

# Foreword: Some Early Views on *District of Columbia v. Heller*

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The U.S. Supreme Court's ruling in *District of Columbia v. Heller* was clearly one of the most eagerly anticipated decisions of the Court's 2007 Term.<sup>1</sup> The first formal pronouncement by the Supreme Court on the meaning of the U.S. Constitution's Second Amendment in generations,<sup>2</sup> the Court's ultimate declaration in the case—loosely put, that the Second Amendment's right to keep and bear arms in self-defense is a right that individuals as individuals enjoy<sup>3</sup>—was, by virtually all lights, a foregone conclusion. When it arrived, many were outraged, but few were surprised. Nor were many observers caught slackjawed by the Court's chosen method for reaching its conclusion. Writing for the Court, Justice Antonin Scalia's opinion in *Heller* was thoroughly originalist in form.

Predictably, *Heller* has breathed a new urgency into the long-standing and long-simmering debates about originalism as an exclusive method of constitutional interpretation,<sup>4</sup> including the commonplace that it properly displaces all its competitors by virtue of its unique, objective constraint on the judicial construction of constitutional meaning.<sup>5</sup> How significant will originalism be for the Roberts Court?

The essays in this Colloquium, written by some of the country's leading academic thinkers about the Constitution's Second Amendment, engage the

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<sup>1</sup> 128 S. Ct. 2783 (2008).

<sup>2</sup> The last one came in *United States v. Miller*, 307 U.S. 174 (1939). I say formal, of course, because many believed that other Supreme Court decisions, including, say, *United States v. Lopez*, 514 U.S. 549 (1995), were inexplicable but for a particular view of the substance of the Second Amendment.

<sup>3</sup> Various locutions and understandings of the right (or rights) at issue in *Heller* are found in these pages. I only mean to gesture toward what Brannon Denning and Glenn Reynolds maintain is a certain conclusiveness in *Heller* on the status of the Second Amendment, understood as a collective, and not an individual, right. As they put it, "in *Heller*[,] the Court unanimously interred the old 'collective' right interpretation of the Second Amendment, which read the right to keep and bear arms as guaranteeing only a state's right to maintain and arm a militia free from some federal control." Brannon P. Denning & Glenn H. Reynolds, *Five Takes on District of Columbia v. Heller*, 69 OHIO ST. L.J. 671, 673 (2008). Exactly how dead and gone it will stay, remains to be seen.

<sup>4</sup> Or better yet, as Mark Tushnet reminds us, methods. Originalism comes in a variety of forms. Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 609–610 (2008).

<sup>5</sup> Mark Tushnet crisply lays out this argument in Tushnet, *supra* note 4, at 610, 616–617.

originalism debates in various ways, propelling them forward. Mark Tushnet's essay, tracing the genealogy of originalism into its latest forms, suggests that *Heller*'s "new originalism," which "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[,]"<sup>6</sup> is so close to the "old originalism" it is meant to displace that it "converges with the old [originalism] in its failure to eliminate judicial choice and judgment."<sup>7</sup> That—judicial choice and judgment—and not, as *Heller* itself professes, a single, determinate, and unassailable legal truth the Court's method leads it to discover, is, Tushnet maintains, what must explain *Heller*. Too bad the Court never gives us this account of its own decision. By extension, the implication we are left to reach is that *Heller*, as it stands, is a naked exercise of authority that awaits the articulation of its real—or any constitutionally adequate—justification.

Hardly disagreeing, Saul Cornell's contribution pursues a more vigorous line. Cornell's observations are not so much aimed at criticizing originalism as constitutional method in the abstract (though he does let fly "that most historians are militantly anti-originalist"<sup>8</sup>) as they are focused on damning *Heller*'s rendition of history in the concrete. According to Cornell, one of the most well-known and well-respected historians of the Second Amendment, *Heller* gets its history very, very wrong.<sup>9</sup> Indeed, Cornell seems at various points to suggest, *Heller* gets its history so wrong, it teeters on, if it does not clearly fall into, bad faith.<sup>10</sup> All this leads Cornell to venture that the only

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<sup>6</sup> Tushnet, *supra* note 4, at 609.

<sup>7</sup> *Id.* at 617.

<sup>8</sup> Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 626 (2008).

<sup>9</sup> This is not, one assumes, only Cornell's view. As Richard Posner's own critique of *Heller* proposes, "professional historians were on Stevens's side." Richard A. Posner, *In Defense of Looseness*, THE NEW REPUBLIC, Aug. 27, 2008, at 32, 35. Justice Stevens wrote the dissent to Justice Scalia's opinion for the Court.

<sup>10</sup> See, e.g., Cornell, *supra* note 8, at 629 (describing one of Justice Scalia's "assertion[s]" as "demonstrably false," and then offering that "[t]he notion that there was a general consensus on the meaning of the Second Amendment that supports an individual right with no connection to the militia is simply gun rights propaganda passing as scholarship."); *id.* at 630 (deeming "Scalia's use of historical texts . . . entirely arbitrary and result oriented[,]" and then continuing: "Atypical texts that support Scalia . . . are pronounced to be influential, while generally influential texts . . . are dismissed as unrepresentative. Such an approach is intellectually dishonest and suggests that Justice Scalia's brand of plain-meaning originalism is little more than a smoke screen for his own political agenda.") (footnote omitted); *id.* at 633–634 ("What makes Scalia's reliance on Volokh particularly shocking is that Konig's Essay was cited in both the Petitioner's Brief and the Brady Center's Brief. To ignore such powerful countervailing scholarly evidence on such an important issue is intellectually dishonest.") (footnote omitted); *id.* at 635 (discussing

plausible justification for the *Heller* decision (if there is one) rests in contemporary notions of what the Second Amendment should be taken to mean.<sup>11</sup>

Along the way to a similar point,<sup>12</sup> David C. Williams's essay engages the *Heller* Court's originalism to wonder why, and if, by its own lights, it can properly recognize a right to keep and bear arms that is keyed to self-defense without also recognizing a right to bear arms that is, more fundamentally, grounded on a right to defend against governmental tyranny.<sup>13</sup> In doing so, Williams prompts important reflections on the power of the Patriot's cry about the value of liberty: literally worth dying for. If liberty is as valuable as life itself, maybe even more valuable, but in any case, constitutive of life's very meaning, why would the Second Amendment protect only a right to arms in self-defense and not to safeguard liberty itself, especially against the government? Contemporaneously, of course, there is a world of difference between a right of armed self-defense and a right to stand guard, armed, against what may appear to be an overweening government.<sup>14</sup> Williams knows and appreciates this difference and knows and appreciates that the

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“other signs that Justice Scalia’s methodology is result oriented and not an intellectually rigorous application of a neutral, interpretive methodology.”); *id.* at 636 (“While reading a text backwards may make sense in the Bizarro world made famous in the pages of Superman comic books and hilariously rendered in the post-modern sitcom *Seinfeld*, it is an odd approach to constitutional interpretation for a judge seeking the original understanding of a constitutional provision. Once again Scalia’s originalist methodology turns history on its head.”) (footnote omitted); *id.* at 637 (describing Justice Scalia’s reading of the preamble to the Second Amendment as embracing a “Bizarro view.”); *id.* at 639 (suggesting that “judges [should] not play fast and loose with history.”); *id.* at 639–640 & n. 63 (labeling Justice Scalia’s originalist method “originalist rhetoric,” and his jurisprudence, “intellectually dishonest.”).

<sup>11</sup> Cornell, *supra* note 8, at 639 (“Ironically, Scalia would have a more powerful argument if he [had] . . . simply argued that the Second Amendment gradually evolved into an individual right over the course of American history.”).

<sup>12</sup> See David C. Williams, *Death to Tyrants: District of Columbia v. Heller and the Uses of Guns*, 69 OHIO ST. L.J. 641, 658 (2008) (“Justice Scalia offers us an evolving constitution based on a Living Tradition.”).

<sup>13</sup> *Id.* at 641 (observing that “it is not at all clear that the Second Amendment was meant to protect a personal right of self-defense[.]” but it is “crystal clear that the Amendment was meant to protect the right to keep and bear arms to resist tyranny—as the *Heller* Court itself concedes.”). See also *id.* at 660 (proposing that, “under Scalia’s analysis, the people must have a Second Amendment right to form private armies . . . [b]ut as we have seen, Justice Scalia ultimately repudiates any such idea as dangerously unsound. And so it is, but to an originalist, the danger should be irrelevant. We should merely discern the meaning of the constitution and damn the consequences. Otherwise, we are merely enacting our own values.”).

<sup>14</sup> Reports of massive spikes in gun sales in the weeks after Barack Obama’s election as President are suggestive of some of the reasons why. See, e.g., Kirk Johnson, *Buying Guns, for Fear of Losing the Right to Bear Them*, N.Y. TIMES, Nov. 7, 2008, at A20.

Justices do, too.<sup>15</sup> Just so, he forces us to recognize that, no matter how impressed we are by the distinction, or how much we may collectively agree it should matter legally, it is unavailable within the *Heller* Court's chosen constitutional frame. Consistently applied, *Heller's* originalism, particularly given the actual history of the Second Amendment that *Heller* recounts and affirms, cannot distinguish between the two kinds of rights.<sup>16</sup> What are we to make of such a decision? What are its potential dangers?

For their part, Brannon Denning and Glenn Reynolds pursue a different tack on the question of method. Recognizing the power of the challenges to *Heller's* originalism, they seek to fill in the opinion's gaps, and thus rescue it, insisting that *Heller*, for all its claimed originalist credentials, has "essentially followed the prevailing national consensus on the meaning of the Second Amendment."<sup>17</sup> (This is just the sort of account of, and for, *Heller* that Cornell and Williams point out must be found.<sup>18</sup>) If Denning and Reynolds are right,<sup>19</sup> their argument cannot but give serious pause to those who, while generally believing that the meaning of the Constitution is an "evolving" one, nonetheless oppose the view that the Second Amendment protects an individual's right to keep and bear arms—even in self-defense. Whatever else such an understanding of the Second Amendment is, it is an end to any prospect that the State will have, as many liberals believe it should, "a monopoly on the use of violence."<sup>20</sup>

As important as debates about originalism and constitutional method, more generally, are within these pages, the contributions to this Colloquium go well beyond them, paving the way for future scholarship on the meaning and impact of *Heller*. Tushnet argues that these debates—forms of displacement—are better seen as transparencies for other debates about politics and society, to which we should properly turn when thinking about

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<sup>15</sup> See, e.g., Williams, *supra* note 12, at 658, 667–669 (making the point).

<sup>16</sup> *Id.* at 651 ("Scalia brought the individual right of resistance into the constitutional domain for a very particular reason: that right brought with it a friend, the right of self-defense, and Scalia could then exile the first right while allowing the friend to remain behind, becoming the heart and soul of *Heller's* version of the Second Amendment."). See also *id.* at 660, 664 (discussing what a principled application of Justice Scalia's originalism should entail).

<sup>17</sup> Denning & Reynolds, *supra* note 3, at 671.

<sup>18</sup> Cornell, *supra* note 8, at 639; Williams, *supra* note 12, at 658, 667.

<sup>19</sup> Richard Posner agrees that "[a] majority of Americans support gun rights[.]" but he does note that the "differences in attitudes toward private ownerships of pistols across regions of the country and, outside the South, between urban and rural areas, are profound." Posner, *supra* note 9, at 34.

<sup>20</sup> Williams, *supra* note 12, at 669.

what *Heller* means and does.<sup>21</sup> To similar effect in redirecting our focus on the case is the idea that Williams powerfully provokes: that we should see and understand, if only better to resist, the ways in which the Supreme Court's *Heller* decision tends to lend a certain constitutional legitimacy to the claims of radical citizen militias, which position their own anti-government ideologies and practices as in the spirit of the Patriots who founded the Nation, turning themselves into the latest, great defenders of American Liberty. Even if *Heller* itself steadfastly refuses to recognize a right to defend ourselves against governmental tyranny, and (as Williams repeatedly affirms<sup>22</sup>) it does, it dangerously gives a certain hope to social movements that imperil and take aim at the existing social order and the well-being of other socially-subordinated groups.<sup>23</sup> Denning and Reynolds are likewise interested in the consequences of *Heller*, though the consequences that they highlight are more conventionally, if no less significantly, legal. They want to know and thus speculate on how *Heller* will (or will not) be incorporated to limit the authority of state legislatures,<sup>24</sup> and also how *Heller*, incorporation questions aside, is likely to be treated by the lower courts.<sup>25</sup> What will it come, legally, to be understood to mean? How, in this sense,

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<sup>21</sup> As he explains, after all, "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 . . . with an eye to using them to diagnose something about politics and society. But, on the merits, defenses[] and criticisms of originalism . . . [a]t some point . . . reach bedrock and [we] simply say: 'My spade is turned.'" Tushnet, *supra* note 4, at 623 (footnotes omitted).

<sup>22</sup> See, e.g., Williams, *supra* note 12, at 650–651 ("Scalia . . . has no intention of actually recognizing a meaningful right of resistance under present circumstances."); *id.* at 658 ("Few today would celebrate a right of resistance, and Scalia clearly would not."); *id.* at 660 ("Scalia ultimately repudiates any such idea [that "the people must have a Second Amendment right to form private armies"] as dangerously unsound."); *id.* at 667 ("Justice Scalia . . . clearly believes that the right of self-defense is valuable under present circumstances, but the right of resistance is too dangerous."). But see, e.g., *id.* at 669 ("[T]he *Heller* Court never admits that it has effectively terminated the right of resistance, and so we can only sense its demise without having seen its funeral. The *Heller* Court never explains why it has jettisoned the right of resistance, nor [has it] pondered the long-run consequences for American democracy.").

<sup>23</sup> *Id.* at 668 ("The *Heller* opinion is saturated with fear of the darkness that lurks in men's souls. . . . [I]t fears the people en masse; it promises the right of resistance but then ensures that it will be utterly ineffective. . . . [P]erhaps the Court is right to fear the people in this way. If the people really had the tools to resist and believed that they had the right to resist, we might quickly disintegrate into a complex civil war. As I have suggested elsewhere, in this country, political violence has commonly been tinged with racism, religious bigotry, and political intolerance. A right of resistance would not be good for less powerful groups, especially racial minorities.").

<sup>24</sup> Denning & Reynolds, *supra* note 3, at 679–688.

<sup>25</sup> *Id.* at 688–693.

will *Heller* come, loop-de-loop, to be a consequence of itself? For his part, Cornell invites us to see *Heller* as a reason to reflect not only on originalism as constitutional method, including its ordinary trip-wires, but also how—no matter the ways in which all legal texts are inevitably bound up with history, and sometimes, as with *Heller* itself, *make* history, *are* history—they do not possess the kind of power needed to render the histories they tell beyond any shadow of doubt.

This Colloquium, among the first legal academic volumes dealing with the Supreme Court's *Heller* decision to go to press, would not have been possible without the work of many people and considerable institutional support. There are, of course, first and foremost the contributors to it. They all generously worked on an expedited publishing schedule to enable this volume to be published as soon after *Heller* came down as it possibly could be. There are also several others whose names must be mentioned. Chad Eggspuehler, the Editor-in-Chief of the *Ohio State Law Journal* while *Heller* was pending, sensed the history-making significance of the decision, and committed room in the pages of the Journal he shepherded to a paper Colloquium on it. Dylan Griffiths, Eggspuehler's successor as Editor-in-Chief, took the commitment to an idea, and along with the support of the Law Journal staff, especially Brad Stoll, its Executive Editor, brought it to life. And last, but hardly least, Nancy Rogers, the Dean of the College of Law when the idea for the Colloquium first came to light, supported it in every way she could.