of the new originalism, see Steven D. Smith, *That Old Time Originalism* 7–9 (University of San Diego School of Law Legal Studies Research Paper Series, Paper No. 08-028), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1150447 (describing why and how the new originalism is more exclusionary than the old originalism).

sting will be the same: The new originalism, like the old, fails to deliver on its claim about eliminating judicial subjectivity, judgment, and choice.

The difficulty arises because meanings—at least the meanings of interesting constitutional terms—are contested. The new originalism seeks *the* original public meaning of constitutional terms, but there is (was) no single such meaning, again at least for interesting constitutional terms. For such terms, as Madison put it, meanings are "liquidated" over time.[37] Struggles over meaning do get resolved, to the point where a meaning that once had real competitors wins out. And, of course, this implies that we cannot rule out the possibility that a particular constitutional term represents not the embodiment of an existing contest over meaning but the outcome of a now-terminated struggle. That, though, is a conclusion to be drawn on the basis of an examination of the history of the public's understandings of the term.

Emphasizing that meaning can be contested—that there might be competing original public meanings—also requires a reasonably careful explication of the available meanings (the emphasis is important, of course). In what follows, I develop criticisms of Justice Scalia's account of *the* original public meaning of the Second Amendment, but I emphatically do not mean to suggest that his account is unfounded in the grammar, syntax, and usages of the time, that it is wrong in some deep sense, or even that it is worse than alternative accounts of other available public meanings. My point is only that there are (were) other such meanings, which can be retrieved by examining the same materials about grammar, syntax, and usage.[38] In the end, judges must make a judgment about which account they find more satisfying; but then the new originalism converges with the old in its failure to eliminate judicial choice and judgment.

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[37] THE FEDERALIST NO. 37, at 269 (James Madison) (Benjamin Fletcher Wright ed., 1961).

[38] Emphasizing the possibility of contests over meanings has the collateral benefit of lowering the rhetorical tone of disagreement. Justice Scalia obviously uses a distinctive rhetoric, but were he to be open to the possibility of contests over meaning, he would find it harder to use that rhetoric, and to the extent that he continued to do so readers would find it overheated and unpersuasive. For examples, see *Heller*, 128 S. Ct. at 2797 n.14 ("bizarre argument"), 2804 ("flatly misread the historical record"), 2794 ("Grotesque."). Justice Scalia uses similar rhetorical forms even when not engaging in new-originalist analysis. *See id.* at 2815 (observing, in a discussion of the Supreme Court's decision in United States v. Miller, 307 U.S. 174 (1939): "Not a word (*not a word*) about the history of the Second Amendment." (incomplete sentence and emphasis in original)). Still I suspect that the idea that there is a single original public meaning of interesting constitutional terms conduces to a rhetoric that castigates those who refuse to accept one's account of what that meaning is, as willfully ignoring what everyone not committed to some personal agenda can see.

Here I take up two examples of how grammar, syntax, and usage at the time of the framing show that the Second Amendment had a contested public meaning.[39] The first is what I call Justice Scalia's distributed analysis of the words "to keep and bear arms," the second his analysis of whether the Amendment's prefatory phrase or preamble serves to explain or to qualify its operative terms.

The bulk of Justice Scalia's analysis of "to keep and bear arms" assumes that the phrase was understood as if it read "to keep arms and to bear arms." Indeed, in a footnote he asserts that, "We have never heard of the proposition that omitting repetition of the 'to' causes two verbs with different meanings to become one."[40] Actually, he has, for the paragraph containing that footnote begins by taking up the suggestion that "'keep and bear arms' was some sort of term of art, presumably akin to 'hue and cry' or 'cease and desist.'"[41] Or, to take an example using verbs: "aid and abet." Careful writers—and careful, which is to say reasonably well-informed, readers—know that including the "to" twice suggests that the two verbs are somewhat related, and including it only once suggests that the two verbs are rather closely related. Now, "suggests" here is the relevant word: Clearly, writers can be sloppy, and, even more, the suggestion might not be strong enough to overcome other understandings one might glean from the terms used and the context in which they were used. But, at the least, today's writers do indeed sometimes use a single "to" to link two verbs more closely than the verbs would be linked by using "to" twice.[42]

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[39] I simply note here, and discuss in more detail in a companion essay, Mark Tushnet, Heller *and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. (forthcoming Apr. 2009) (manuscript at 8 n.3, on file with the author), the implausibility of the claim that the presumptive constitutionality of various regulations that the Court's opinion acknowledged, 128 S. Ct. at 2816–17, 2817 n.26, can be established by examining original understanding. Whether those regulations are constitutionally permissible is to be determined within the new originalism by constitutional construction rather than constitutional interpretation. And, I note, construction appears to involve a fair amount of judgment, so that, while the new originalism purports to reduce substantially the amount of judgment entailed in interpretation, in a large domain of important matters it tolerates judgment when judges engage in constitutional construction. The overall benefits of the new originalism with respect to ensuring a "rock-hard, solid" Constitution then seem to me smaller than its most vigorous enthusiasts proclaim.

[40] 128 S. Ct. at 2797 n.14.

[41] *Id.* at 2797.

[42] Consider a parallel example of a distributed reading, here of the First Amendment. It would be profoundly misleading to seek the original public meanings of the words "freedom," "speech," and "abridged," and then simply string those meanings together to come up with the original public meaning of the terms in which the First Amendment protected free speech. And again there is a subtle grammatical feature in the First Amendment that signals why: The Amendment refers to "the" freedom of

That point means that, to figure out what reasonably well-informed readers of the phrase "to keep and bear arms" understood it to mean, we have to examine three categories of uses, each with subdivisions. And Justice Scalia does so, but because he must come up with a single original public meaning, he has to dismiss the evidence he reports about one of the categories. The categories are these: What was "to bear arms" commonly understood to mean; what "to keep arms"; and what "to keep and bear arms"?[43] And the subdivisions are: uses without qualifications or modifiers; uses with a qualification or modifier suggesting a nonmilitary meaning ("to keep arms for defense of the home"); and uses with a qualification or modifier suggesting a military meaning ("to bear arms in defense of the state").[44]

Justice Scalia surveys the uses of the three phrases, finding first that there are many more uses of "to keep arms" and "to bear arms" than there are of "to keep and bear arms." And, examining the uses with qualifications, he finds no uses of "to keep arms" with a military qualification or modifier, and that uses of "to bear arms" with a nonmilitary qualification predominate over the uses with a military qualification. He infers, reasonably enough, that a reasonably well-informed citizen who saw the term "to keep arms" in a constitutional document would understand it to have a nonmilitary meaning, and would have a similar understanding of the term "to bear arms."

The evidence regarding "to keep and bear arms" is different. Justice Scalia says that uses of the phrase were relatively few, and Justice Stevens shows that most of those uses were accompanied by a military qualification or modifier. All that Justice Scalia can say in response is, "we have found instances of its use with a clearly nonmilitary connotation."[45] But, of course, Justice Stevens found instances of the use of "to bear arms" with a clearly military connotation—the ones with the military modifier or qualification. The question is: What would a reasonably well-informed reader in 1789–91 have understood the unqualified phrase "to keep and bear arms" to mean? At this point the earlier discussion of the mild suggestion raised by the single "to" becomes relevant. It is reasonable to conclude—not compelled, but reasonable—that such a reader, knowing that most of the time when the phrase was used it had a military connotation, and that the use of a single

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expression, and the definite article tells readers that they should understand what follows as referring to an already aggregated concept.

[43] I depart from the order in which the terms appear in the Second Amendment for ease of exposition in connection with the subdivisions.

[44] The parenthetical examples are stylized to simplify exposition.

[45] *Heller*, 128 S. Ct. at 2797. The plural "instances" is a bit overstated. In the text Justice Scalia identifies a single use with a nonmilitary connotation, and attaches a footnote with a "*cf.*" signal indicating, appropriately, that the nonmilitary connotation must be inferred from a less-than-transparent exchange. *Id.* at 2797 n.15.

"to" suggested that the terms were traveling together, would understand it to have such a connotation in the Second Amendment as well.

The second example is the Second Amendment's preamble or, as Justice Scalia called it, prefatory clause.[46] Here the question is whether the clause was generally understood to be an explanation for the right protected in the operative clause or to be a qualification upon that right.[47] The Court concludes that the preamble was understood to be an explanation, or, in Justice Scalia's terms, the clause "announces the purpose for which the right was codified":[48] It was important to protect the right of the people to keep and bear arms for self-defense (and for use in the militia) because of the risk that the national government would disarm the militia.

I have no quarrel with the conclusion that the preamble *might* have been understood as an explanation. The question, though, is whether it *was* so understood, or at least was so understood widely enough for us to conclude that the preamble's original meaning, as commonly understood, was as an explanation. And there are several difficulties with offering "explanation, not qualification" as the answer to that question.

Treating the preamble as an explanation of the purpose for which the right is being protected creates a slight mismatch between the purpose and the right. Recall that the right being constitutionalized, according to the Court, was the right, well-established at common law, to keep and bear arms for the purpose of self-defense. The people having that right, of course they would also have arms they could use in the militia. So, a government that had the power to disarm the militia might have the effective power to prevent the people from owning weapons for purposes of self-defense. Protecting the common law right to own weapons for purposes of self-defense is indeed an effect of denying the government the power to disarm the militia, which is why the mismatch is only a slight one. An ordinary citizen might worry that a national government intent on disarming the militia might incidentally end up denying people the right to own weapons for purposes of self-defense, and so might understand the preamble as an explanation for guaranteeing the latter right. But, the ordinary citizen might have thought, the government's power to take away the arms people owned for purposes of self-defense is a collateral rather than a direct effect.

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[46] 128 S. Ct. at 2789. The prefatory clause beings: "A well regulated Militia being essential to the security of a free State . . . ." U.S. CONST. amend. II.

[47] *See* MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS 8–9 (2007) (discussing the distinction between preamble-as-explanation and preamble-as-qualification). *See also* H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT 11–12 (2002).

[48] 128 S. Ct. at 2801.

Such a citizen might draw a more straightforward understanding from the Second Amendment's preamble: The right protected in the operative clause is more directly associated with the use of arms in the militia. Or, put another way, were one to try to explain why people had a right to keep and bear arms for purposes of self-defense, one would more naturally say something about self-defense. A reasonably well-informed citizen reading the preamble and the operative clause together might have understood the preamble to operate as a qualification on the right later protected.

The reasonably well-informed ordinary citizen might have found support for that understanding by considering why he needed to ensure that the right was protected. He could begin by asking, "Why do we guarantee these rights and not others in the Constitution?"[49] One answer that our reasonably well-informed ordinary citizen could give, I believe, is that there were reasons to think that the national government might have some interest in violating the enumerated rights and the power to do so. But, this citizen might then wonder, "Why would the national government want to take away my right to own a weapon for purposes of self-defense? And, where in the Constitution does the national government have the power to do so anyway?" Reading the Constitution, the ordinary citizen could conclude that the national government lacked the power to take away the common law right to own a weapon for purposes of self-defense. And thinking—even thinking reasonably suspiciously—about the motivations the national government's officials might have, the ordinary citizen might have been hard pressed to imagine why they would want to do so anyway.

These reflections suggest that the ordinary citizen might then consider whether the preamble should be understood as a qualification on the protected right, that is, that the protected right is one that has something to do with membership or participation in the militia. And here the answers to the questions about motivation and power would be immediately apparent. The national government has an interest in disarming the militia because doing so would eliminate one source of threats to its own aggrandizement. And it has the power to do so in specific constitutional provisions giving the national government power to regulate the state-organized militia.

Notice, of course, that I have slipped in an adjectival phrase there: "state-organized" militia. An ordinary citizen, thinking about why we need constitutional rights under the Constitution as adopted in 1789, could readily have understood the preamble as a qualification. The ordinary citizen could have understood the preamble as an explanation that was tightly rather than loosely associated with the operative clause. The preamble's reference to the militia explained why the right protected in the operative clause was one

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[49] I put aside for present purposes the implications of this question for our understanding of the Ninth Amendment.

associated with membership in the state-organized militia: The national government had neither an interest in taking away nor power to take away the weapons ordinary people owned for their own protection, but it had both an interest in disarming and the power to disarm the state-organized militia.

Finally, here are two comments on how canonical language inserted into a constitution might nonetheless not have a single public meaning.

• At the time of adoption, nothing concrete turns on what "the" public understanding is, because consequences follow only when the new government actually begins to exercise power. An ordinary citizen believing that the Second Amendment protected the right to keep and bear arms for self-defense and an ordinary citizen believing that it protected a right to keep and bear arms in connection with service in a state-organized militia had no quarrel with each other, or, indeed, with Congress. Each could hold to his understanding of the Amendment's meaning, and neither would have to realize that the meaning was actually contested.[50]

• As criticism of the old originalism showed, understandings are always indexed, so to speak, to unexpressed, taken-for-granted background facts: "Given the world as we understand it to be, here is what we understand this term to mean."[51] Even granting the new originalist requirement that a term's meaning be uncontested when it was inserted into the Constitution, all we can know is what that understanding was given the background. We cannot infer from that what the term would have been understood to mean were the background facts different, as they inevitably are. A standard trope in the critique of the old originalism is equally effective here: Take James Madison, tell him everything that has happened since 1791, and then ask him what "the right to keep and bear arms" *means*, and you'll get an answer different from the one he would have given in 1791.

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[50] This point is independent of another, which might also be accurate. Ordinary citizens might know that the public meaning of the Amendment's terms was contested, but, because nothing concrete turned on resolving the contest, might decide to kick the can down the road, leaving the Amendment's interpretation to another generation. For a comment to similar effect, see McCreary County v. ACLU of Kentucky, 545 U.S. 844, 876, 879 (2005) (emphasis added): After a review of evidence regarding Framers' "thought[s]" and "inten[tions]," the Court concluded that the "fair inference is that there was *no common understanding* about the limits of the establishment prohibition. . . . What the evidence does show is a group of statesmen . . . who proposed a guarantee with contours not wholly worked out, leaving the Establishment Clause with edges still to be determined." As with Justice Stevens's dissent in *Heller*, here too we need not insist strenuously that the opinion rests on the old originalism despite its use of intentionalist terms.

[51] Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 797, 802 (1983). (There the point is phrased in the terms used in the old originalism, but the conceptual point remains valid with respect to the new originalism.)

As I did earlier, I emphasize in conclusion that I am definitely not claiming that the Second Amendment, properly interpreted according to its original public meaning, clearly restricted the right it created to those who kept and bore weapons for military purposes. My only claim is that the grammar, syntax, and common use of the Second Amendment's terms support competing identifications of the Amendment's original public meaning. Judges have to choose between them. The majority in *Heller* chose one, the dissenters another. It is enough to support the criticism of the new originalism that it has not supplied grounds for the choice—and enough to observe that the necessity for choice deprives the new originalism of one of the primary benefits claimed for it.[52]

IV. CONCLUSION

Almost twenty-five years ago I published an article criticizing the old originalism.[53] I have gradually concluded that engaging in such criticism—and criticizing the new originalism, too—is futile and, more importantly, uninteresting. We can examine originalism's variations—in my view, Ptolemaic epicycles (and, to be sure, Ptolemy was a smart guy)—with an eye to using them to diagnose something about politics and society.[54] But, on the merits, defenses, and criticisms of originalism have come to seem to me more like disputes among theologians than like other academic inquiries. And here I will go fancy: At some point we reach bedrock and simply say, "My spade is turned."[55] What is depressing about the new originalism is that

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[52] The new originalism, being new, might develop some criteria for determining which of competing commonly available understandings should be taken as "the" original meaning as commonly understood. My guess is that those criteria would include something like a head-count of the number of reasonably well-informed ordinary citizens who understood the terms in one or the other (or the third, and so on) way—at which point many of the difficulties of the old originalism would arise again, the gaps in the evidentiary record being the most obvious.

[53] Tushnet, *supra* note 51.

[54] For example, the political analysis obviously would involve the role originalism played for the conservative movement. For contrasting interpretations, see JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2005) (offering a political analysis in which originalism is closely connected to conservative political theory); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006) (offering a political analysis in which originalism is seen as used opportunistically by conservatives). A social analysis might say something about the role imagined continuities with the past play in supporting stability or the status quo (depending on whether one likes or dislikes the current state of affairs).

[55] LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 217 (G. E. M. Anscombe trans., 1953).

it does not seem that the new bedrock is very far from the old one, nor that we had to dig much deeper than before to find it.