

Originalism on Trial: The Use and Abuse of History in *District of Columbia v. Heller*

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The landmark ruling of the Supreme Court in *District of Columbia v. Heller* pitted two competing versions of the theory of originalism against one another.¹ Justice Scalia's majority opinion employed original public meaning originalism, while Justice Stevens' dissent used the more traditional method of originalism which focuses on the intent of the Founders.² Early reactions to the opinion, in the press, the blogosphere, and in web-based debates sponsored by organizations such as the Federalist Society were mostly predictable. Gun-rights supporters hailed Justice Scalia's opinion for its intellectual power, while critics of gun rights were more impressed with the historical arguments of the dissenters. A few commentators, most notably, Sanford Levinson and Mark Tushnet, saw both opinions as examples of result-oriented law office history.³

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¹ 128 S. Ct. 2783 (2008). There is a large amount of scholarly literature on originalism, *See generally*, JACK N. RAKOVE, *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* (Northeastern University Press 1990); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (University Press of Kansas 1999); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988). For recent endorsements of this methodology, *see* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105–08 (2001) and John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 391 (2003). On the notion of standards for originalists, *see* H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987). For incisive critiques of this method and its lack of historical sophistication, *see* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 523–29 (1995); Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387 (2003).

² On the difference between new originalism and old, *see* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 609 (2004).

³ Posting of Mark Tushnet to Balkinization, *More on Heller*, <http://balkin.blogspot.com/2008/06/more-on-heller.html> (last visited Nov. 17, 2008); Posting of Sanford Levinson to Balkinization, *Some Preliminary Reflections on Heller*, <http://balkin.blogspot.com/2008/06/some-preliminary-reflections-on-heller.html> (last visited Nov. 17, 2008). *See also* Posting of Ilya Somin to The Volokh Conspiracy, *Mark Tushnet on "Judicial Activism,"* <http://volokh.com/posts/1214863772.html> (last visited Nov. 17, 2008).

The most outspoken champion of Scalia's majority opinion and its originalist methodology was Randy Barnett, a leading advocate of plain-meaning originalism. In the pages of the *Wall Street Journal*, Barnett opined:

Justice Scalia's opinion is the finest example of what is now called "original public meaning" jurisprudence ever adopted by the Supreme Court. This approach stands in sharp contrast to Justice John Paul Stevens's dissenting opinion that largely focused on "original intent" – the method that many historians employ to explain away the text of the Second Amendment by placing its words in what they call a "larger context." Although original-intent jurisprudence was discredited years ago among constitutional law professors, that has not stopped non-originalists from using "original intent"—or the original principles "underlying" the text—to negate its original public meaning.⁴

Although Barnett is surely correct that scholars and students are apt to pour over the decision for years to come, they are likely to come to a very different assessment of the intellectual merits of the opinion. Rather than vindicate plain-meaning originalism, Scalia's decision demonstrates that plain-meaning originalism is not a neutral interpretive methodology, but little more than a lawyer's version of a magician's parlor trick—admittedly clever, but without any intellectual heft. Indeed, Scalia's opinion demonstrates that plain meaning originalism has no coherent, historical methodology. It is little more than the old law-office history dressed up in the latest legal-academy fashions.⁵ What is particularly shocking is that Barnett's analysis of the opinion confuses historical contextualism (the methodology employed by most historians) with Justice Steven's originalist methodology, an approach most historians reject. Curiously, Barnett seems unaware that most historians are militantly anti-originalist. Historians' anti-originalism was ably captured by Gordon Wood, perhaps the leading historian of the Founding Era, whose observations on this point seem fairly representative. "It may be a necessary

⁴ Randy Barnett, *News Flash: The Constitution Means What it Says*, WALL ST. J., June 26, 2008, at A13.

⁵ Lawrence Solum defends the new originalism in terms of the philosopher, Paul Grice's concept of semantic meaning. See Lawrence B. Solum, *Semantic Originalism*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 (last visited Nov. 17, 2008); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, <http://papers.ssrn.com/sol3/papers.cfm?abstractid=1241655> (last visited Nov. 17, 2008). Among the more serious problems with Solum's analysis is that it does not deal adequately with the Founding Era's own interpretive practices. For a thoughtful critique of Solum's variant of originalism, see Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185 (2008) Even if Grice's theory is the proper starting point for an originalist inquiry, it provides no guidance on historical methodology and hence allows lawyers and judges to simply recycle the same old methods of law-office history.

fiction for lawyers and jurists to believe in a ‘correct’ or ‘true’ interpretation of the Constitution in order to carry on their business, but we historians have different obligations and aims.”⁶ Both of the forms of originalism employed in *Heller* fall short of the standards historical scholarship demands. Indeed, most legal scholars working within an originalist paradigm continue to employ an impressionistic scholarly methodology that is thirty years out of date.⁷ The failings of plain-meaning originalism are particularly egregious in this regard. Plain-meaning originalists continue to cherry pick quotes and present this amateurish research as systematic historical inquiry.⁸ In this method there is no serious attention to establishing the relative influence of particular texts. Indeed, all texts are created equal in this bizarre anti-method. The version of reality conjured up by originalists is a caricature of the history it purports to represent.

The problems with Scalia’s plain-meaning originalism are evident in his glib dismissal of the influential nineteenth-century legal commentator Benjamin Oliver:⁹

We have found only one early 19th-century commentator who clearly conditioned the right to keep and bear arms upon service in the militia—and he recognized that the prevailing view was to the contrary. “The provision of the constitution, declaring the right of the people to keep and bear arms, &c. was probably intended to apply to the right of the people to bear arms for such [militia-related] purposes only, and not to prevent congress or the legislatures of the different states from enacting laws to prevent the citizens

⁶ Gordon S. Wood, *Ideology and the Origins of Liberal America*, 44 WM. MARY Q. 628, 632–33 (1987).

⁷ John Higham and Paul Conkin, *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY* (Johns Hopkins Univ. Press 1979).

⁸ Compare the impressionistic use of sources in Clayton E. Cramer and Joseph Edward Olson, *What Did “Bear Arms” Mean in the Second Amendment?* 6 GEO. J.L. & PUB. POL’Y 511 cited by Scalia, with the systematic investigation of all of the uses of this term in published sources presented in Nathan Kozuskanich, *Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?* 10 U. PA. J. CONST. L. 413. A careful scan of the former reveals that much of its evidence is not drawn from the Founding Era, but from later periods and English sources. Interestingly, the Kozuskanich article was cited by the District of Columbia in its reply brief, but Scalia ignored its clear evidence of the dominant usage of the term “bear arms” in the Founding era. Reply Brief for Petitioners at *7, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

⁹ *Heller*, 128 S. Ct. at 2807.

from always going armed. A different construction however has been given to it.”¹⁰

Setting aside the question of the uniqueness of Oliver’s argument for the moment, it is hard to believe that the Court would cast aside the most influential popular legal writer of the antebellum era. One might just as easily dismiss J.K. Rowling, as the only person writing about under-age wizards in Britain today.¹¹ In reality, Oliver was among the most prolific and influential popular legal writers of his day. Indeed, one contemporary review of Oliver’s writings noted his profound influence on American legal thought, reminding his readers that “the profession has been much indebted to Mr. Oliver, for several books in general use among the gentlemen of the bar.”¹²

Oliver was a protégé of Justice Story. He not only studied with the influential jurist, but Oliver actually coauthored an important popular legal reference work with Story.¹³ More to the point, Oliver’s interpretation of the original meaning of the Second Amendment is almost identical to Story’s discussion. In his analysis of the meaning of Article I, Section 8, Story noted that:

It was nevertheless made a topic of serious alarm and powerful objection. It was suggested, that it was indispensable to the states, that they should possess the control and discipline of the militia. Congress might, under pretence of organizing and disciplining them, inflict severe and ignominious punishments on them. The power might be construed to be exclusive in congress. Suppose, then, that [C]ongress should refuse to provide for arming or organizing them, the result would be, that the states would be utterly without the means of defence, and prostrate at the feet of the national government. It might also be said, that congress possessed the exclusive power to suppress insurrections, and repel invasions, which would take from the states all effective means of resistance. The militia might be put under martial law, when not under duty in the public service.¹⁴

¹⁰ *Id.*; BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN* 177 (Boston: Marsh, Capen & Lyon; Philadelphia: P.H. Nicklin & T. Johnson 1832).

¹¹ BBC News, *Potter Sales Hit Magic Number*, available at <http://news.bbc.co.uk/1/hi/entertainment/arts/1308902.stm> (last visited Nov. 17, 2008).

¹² Benjamin Oliver, *The Law Summary*, 1 *THE NEW ENGLAND MAGAZINE* 270 (1831).

¹³ STORY, J. & OLIVER, B. L., *A SELECTION OF PLEADINGS IN CIVIL ACTIONS, WITH OCCASIONAL ANNOTATIONS* (Carter and Hendee 1829).

¹⁴ JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1201 (Da Capo Press New York 1970) (1833).

Story's account of the Anti-Federalist fears that prompted calls for explicit protection for the right to bear arms captures the essence of the public debate on this issue during ratification. Story noted that Anti-Federalist fears were unfounded, but the amendments proposed, including the Second Amendment, had effectively neutralized these concerns.¹⁵

It is difficult fully to comprehend the influence of such objections, urged with much apparent sincerity and earnestness at such an eventful period. The answers then given seem to have been in their structure and reasoning satisfactory and conclusive. But the amendments proposed to the constitution (some of which have been since adopted) show, that the objections were extensively felt, and sedulously cherished.¹⁶

Scalia's basic assertion is demonstrably false. Oliver was not alone in his views, but shared them with Joseph Story. The 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.¹⁷

Although original-intent originalism may not live up to the rigors of professional history, it does force judges to focus their attention on the beliefs of identifiable groups: either the Framers or ratifiers of the Constitution or Bill of Rights. The difference between the two methods is obvious if one considers the use of a text often cited in Second Amendment debate: the *Dissent of the Pennsylvania Minority*. Justice Scalia describes this text as "highly influential" but provides little evidence to support this claim.¹⁸ Indeed, most historians would dispute this claim and would point out the obvious fact that this text was composed by the Anti-Federalist minority of a single state.¹⁹

¹⁵ For a discussion of the misuse of Story in Second Amendment Scholarship, see Saul Cornell, *A New Paradigm for the Second Amendment*, 22 LAW & HIST. REV. 161, 164 (2004).

¹⁶ STORY, *supra* note 14, at 85.

¹⁷ David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359 (1998); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983). For additional evidence that antebellum thinking on the meaning of the Second Amendment was divided, see SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA*, 137–166 (Oxford University Press 2008).

¹⁸ *Heller*, 128 S. Ct. at 2804.

¹⁹ *Heller*, 128 S. Ct. at 2805. The view of historians on this issue is forcefully articulated by Paul Finkelman, "A Well-Regulated Militia": *The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 196–97 (2000); see also, Brief for

While this text was certainly widely reprinted, and represented the viewpoint of an important minority voice during ratification, its formulation of the right to bear arms was never emulated by any other ratification convention or echoed by any major writer during ratification.²⁰ Indeed, the text was largely disowned by its authors after ratification.

Finally, the members of the First Congress who framed the Second Amendment used its arguments as a metric for defining the most extreme proposals for amendments, not a marker of what the average reasonable man on the street thought about amendments.²¹ In this regard, Justice Stevens's originalist methodology seems far more sensible. If we are interested in original meaning we would accord relatively little weight to the voices of a minority of a single-state ratification convention, particularly when we know that Madison did not include the *Dissent of the Pennsylvania Minority* among his list of proposed amendments he submitted to the First Congress.²²

Scalia's use of historical texts is entirely arbitrary and result oriented. Atypical texts that support Scalia, such as the *Dissent of the Minority*, are pronounced to be influential, while generally influential texts, such as Benjamin Oliver's, *Rights of an American Citizen* are dismissed as unrepresentative.²³ 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.

Historical contextualism, the methodology that Barnett confuses with originalism, acknowledges the importance of both the *Dissent of the Minority*²⁴ and Oliver's, *The Rights of an American Citizen*.²⁵ The former is a key text for understanding the dissenting constitutional views of Anti-

Jack N. Rakove, et al. as Amici Curiae Supporting Petitioners, *Dist. Of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) (Hereinafter *Historians' Brief*).

²⁰ Saul Cornell, *The Original Meaning Of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 159 (2008).

²¹ For additional discussion of the un-representative character of the *Dissent of the Minority*, see Cornell, *supra* note 20, at 158-62.

²² Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *The Founders' Constitution*, Vol. 1, Chap. 14, Document 47; James H. Hutson, *The Bill of Rights and the American Revolutionary Experience, in A CULTURE OF RIGHTS: THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS, AND LAW 1791 AND 1991* 62, 87 (Michael J. Lacey & Knud Haakonssen eds., 1993).

²³ For the different influences and significance of these two texts, see generally Saul Cornell, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (Oxford University Press 2006).

²⁴ *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents* (Dec. 18, 1787), reprinted in *THE ORIGIN OF THE SECOND AMENDMENT* 154, 160 (David E. Young ed., 1991).

²⁵ OLIVER, *supra* note 10.

Federalists, while the latter is indispensable to understanding early Nineteenth Century views of the Constitution. As Gordon Wood's comment earlier makes clear, most historians have abandoned the search for a single monolithic meaning for the Constitution.²⁶ Most scholars now focus on what the Constitution meant to specific groups: Anti-Federalists or non-elites such as farmers.²⁷ The Founding era was not characterized by harmony, but by bitter division over virtually every major constitutional issue. One can disagree over how to weight these different voices, but grounding constitutional claims in the views of specific groups seems far less likely to mislead than unsubstantiated and poorly researched claims about the public meaning of terms that were often bitterly contested. Equally important, and noticeably absent from originalist inquiry, is any attention to how these meanings changed over time.

I. THE PROBLEM WITH PREAMBLES: PLAIN-MEANING ORIGINALISM UNMASKED

One of the central points of disagreement between Justice Stevens and Justice Scalia revolves around the proper interpretation of preambles. According to Scalia, "the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms."²⁸ Stevens, by contrast, views preambles in classic Blackstonian terms, as a key to the mind of the legislator.²⁹ Ascertaining the correct model for interpreting the preamble of the Second Amendment was one of the central points of disagreement in *Heller*. Before one can establish what the words of the Second Amendment meant, one must grapple with the Founding era's approach to interpreting constitutional texts. As Judge Richard Posner notes, "[o]riginalism without the interpretive theory that the Framers and the ratifiers of the Constitution expected the courts to use in construing constitutional provisions is faux originalism."³⁰

²⁶ Wood, *supra* note 6.

²⁷ SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828* (The University of North Carolina Press 1999); WOODY HOLTON, *UNRULY AMERICANS AND ORIGINS OF THE CONSTITUTION* (Hill and Wang 2007).

²⁸ *Heller*, 128 S. Ct. at 2789 n.3 (quoting J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION*, 47.04 (N. Singer ed. 5th ed. 1992)).

²⁹ *Id.* at 2826 (Stevens, J., dissenting).

³⁰ Richard Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, *THE NEW REPUBLIC*, Aug. 27, 2008, at 32. For a useful overview of the range of interpretive practices at the time of the Founding, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003). On the Founders' views of the

Any rigorous originalist or historical inquiry must engage in a process analogous to the one used by musicians interested in rendering a historically accurate performance of Bach. One must not simply play the notes Bach wrote, one must attempt to reproduce the instrumental techniques of Bach's era as accurately as possible, and play the music on a period instrument. Ultimately, we shall never be able to definitively decide if Christopher Hogwood's performance of Bach's Brandenburg Concertos with the Academy of Ancient Music is closer to the composer's ideal than another original instrument's version performed by Trevor Pinnock and the English Concert. What is clear, however, is that one ought to be able to tell the difference between either of these recordings and the sound of a Bach concerto played on a kazoo. Scalia's opinion in *Heller* sounds a bit like Bach played on a kazoo. While this result may be pleasing to the ears of Randy Barnett and other gun rights advocates, it is not an accurate reconstruction of original meaning.³¹

If Justice Scalia's opinion were seriously concerned with establishing the plain meaning of the text at the time of its enactment, then one would expect him to cite Founding-era sources for his interpretation of the role of preambles. It is worth looking closely at the texts Scalia cites to support his approach to reading preambles. None of them are texts grounded in Founding practice. Scalia cites an 1871 edition of an English treatise on statutory construction.³² Scalia also cites another late-Nineteenth-Century edition of an American treatise on statutory construction.³³ Curiously, Scalia does not cite any Eighteenth-Century texts on statutory construction or constitutional interpretation to support his theory of how to interpret preambles.³⁴

To support his claims about the role of preambles, Scalia cites Eugene Volokh's *New York University Law Review* article which avers that preambles were essentially justification clauses which did not control the subsequent enacting clause.³⁵ If one analyzes the footnotes of Volokh's article what is most curious is the absence of any Founding-era documentation for its claims. To support his conclusions, Volokh relies on

matter, see Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77 (1988); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

³¹ For a discussion of some of the issues raised by authentic historical performances of music, see BERNARD D. SHERMAN, *INSIDE EARLY MUSIC: CONVERSATIONS WITH PERFORMERS* (Oxford University Press 1997).

³² *Heller*, 128 S. Ct. at 2789.

³³ *Id.*

³⁴ *Id.* at 2788–2822.

³⁵ *Id.* at 2789 (citing Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 814–821 (1998)).

Nineteenth-Century—not Eighteenth-Century—discussions of constitutional interpretation. Indeed, Scalia’s opinion follows Volokh’s closely in this regard. The fact that Volokh and Scalia could not find any corroborating Eighteenth-Century evidence to support their view of preambles is not surprising. Volokh’s thesis had been thoroughly discredited by historian David Konig in an important Essay published in the *Law and History Review*.³⁶ Scalia ignores the Founding Era’s Blackstonian rules of construction and effectively erases the preamble.³⁷ What makes Scalia’s reliance on Volokh particularly shocking is that Konig’s Essay was cited in

³⁶ David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of “the Right of the People to Keep and Bear Arms,”* 22 L. & HIST. REV. 119 (2004).

³⁷ Blackstone’s rules were summarized in the introduction to his Commentaries in § 2:

The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law.

....

1. Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. . . .

2. If words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the fame legislator, that have some affinity with the subject, or that expressly relate to the same point.

In *Heller*, Scalia conceded that the phrase bear arms had two different meanings. “Of course, as we have said, the fact that the phrase was commonly used in a particular context does not show that it is limited to that context, and, in any event, we have given many sources where the phrase was used in nonmilitary contexts.” *District of Columbia v. Heller*, No. 07-290, slip. op. at 15 (U.S. June 26, 2008). The first problem with Scalia’s methodology is that it ignores Blackstone’s rule that words are to be understood in their “most known” signification. Simply showing that the word might have been used in a non-military sense would not satisfy Blackstone’s first rule which requires that we use its most common meaning. Even if Scalia were correct that the two uses were each common, then Blackstonian method mandates a consideration of the preamble to decide which use was correct in this context. Even under the most narrow reading of Blackstone’s rules this would be the appropriate method. Of course this is not how Scalia approached the preamble. Instead of using the Founders’ Blackstonian rule, he used a method drawn from a constitutional treatise written after the Second Amendment that employed a rule at odds with Founding era practice. For discussion, see *infra* at 634–635.

both the Petitioner's Brief and the Brady Center's Brief.³⁸ To ignore such powerful countervailing scholarly evidence on such an important issue is intellectually dishonest.

Scalia and Volokh's preferences for Nineteenth-Century models of statutory construction and constitutional interpretation make perfect sense if one is seeking to construct an argument against interpreting the Second Amendment in light of its preamble. Indeed, this is precisely what Heller's lawyers had suggested in their brief. Heller's attorney argued that:

Preambles are examined only "[i]f words happen to still be dubious." Pet. Br. 17 (quotation and citation omitted). "[B]ut when the words of the enacting clause are clear and positive, recourse must not be had to the preamble." James Kent, 1 COMMENTARIES ON AMERICAN LAW 516 (9th ed. 1858). "The preamble can neither limit nor extend the meaning of a statute which is clear. Similarly, it cannot be used to create doubt or uncertainty." Norman Singer, 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 47.04, at 295 (7th ed. 2007).³⁹

To get around Blackstone's injunction, Heller's lawyer read Blackstone's rule in light of the Nineteenth-Century commentators favored by Volokh and Scalia, most notably the influential New York jurist James Kent. Yet, quotations from a treatise published in 1826 are a poor choice if one is interested in practices in place at the time the Second Amendment was adopted (1791). To complicate matters further, it is not even clear that most Nineteenth-Century commentators accepted Kent's view of preambles. American jurisprudence was deeply divided over this question. Consider the treatment of preambles in Joseph Story's influential treatise on the Constitution. Story, a strong supporter of federal power remained essentially Blackstonian in his view about the role of preambles. Curiously, neither Scalia nor Volokh discuss this crucial passage in Story's analysis of preambles, which is worth quoting in full.

The importance of examining the preamble, for the purpose of expounding the language of a statute, has been long felt, and universally conceded in all

³⁸ Petition for Writ of Certiorari at 12, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290); Brief for Brady Center et al. as Amici Curiae Supporting Petitioner at 9, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290). Blackstone's rules directly contradict Eugene Volokh's suggestion that preambles were simply non-binding justification clauses. See generally Volokh, *supra* note 35. Interestingly, Scalia and Volokh both address Blackstone's discussion of the Fifth Auxiliary right, but ignore his discussion of the role of preamble. Justice Stevens noted this irony in his dissent. *Heller*, 128 S. Ct. at 2824–2826.

³⁹ Brief for Respondent at 5, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

juridical discussions. It is an admitted maxim in the ordinary course of the administration of justice, that the preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute.⁴⁰

Thus, Story did not view the preamble as a mere justification clause, as Volokh suggests, but rather his characterization of these clauses is far closer in spirit to the idea of a “purpose clause.” Story’s Blackstonian view supports Stevens, not Scalia. Indeed, given the clear tension between Kent and Story, it is clear that Scalia’s view was never dominant, even in Nineteenth-Century jurisprudence.

There are other signs that Justice Scalia’s methodology is result oriented and not an intellectually rigorous application of a neutral, interpretive methodology. Scalia does not even apply the rule he himself asserts in a neutral and even-handed manner. Consider Scalia’s reading of an important Founding-era gun regulation dealing with the safe storage of firearms and gun powder.⁴¹ This law was a central focus of Justice Breyer’s dissent.⁴² The 1783 Boston law prohibited storing a loaded gun in any dwelling in Boston.⁴³ Lawyers for the District of Columbia and its amici viewed this as strong evidence that the Founders accepted a robust police power to regulate firearms.⁴⁴ Heller’s lawyers, by contrast, argued that the law in question had nothing to do with gun regulation. Respondents argued that the law was not a gun control law at all, but a fire regulation.⁴⁵ Scalia rejected the District’s reading, and embraced Heller’s view of the law. To justify this reading, Scalia relied on the preamble of the statute, which described the reason for the law: the danger loaded guns posed to firefighters.⁴⁶ Scalia’s reading of the law required using the statute’s preamble in precisely the fashion Scalia had said was impermissible in the case of the Second Amendment. The statement of purpose in the preamble was used to narrow the scope of a law whose language was clear and unambiguous: the state may compel citizens to store their guns locked up if public safety demands such a practice.

One final irony about Justice Scalia’s approach to preambles is worth noting. In his decision, Scalia sets aside consideration of the preamble until

⁴⁰ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 459 (Da Capo Press 1970) (1833).

⁴¹ *Heller*, 128 S. Ct. at 2819.

⁴² *Id.* at 2848–49 (Stevens, J., dissenting).

⁴³ *Id.*

⁴⁴ Petition for a Writ of Certiorari, *supra* note 38, at 16.

⁴⁵ Brief for Respondent, *supra* note 39, at 21 n.7.

⁴⁶ *Heller*, 128 S. Ct. at 2819.

he establishes his own preferred reading of the arms-bearing clause. This novel approach to constitutional interpretation, reading a text backwards, prompted Justice Stevens to remark:

The Court today tries to denigrate the importance of this clause of the Amendment by beginning its analysis with the Amendment's operative provision and returning to the preamble merely "to ensure that our reading of the operative clause is consistent with the announced purpose." *Ante*, at 2790. That is not how this Court ordinarily reads such texts, and it is not how the preamble would have been viewed at the time the Amendment was adopted.⁴⁷

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.⁴⁸ Once again Scalia's originalist methodology turns history on its head.

The Congress that drafted the Second Amendment deliberately rearranged Madison's original draft so that the affirmation of a well-regulated militia precedes the assertion of the right to keep and bear arms.⁴⁹ In essence, Scalia rewrites the Amendment, restoring its original order. It is hard to see how one can reconcile such a move with any theory of originalism, apart from a Bizarro one. Rewriting a provision of the Bill of Rights is not originalism; it is the worst sort of judicial activism.

⁴⁷ *Id.* at 2826 (Stevens, J., dissenting).

⁴⁸ *Seinfeld: The Bizarro Jerry* (NBC television broadcast, Oct. 3, 1996) (To describe Bizarro Superman to his friend Elaine, Jerry Seinfeld explains: "Bizarro Superman. Superman's exact opposite who lives in the backwards Bizarro world. Up is down. Down is up. He says 'hello' when he leaves, 'goodbye' when he arrives."); see also JERRY SIEGEL ET AL., *Superman: Tales of Bizarro World* (DC Comics 2000).

⁴⁹ Compare Papers of James Madison, *House of Representatives*, (June 8, 1789), The Founders' Constitution, Vol. 1, Chap. 14, Document 50, available at <http://press-pubs.uchicago.edu/founders/documents/v1ch14s50.html> with Congress, *Amendments Agreed to and Proposed to the States*, (Sept. 25, 1789), The Founders' Constitution, Vol. 1, Chap. 14, Document 56, available at <http://press-pubs.uchicago.edu/founders/documents/v1ch14s56.html>. As evidenced by the papers cited above, Madison originally proposed that "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." *Id.* The accepted version reversed the first two clauses and dropped the conscientious objector clause.

II. INTENTIONALISM: JUSTICE STEVENS' BLACKSTONIAN MODEL

Justice Stevens' approach to preambles is orthodox Blackstonian. Stevens rejects Scalia's reading of the Second Amendment's preamble because it is at odds with Founding-era practices. Stevens faults Scalia for ignoring Blackstone's rules of construction regarding preambles:

"The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable," Blackstone explained that "[i]f words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus, the proeme, or preamble, is often called in to help the construction of an act of parliament"⁵⁰ 1 Commentaries on the Laws of England 59–60 (1765).

To evaluate his Blackstonianism one must answer two questions: has Stevens rendered the Blackstonian rule correctly and was Blackstone truly influential on Founding-era practice? Two alternative readings of Blackstone's rule were presented to the Court. The Plaintiff's Brief filed by the District of Columbia argued that the Founders understood Blackstone's injunction to require courts to give weight to a preamble's words and to read the Second Amendment as articulating a unified principle. Stevens accepted this reading of Blackstone. In modern parlance the amendment would effectively read: Because the right to keep and bear arms is essential to a well-regulated militia, the right of the people to keep and bear arms shall not be infringed. The Respondent's Brief argued that "preambles are examined only "[i]f words happen to still be dubious."⁵¹ In essence, the Respondent's Brief argued that the preamble could be consulted only if the words were ambiguous. If the words were clear—then one can ignore the preamble. If one followed Respondent's theory then one could use the context only in dubious cases. Blackstone's injunction is not to ignore the context and preamble, but rather to argue that both were useful means of clarifying the meaning of a legal or constitutional text. The Respondent's theory would effectively rewrite Blackstone's rule to read: "If and only if words happen to be still dubious, we may establish their meaning from the context or preamble." This is an absurd reading of Blackstone that belongs in a Bizarro universe. Yet, this Bizarro view is exactly how Scalia reads the preamble. Story clearly did not treat preambles in this fashion and neither did the

⁵⁰ *Heller*, 128 S. Ct. at 2838 (Stevens, J., dissenting) (emphasis in original).

⁵¹ Brief for Respondent, at 5, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-250).

Founders. The Founders shared Blackstone's view that the preamble, like the context of the words, held the key to the intent of the legislator and hence to the meaning of the statute. Clearly Stevens' rendering of the rule about preambles is a closer approximation of Blackstone's understanding of this interpretive practice.

Even if Justice Stevens has rendered Blackstone's rule more faithfully, one must still ascertain how influential Blackstone's rules of construction were during the Founding era. It is beyond the scope of this Essay to provide a definite answer to this question. Among the most interesting sources that shed some light on this problem are the popular legal guide books that flourished in the early Republic.⁵² In contrast to Scalia, Volokh, and Barnett, Eighteenth-Century Americans did not have the benefit of a formal legal education.⁵³ Lawyers were trained by an apprenticeship system, which often included generous doses of Blackstone and Coke.⁵⁴ Many legal functions were carried out by justices of the peace, sheriffs, and other ordinary citizens. These ordinary Americans relied on lay guides such as the *Conductor Generalis* to guide them through the law.⁵⁵ In the decade after the adoption of the Constitution, this popular text went through four editions. The book included a brief discussion on how statutes ought to be interpreted.⁵⁶ Rather than approach preambles in the manner suggested by Justice Scalia, the authors of this lay legal guide, adopted orthodox British practice.⁵⁷ "The preamble or rehearsal of a statute is deemed true: and therefore good argument may be drawn from the preamble."⁵⁸ The source for this rule was not Blackstone, but Coke. Still, the readers of the *Conductor Generalis* were steeped in both Coke and Blackstone, a fact that suggests that if one had to choose between Scalia and Stevens then the latter has the better historical argument. The evidence that Blackstone and other English commentators

⁵² Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment*, in *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 109, 139 (R.H. Hemholz, et al., eds., 1997).

⁵³ WILLIAM LAPIANA, *LOGIC & EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 3 (Oxford University Press 1994) (noting that formal legal education is not considered to have begun until 1870 at Harvard).

⁵⁴ CHARLES WARREN, *1 HISTORY OF THE HARVARD LAW SCHOOL AND THE EARLY LEGAL CONDITIONS OF AMERICA* 138–39 (Lewis Publishing Co. 1908).

⁵⁵ BURN, R., & PARKER, J., *THE CONDUCTOR GENERALIS, OR, THE OFFICE, DUTY & AUTHORITY OF JUSTICES OF THE PEACE, HIGH-SHERIFFS, UNDER-SHERIFFS, CORONERS, CONSTABLES, GAOLERS, JURY-MEN, & OVERSEERS OF THE POOR: AS ALSO, THE OFFICE OF CLERKS OF ASSIZE, & OF THE PEACE, &C.* VI (Philadelphia, M. Carey) (1801).

⁵⁶ *Id.* at i.

⁵⁷ *Id.* at vi.

⁵⁸ *Id.*

such as Lord Coke were important sources for the Founding-Era's approach to constitutional interpretation seems beyond dispute. Although Blackstone's influence was not hegemonic, it was indisputably important.⁵⁹

III. ORIGINALISM V. HISTORY

The goals of the historian and judge are different. It is not reasonable to expect judges and their clerks to produce professional quality history in their opinions.⁶⁰ It is not unreasonable, however, to demand that judges not play fast and loose with history. The choice is not between law-office history and professional history, but rather between history wrong or history right.⁶¹ Thus, if one claims to be employing originalism, one ought to pay more attention to the Founding-Era's own interpretive practices and less to modern language philosophy. One must apply the Founders' interpretive rules uniformly.⁶² Finally, one must also distinguish between minority voices and those of the dominant majority. Judged according to these rules, Stevens' intentionalist model comes much closer to capturing the dominant views of the Founding generation than does Scalia's plain-meaning originalism. Professional historians may well grumble and find fault with Stevens for not dealing with the full range of Founding-Era voices. Still, if one had to choose between the two approaches, Stevens's opinion is by far the better one. Ironically, Scalia would have a more powerful argument if he abandoned his originalist model, and simply adopted a genuinely historical interpretation of the Second Amendment. Rather than grounding his claims in a dubious originalist argument based on a tortured and intellectually dishonest reading of the evidence, he might have simply argued that the Second Amendment gradually evolved into an individual right over the course of American history. Even if one rejected the notion of a living Constitution, an anathema to Scalia, one might still have protected gun rights by locating the right of self defense in the idea of "ordered liberty" and "the traditions of our people."⁶² Such an interpretation would have been more intellectually honest,

⁵⁹ Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1 (1996).

⁶⁰ Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479 (2008); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (1965); Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 913-14 (1996).

⁶¹ Flaherty, *supra* note 1.

⁶² See Griffin, *supra* note 5; Posner, *supra* note 30; Solum, *supra* note 5.

⁶² Akhil Reed Amar, *Putting the Second Amendment Second: Reframing the Constitutional Debate Over Gun Control*, SLATE, Mar. 17, 2008, available at <http://www.slate.com/toolbar.aspx?action=print&id=2186750>. See also Cass Sunstein,

but it would have required Justice Scalia to abandon his originalist rhetoric. Had he done so, history's inevitable judgment of his decision in *Heller* would have been far more favorable.⁶³

Second Amendment Minimalism: Heller as Griswold, HARV. L. REV. (forthcoming) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1204942.

⁶³ For a preliminary effort to deal with the intellectual dishonesty in Scalia's jurisprudence, see Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385 (2000).