

## HELLER & ORIGINALISM'S DEAD HAND—IN THEORY AND PRACTICE

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*This Article considers whether and how originalism promotes the Constitution's democratic legitimacy, in theory and in practice. In the late twentieth century, critics of the Warren and Burger courts argued that judicial review lacks democratic authority when judges depart from the original understanding of those who ratified the Constitution. Originalism's critics objected that giving past generations this kind of control over the living would vitiate the Constitution's democratic authority. Initially, originalism's theorists belittled this objection to dead hand control; recently, originalists have developed varied and sophisticated responses to it. But these responses generally tend to qualify originalism's claims to democratic legitimacy or to weaken the originalist character of the interpretive method they set out to defend.*

*The dead hand objection may trouble originalism in theory, but it poses far less of a problem in practice. To show why, the Article examines originalist interpretation in *Heller v. District of Columbia*. While *Heller* purports to enforce the decisions of eighteenth-century Americans, this Article identifies several forms of internal evidence that suggest the opinion is enforcing the beliefs of Americans living long after the Constitution's ratification. This evidence, considered alone or with the social movement history of *Heller* that I have elsewhere examined, shows how originalism can enforce the constitutional convictions of living Americans. In practice, originalism appears to be a species of popular constitutionalism.*

*If originalism does not enforce dead hand control, what role might constitutional history play in constitutional interpretation? To explore this question, the Article compares the role of historical argument in *Heller* and *Parents Involved in Community Schools v. Seattle School District No. 1*—a recent equal protection decision in which conservative and liberal justices fought over *Brown* and the post-ratification history of the Fourteenth Amendment. As appeals to pre- and post-ratification history in these cases illustrate, history constrains as it channels debate. Appeals to the collective memory of past constitutional settlements enable Americans of very different normative views to make authoritative claims about who we are and what we owe one another.*

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|  |      |
|--|------|
| INTRODUCTION.....  | 1400 |
| I. ORIGINALISM’S DEAD HAND PROBLEM, IN THEORY .....  | 1403 |
| II. <i>HELLER</i> , ORIGINALISM’S DEAD HAND IN PRACTICE.....   | 1412 |
| A. <i>Heller</i> ’s Justification for the Constitutional Right of Self-Defense—<br>Positive Law or Common Law?.....                          | 1415 |
| B. What Original Understanding Defines the Scope of the Right?.....  | 1416 |
| C. Why Would an Originalist Exclude Protection for the Kinds<br>of Weapons Best Suited to Vindicate the Amendment’s<br>Republican Aims?..... | 1417 |
| III. ORIGINAL UNDERSTANDING AND COLLECTIVE MEMORY.....   | 1419 |

## INTRODUCTION

The United States Constitution speaks in the name of “We, the People.” It is widely understood to have democratic, as well as rule of law, authority. This Article considers how originalism sustains the Constitution’s democratic authority, in theory and practice. It examines the debates over “dead” and “living” constitutionalism<sup>1</sup> in light of the Court’s originalist interpretation of the Second Amendment in *District of Columbia v. Heller*,<sup>2</sup> and concludes with reflections on the role that historical evidence plays in enabling community in disagreement.

Those who mobilized in support of originalism in the late twentieth century<sup>3</sup> asserted that ratification was the source of the Constitution’s

1. See, e.g., William H. Rehnquist, Observation, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 693 (1976) (“At first blush it seems certain that a *living* Constitution is better than what must be its counterpart, a *dead* Constitution. It would seem that only a necrophile could disagree.”).

2. 128 S. Ct. 2783 (2008).

3. The claim that the Constitution should be interpreted in light of understandings that prevailed at the time of its ratification has been asserted in many different times and contexts. The term originalism is of more recent origin, first coined in 1979 by Paul Brest as an account of such claims. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980). This Article locates debates over jurisprudence in historical and political context, and uses the term originalism to describe the claims of the movement to which Brest was responding.

In this Article, originalism refers to claims about constitutional interpretation advanced in criticism of decisions of the Warren and Burger Courts by Americans mobilized in constitutional politics in the late twentieth century. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 215–26 (2008) (documenting how originalism gave jurisprudential expression to the coalition politics of the New Right); see also JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS 94–110, 146–60 (2005) (discussing the idea of originalism in post-Warren Court politics and jurisprudence). The Article refers to Americans who participated in this late-twentieth-century constitutional mobilization against decisions of the Warren and Burger Courts as first-generation originalists. For example, first-generation originalists contended that enforcing the original understanding was the *only* legitimate way to interpret the Constitution. See *infra* note 20 and accompanying text. This is a constraint that many of their

democratic authority, and contended that the procedures for amending the Constitution set forth in Article V were the only democratically legitimate method of changing the Constitution.<sup>4</sup> This provided first-generation originalists a rhetorically powerful basis for criticizing Warren and Burger Court decisions as democratically illegitimate modes of updating the Constitution, but simultaneously opened the theory of originalism to the charge that originalism itself led to a democratically illegitimate understanding of the Constitution. As originalism's jurisprudential critics have emphasized for decades now, the constitutional order that the theory of originalism produces is plagued by problems of dead hand control that vitiate its democratic authority: "We did not adopt the Constitution, and those who did are dead and gone."<sup>5</sup> Second-generation originalists who attempted seriously to grapple with the dead hand problem in the 1990s qualified originalism's claim to democratic authority, or proposed modifications in the practice of originalist interpretation that dilute its methodological character as originalist interpretation.<sup>6</sup>

If originalism interprets the Constitution in ways that privilege the democratic voice of the dead over the living, what accounts for originalism's late twentieth-century popularity? This seeming paradox dissolves if we look outside the theory of originalism to the practice of originalism. As I have elsewhere argued, the conservative movement's demands for restoring the original understanding of the Constitution co-joined a jurisprudence and a politics,<sup>7</sup> allowing originalism to function, as Robert Post and I describe, as conservatives' living constitution.<sup>8</sup>

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successors—whom I term second-generation originalists—have relaxed. See *infra* notes 44–56 and accompanying text.

Keith Whittington also analyzes the development of originalism with attention to the political engagements of its proponents. See Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 601 (2004) (conceding that originalism's initial expositors were more interested in criticizing the decisions of the Warren and Burger Courts than in elaborating the theoretical premises of their criticisms; describing the rise of a "new originalism" as conservatives gained control of the federal judiciary and needed to develop a theory to justify the exercise of judicial power, and not merely to criticize it).

4. See *infra* notes 18–21 and accompanying text.

5. Brest, *supra* note 3, at 225. For a recent discussion, see Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 192 & n.104 (2008).

6. See *infra* text at notes 44–56.

7. See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1347 (2006) ("Justice Scalia and other avatars of the Reagan revolution regularly employ the language of originalism to exhort Americans to mobilize against the Court and seek constitutional change without the intermediation of constitutional lawmaking. Originalism, in other words, is not merely a jurisprudence. It is a discourse employed in politics to mount an attack on courts. Since the 1970s, originalism's proponents have deployed the law/politics distinction and the language of constitutional restoration in the service of constitutional

My recent Comment on *District of Columbia v. Heller*<sup>9</sup> contextualizes the decision's originalist reading of the Second Amendment in twentieth-century constitutional politics.<sup>10</sup> It offers an historical account of how originalism gave jurisprudential expression to the coalition politics of the New Right,<sup>11</sup> and documents how processes of mobilization, countermobilization, coalition, and compromise shaped the justification and reach of the right *Heller* recognizes.<sup>12</sup> The *Heller* Court claims that in striking down the District of Columbia's handgun ban, it is merely enforcing a decision made by eighteenth-century Americans.<sup>13</sup> Yet, whatever its vices, *Heller* does not impose the decisions of the dead on the living. The decision arises out of a quite contemporary and still persisting dispute about the nature and scope of our constitutional freedoms—as any politically aware reader of the decision understands. Cass Sunstein observes that *Heller*'s originalism “has everything to do with the particular context in which the *Heller* Court wrote—the context that led the Court to be composed as it was and to have the inclinations that it did.”<sup>14</sup> J. Harvie Wilkinson is more blunt: “*Heller* encourages Americans to do what conservative jurists warned for years they should not do: bypass the ballot and seek to press their political agenda in the courts.”<sup>15</sup>

If constitutional history does not impose dead hand control, what role does historical evidence play in a case like *Heller*? Reading *Heller* with attention to the politics as well as the jurisprudence of originalism, we can see that constitutional history plays an important role in structuring constitutional disputes that history cannot settle. Members of the political community share fidelity to the memory of the nation's founding and subsequent history, and

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change—so successfully that, without Article V lawmaking, what was once the language of a constitutional insurgency is now the language of the constitutional establishment.”).

8. See Robert Post & Reva B. Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545 (2006); see also Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, at 25 (Jack M. Balkin & Reva B. Siegel eds., 2009) (analyzing originalism through the lens of democratic constitutionalism). For another account of the ways originalism derives authority from contemporary popular convictions, see Jamal Greene, *Selling Originalism*, 97 *GEO. L.J.* 657 (2009).

9. 128 S. Ct. 2783 (2008).

10. See Siegel, *supra* note 3.

11. *Id.* at 216–23.

12. *Id.* at 201–36.

13. See *infra* notes 59–60 and accompanying text.

14. Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 *HARV. L. REV.* 246, 252 (2008). The day after *Heller* was decided, Dave Kopel, Associate Policy Analyst for the Cato Institute and one of three lawyers who assisted Alan Gura, the attorney for Mr. Heller, at oral argument, made much the same point. See *infra* text accompanying note 93.

15. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 *VA. L. REV.* 253, 254 (2009).

appeal to this collective memory in disputes about the Constitution's meaning. Debate over the Second Amendment's ratification history in *Heller* functions like the debate over the Fourteenth Amendment's post-ratification history in *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>16</sup>—a widely anticipated end-of-term case in which the Court divided along similar lines only the year before. Appeal to the authority of a shared past anchors relationship among those in conflict, and so plays an important role in sustaining a normatively heterogeneous political community.

In the domain of constitutional theory, the obligation to reason from history is said to subject the living to the dead hand of the past, and to constrain constitutional interpreters from enforcing their own normative views; in practice, however, historical evidence seems to play a very different role. The living advocate their normative views by appeal to historical narratives the community shares, and through these practices of constitutional dispute sustain community in disagreement.

#### I. ORIGINALISM'S DEAD HAND PROBLEM, IN THEORY

There is not one theory of originalism, but many.<sup>17</sup> That said, originalist theories commonly locate the Constitution's democratic authority in the consent of the ratifying generations, leading one scholar to characterize originalism as a form of "consent-based positivism."<sup>18</sup> Advocates of originalism in the 1970s and 1980s viewed consent as playing a crucial role in fixing the Constitution's meaning.<sup>19</sup> They argued that the Constitution should only be

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16. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 127 S. Ct. 2738 (2007).

17. For some recent accounts of the dimensions in which theories of originalism differ, see Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 Duke L.J. (forthcoming Nov. 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1090282](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090282).

18. James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 8 (1991). *But see* Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 117 (2003) ("[C]onstitutional legitimacy has not been conferred by either the individual or the collective consent of 'We the People.'").

19. See Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 8 (1988) (Constitutions "confer democratic legitimacy by formally expressing the consent of the people to the government's exercises of authority."). Judicial review, if "guided by text and original meaning, . . . validates the consent of the governed." *Id.* at 10. See generally Gardner, *supra* note 18, at 7–8 ("The Constitution is the vehicle by which the people consent to the creation of a government and spell out its various powers and the limitations on those powers.") (citing RAOUL BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* 66 (1982); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT passim* (1977) [hereinafter BERGER, *GOVERNMENT BY JUDICIARY*], Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2, 3 (1971); Edwin Meese, *Construing the Constitution*,

interpreted as it was understood at the time of its ratification,<sup>20</sup> and contended that the only legitimate way to change the Constitution was by the amending process provided by those whose consent made the instrument binding.<sup>21</sup> This claim that the original understanding was the only legitimate basis for interpreting the Constitution supplied first-generation originalists a basis for attacking interpretive methods employed by the Warren and Burger Courts.<sup>22</sup> And it was this claim in turn that provoked the rejoinder that, as Michael Moore put it, “The dead hand of the past ought not to govern, . . . and any theory of interpretation that demands that it does is a bad theory.”<sup>23</sup>

Originalism’s critics objected that interpreting the Constitution in accordance with originalist methods would undermine the Constitution’s democratic legitimacy.<sup>24</sup> The problem was clear enough. It has been hundreds

19 U.C. DAVIS L. REV. 22, 23–24, 26 (1985); Edwin Meese, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL’Y 5, 5–6, 8, 9 (1988)).

20. OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION 3 (1988) (“[C]onstitutional language should be construed as it was publicly understood at the time of its drafting and ratification and government attorneys should advance constitutional arguments based only on this ‘original meaning.’ To do this, government attorneys should attempt to construct arguments based solely on the ordinary usage of the words at the time the provision at issue was ratified.”); see DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 139 (2005) (identifying the defining claim of originalism as the claim that “original understanding of the constitutional text always trumps any contrary understanding of that text in succeeding generations”); see also Berman, *supra* note 17 (discussing originalists asserting the exclusive authority of originalism).

21. BERGER, *supra* note 19, at 363–64, 386 (“The sole and exclusive vehicle of change the Framers provided was the amendment process . . .”); see also *infra* note 38 and accompanying text (quoting Justice Antonin Scalia). Originalists shifted ground on this point, once they began to exercise power in the Executive Branch and through judicial appointments.

Although proponents of original intent insisted that the Constitution could only be changed through Article V amendment, the director of the Center for Judicial Studies, James McClellan, penned editorials advising conservatives to “kick the habit” of relying on Article V to overturn Supreme Court decisions; the strategy had repeatedly failed in the 1960s and 1970s and tended instead to legitimate the Court. “[T]here is something fundamentally wrong with our system if we are driven to amend the Constitution so as to restore its original meaning,” McClellan advised, criticizing the Reagan Administration’s “Prayer Amendment” and pointing out that conservatives would better achieve their aims by selectively restricting the Court’s jurisdiction or filing amicus briefs in Supreme Court cases.

Siegel, *supra* note 3, at 219 (footnotes and citations omitted); see also *id.* at 219–23 (discussing efforts of the Reagan administration to institutionalize originalism through litigation and judicial appointments).

22. See Siegel, *supra* note 3, at 221–23 (locating the jurisprudence of originalism in the coalition politics of the New Right and discussing the specific lines of cases originalists challenged as identified by *The Constitution in the Year 2000* publication of the Reagan Office of Legal Policy).

23. Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 357 (1985).

24. For contemporary statements of this objection, see *supra* note 3 and accompanying text; Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1099 (1989); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three*

of years since the Constitution was ratified. No one alive today participated in the ratification process. The cumbersome supermajority rules of Article V make amending the Constitution so much more difficult than other forms of legislative change that, since ratification of the Bill of Rights, the Constitution has been amended less than twenty times.<sup>25</sup> The living have not assented to Article V as the sole method of constitutional change. And if we are to construe the living as having implicitly consented to any constitutional understanding or arrangement, it is to the Constitution as it is *currently* interpreted, with its many pathways of change.<sup>26</sup>

In retrospect, it is remarkable how little first-generation originalists had to say in response to the dead hand objection. Raoul Berger simply equated the Constitution with its framers, whom he seemed to view as having paternal authority:

It does not dispose of the uncomfortable historical facts to be told that “the dead hand of the past need not and should not be binding,” that the Founders “should not rule us from their graves.” *To thrust aside the dead hand of the Framers is to thrust aside the Constitution.* The argument that new meanings may be given to words employed by the Framers aborts their design; it reduces the Constitution to an empty shell into which each shifting judicial majority pours its own preferences.<sup>27</sup>

Henry Monaghan asserted that “original intent” governed the meaning of the Constitution’s text,<sup>28</sup> and claimed that it was an “incontestable first principle” of American constitutional law that the Constitution’s text was “authoritative . . . for [all] successor generations.”<sup>29</sup> In short, Berger and Monaghan disposed of the dead hand objection axiomatically.

*Objections and Responses*, 82 NW. U. L. REV. 226, 288 & n.309 (1988); see also William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986).

25. See Henry Paul Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32, 35 (2004) (describing the Constitution as “practically unamendable”).

26. See Brest, *supra* note 3, at 225 (“[I]t is only through a history of continuing assent or acquiescence that the document could become law. Our constitutional tradition, however, has not focused on the document alone, but on the decisions and practices of courts and other institutions. . . . [T]he practice of supplementing and derogating from the text and original understanding is itself part of our constitutional tradition.”).

27. BERGER, *supra* note 21, at 314–15 (emphasis added); cf. Rehnquist, *supra* note 1 at 693 (“At first blush it seems certain that a *living* Constitution is better than what must be its counterpart, a *dead* Constitution. It would seem that only a necrophile could disagree.”).

28. Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 360 (1981). Monaghan employed “constitutional text” synonymously with original intent, writing that “a distinction is sometimes posited between textual analysis and original intent inquiry such that only the constitutional text and not ‘parol evidence’ can be examined to ascertain constitutional meaning. But any such distinction seems to be entirely wrong.” *Id.* at 374.

29. *Id.* at 383:

Why, [Professor Brest] asks, should the constitutional text be authoritative at all for successor generations? . . . The authoritative status of the written constitution is a legitimate matter

Even when Raoul Berger confronted the question of dead hand control, he was quick to dismiss it by invoking Article V: “Of course the dead cannot bind us; nor did they seek to do so. Instead, the Framers provided us with an instrument of change—amendment pursuant to Article V.”<sup>30</sup> Berger scoffed at objections that the Article V procedure made the Constitution terribly difficult to amend.<sup>31</sup> Nor did he offer any consent-based reason why living Americans were obliged exclusively to rely on it. Robert Bork was equally dismissive of dead hand objections, as if they raised no significant problem for originalism as a theory:

[W]ith respect to the individual rights amendments we are not governed by our dead and unrepresentative Founders unless we wish to cut back or eliminate the freedoms they specified and to do so by simple legislative majorities. . . . The dead, and unrepresentative, men who enacted our Bill of Rights and the Civil War amendments did not thereby forbid us, the living, to add new freedoms. We remain entirely free to create all the additional freedoms we want by constitutional amendment or by simple legislation, and the nation has done so frequently.<sup>32</sup>

Bork’s focus on the power of the living to legislate pointed to a different ground of rejoinder, based on a conviction that first-generation originalists shared. First-generation originalists believed that originalism would promote democratic values indirectly, by disciplining judicial interpretation and thus limiting the reach of constitutional law.<sup>33</sup> Whereas the argument from consent presupposed the continuing identification of current generations with the

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of debate for political theorists interested in the nature of political obligation. That status is, however, an incontestable first principle for theorizing about American constitutional law. That I cannot otherwise “prove” the constitutional text to be *the* first principle is a necessary outcome of my first principle itself.

30. Raoul Berger, *Paul Brest’s Brief for an Imperial Judiciary*, 40 MD. L. REV. 1, 3 (1981).

31. *Id.* at 24.

32. ROBERT BORK, *THE TEMPTING OF AMERICA* 170–71 (1990).

33. Whittington, *supra* note 3, at 602:

First, originalism was thought to limit the discretion of the judge. . . . By rooting judges in the firm ground of text, history, well-accepted historical traditions, and the like, originalists hoped to discipline them. The “political seduction of the law” was a constant threat in a system that armed judges with the powerful weapon of judicial review, and the best response to that threat was to lash judges to the solid mast of history.

Second, originalism was married to a requirement of judicial deference to legislative majorities. Bork admitted that originalism would require that “broad areas of constitutional law . . . be reformulated,” but what he has in mind was that the Court get out the way of legislative majorities in the many areas “where the Constitution does not speak.” The originalist Constitution, as these writers imagined it, was primarily concerned with empowering popular majorities.



past,<sup>34</sup> originalists just as frequently depicted the judge who enforced the original understanding as reasoning from *impersonal* principle and celebrated this rule-of-law restraint because it preserved the domain of legislative action. “When a judge finds his principle in the Constitution as originally understood, the problem of the neutral derivation of principle is solved,” Bork reasoned. “The judge accepts the ratifiers’ definition of the appropriate ranges of majority and minority freedom,” but if a judge makes “unguided value judgments of his own,” “he violates . . . the rights of the legislature and the people.”<sup>35</sup> Lino Graglia explained:

[T]he democratic principle that originalism seeks to protect is usually upheld, not threatened, when a court declines to intervene in the political process. The Supreme Court serves the concept of a living Constitution less by acting than by getting out of the way, as in its post-1937 refusal to enforce federalism limitations on national power.<sup>36</sup>

Frank Easterbrook subsequently expressed the point: “Democracy by the living is not an alternative to originalism and the rule of the dead; these are two aspects of the same thing, and an emphasis on ‘the dead’ when it comes to judges is essential to the power of ‘the living’ when it comes to governance.”<sup>37</sup> Antonin Scalia’s argument for originalism seems to share these convictions, as it emphasizes the need for judicial restraint over the need for constitutional self-government:

At an even more general theoretical level, originalism seems to me more compatible with the nature and purpose of a Constitution in a democratic system. *A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect “current values.” Elections take care of that quite well.* The purpose of constitutional guarantees—and in particular those constitutional guarantees of individual rights that are at the center of this controversy—is precisely to prevent the law from reflecting certain *changes* in original values that the society adopting the Constitution thinks fundamentally undesirable.<sup>38</sup>

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34. See, e.g., Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 32, 29 (1990) (observing how “[h]istorical interpretation” of the Constitution that “focuses on an original act of consent” relies on “a claimed continuity of identification with those who had proposed and ratified the” Constitution).

35. BORK, *supra* note 32, at 146–47.

36. Lino A. Graglia, “Interpreting” the Constitution: Posner on Bork, 44 STAN. L. REV. 1019, 1031 (1992) (internal quotation marks omitted).

37. Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1123 (1998); cf. *All Things Considered: Scalia Vigorously Defends a ‘Dead’ Constitution* (National Public Radio broadcast Apr. 28, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=90011526>.

38. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (first emphasis added).

In his many speeches calling for a “dead constitution” Justice Scalia has since argued repeatedly that theories of a living constitution leave judges free to impose their values, while only originalism can restrain judges.<sup>39</sup>

In the end, first-generation originalists seem to concede that interpreting the Constitution in accordance with originalist methods denies the living the opportunity to express their distinctive constitutional understandings, but contend that the use of originalist methods will limit the reach of judicial review and so enlarge the domain of democratic self-government. The writings of first-generation originalists typically assert originalism’s superior power to constrain judges as a matter of faith, without bothering to substantiate the point.<sup>40</sup>

In the 1990s, after conservatives achieved dominance in the federal judiciary, a group of academics (and academics turned judges) set out to elaborate the theory of originalism. These second-generation originalists were a more normatively heterogeneous group with different professional aims, and, in the quest to develop a theoretically satisfying account of originalism, engaged in a more sustained way with the dead hand objection.

Some second-generation originalists, such as Randy Barnett, frankly acknowledge that originalism’s authority is not grounded in actual consent:

[C]onstitutional legitimacy has not been conferred by either the individual or the collective consent of “We the People.” . . . Though genuine consent, were it to exist, could give rise to a duty of obedience, the conditions necessary for “We the People” actually to consent to anything like the Constitution or amendments thereto have never existed and could never exist.<sup>41</sup>

Barnett concludes the Constitution’s legitimacy must flow from the justice of the political community it establishes.<sup>42</sup> John McGinnis and Michael Rappaport make the case for originalism on consequentialist grounds, arguing that the supermajoritarian ratification procedures by which the

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39. See, e.g., Mark Morris, *Scalia Criticizes “Living Constitution,”* KAN. CITY STAR, Mar. 5, 2008, at B5; Brian Whitson, *Justice Antonin Scalia: The Case for a “Dead Constitution,”* W&M NEWS, Mar. 21, 2004, <http://web.wm.edu/news/archive/index.php?id=3486>.

40. See Whittington, *supra* note 3, at 602. Part II of this Article considers this claim of originalist theory through an example of originalist practice in the *Heller* decision. For a more wide ranging survey, see THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* (2004) (tracing the emergence of conservative activism on the Rehnquist Court).

41. Barnett, *supra* note 18, at 117.

42. See *id.* at 113; Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 16–19 (2006).

Constitution was adopted are more likely than anything else to produce independently legitimate outcomes.<sup>43</sup>

There are now several second-generation originalists who have attempted to address the dead hand problem, and have forged methods of interpretation better suited to sustain the Constitution's authority across generations. These second-generation originalists abandon the first-generation claim that originalism is the only legitimate mode of interpreting the Constitution, and propose innovations in interpretive method that would give voice to the understandings of those who lived under the Constitution, sometimes elevating their views over those held by the ratifying generation.

The most commonplace way in which first-generation originalists acknowledge accommodating the beliefs of the living is through the practice of *stare decisis*,<sup>44</sup> understood as a pragmatic concession to the errors of others: "[S]*tare decisis* is not *part of* my originalist philosophy," Justice Scalia emphasizes, "it is a pragmatic *exception to it*."<sup>45</sup> (Deferring to non-originalist precedent dilutes originalism and makes it a nakedly discretionary practice,<sup>46</sup> yet Justice Scalia embraces *stare decisis* with much greater frequency than Justice Thomas, explaining, "I am a textualist. I am an originalist. I am not a nut."<sup>47</sup>) By contrast, Michael McConnell acknowledges, as a matter of

43. John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 385 (2007) (defending originalism "by reference to the likely consequences flowing from the process" that adopted the Constitution, not because that process is a source of legitimacy).

44. See Scalia, *supra* note 38, at 861 ("I can be much more brief in describing what seems to me the second most serious objection to originalism: In its undiluted form, at least, it is medicine that seems too strong to swallow. Thus, almost every originalist would adulterate it with the doctrine of *stare decisis*.").

45. Antonin Scalia, *Response*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 129, 140 (Amy Gutman ed., 1997).

46. See Bruce Ackerman, 2006 *Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737, 1755 n.42 (2007) ("Justice Scalia has famously described himself as a 'faint-hearted originalist,' who uses the doctrine of *stare decisis* as a pragmatic device to restrain an all-out assault on the twentieth century. . . . Justice Scalia recognizes the 'pragmatic' character of his approach, but despite his famous denunciation of discretionary judgments in constitutional law, he creates a gaping exception when it comes to deciding when constitutional truth is more or less important than constitutional stability.") (citations omitted).

47. A recent National Public Radio interview with Justice Scalia reports:

"You can't reinvent the wheel. You've got to accept the vast majority of prior decisions. . . . I do not argue that all of the mistakes made in the name of the so-called living constitution be ripped out. I just say, 'Let's cut it out. Go back to the good, old dead Constitution,'" Scalia says.

This attitude puts him in a decidedly different camp than fellow conservative Justice Clarence Thomas, who Scalia concedes is far more willing to reverse past precedent.

"I am a textualist. I am an originalist. I am not a nut," he says, underscoring that he generally doesn't favor undoing old rulings. He also notes that the idea of a living constitution places no restraints on judges.

principle and not merely pragmatism, that constitutional interpretation needs to take into account the constitutional understandings of Americans who live after the founding, whom he claims “also ‘ratified’ the Constitution.”<sup>48</sup> McConnell reasons that judges should temper originalism with “traditionalism,” which he defines as interpreting the Constitution in light of “the long-standing and evolving practices, experiences, and tradition of the nation”<sup>49</sup> and which he associates with *Washington v. Glucksberg*.<sup>50</sup>

In contrast to McConnell’s prescription that judges combine originalism with traditionalism and restraint, Keith Whittington develops an answer to originalism’s dead hand problem that focuses on practices of “consti-

*All Things Considered*, *supra* note 37; see also Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 201 n.156 (2007) (“Justice Scalia has said that Justice Thomas ‘doesn’t believe in *stare decisis*, period. . . . [I]f a constitutional line of authority is wrong, [Thomas] would say ‘Let’s get it right.’ I wouldn’t do that.”) (quoting Stephen B. Presser, *Touting Thomas*, LEGAL AFF., Jan.–Feb. 2005, at 68, 68–69, available at [http://www.legalaffairs.org/issues/January-February-2005/review\\_presser\\_janfeb05.msp](http://www.legalaffairs.org/issues/January-February-2005/review_presser_janfeb05.msp)).

48. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1133 (1998).

49. *Id.* McConnell writes:

This approach to the dead hand problem suggests a mode of constitutional interpretation that gives weight not only to constitutional principles as they were conceived at the founding, but also to those principles as they have been conceived by successive generations of Americans in the years since the founding. Those subsequent generations of Americans also “ratified” the Constitution, and their understandings should also count. In practical terms, that means the Constitution should be interpreted in accordance with the long-standing and evolving practices, experiences, and tradition of the nation. I refer to this constitutional methodology as “traditionalism.”

*Id.* In addition to considering the views of post-ratification generations through the principle of traditionalism, McConnell argues that a constitutional judge should also exercise restraint vis-a-vis the decisions of present-day majorities. In combining originalism with traditionalism and restraint, a judge helps the nation in its “struggle to lay down temporally extended commitments and to honor those commitments over time.” *Id.* at 1135 (quoting Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085, 1105 (1998)). Such is the essence of self-rule and, consequently the nature of the Constitution’s democratic authority, if we, as McConnell argues we should, understand ourselves as part of “a historically continuous community.” *Id.* at 1134. McConnell thus “solves” the dead hand problem by temporally expanding the conception of the “self” that democracy aspires to let rule. In so doing, however, McConnell imbues the constitutional judge’s task with a significant amount of discretion and, moreover, requires that she place significant weight on considerations other than the understandings of the Constitution at the time of its ratification.

See also Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 684 (“The voice of tradition is thus the voice of humility: the assumption that when many people, over a period of many years, have come to a particular conclusion, this is more reliable than the attempt of any one person (even oneself) or small group of persons (such as the Court) to chart a new course on the basis of abstract first principles.”) [hereinafter McConnell, *Right to Die*]; *id.* at 686 (“A jurisprudence grounded in text and tradition is not hostile to social change, but it assigns the responsibility to determine the pace and direction of change to representative bodies.”).

50. 521 U.S. 702 (1997); see *id.* at 710, 711 (interpreting the Due Process Clause “by examining our Nation’s history, legal traditions, and practices” and considering “over 700 years [of] the Anglo-American common-law tradition.”); McConnell, *Right to Die supra* note 49, at 681.

tutional construction” by the representative branches of government. Constitutional construction might be understood as a second-generation originalist’s account of the democratic politics that originalism enables—an account informed by the theories of departmentalism developed in the Reagan Justice Department.<sup>51</sup> Whittington understands politics as a domain of principle as well as preference; it is a domain in which nonjudicial actors make claims on the Constitution. Whittington observes that “[p]olitics is not only constrained externally by the judiciary but also internally by the political operation of constitutional understandings,”<sup>52</sup> and suggests that the representative branches of government construct the Constitution’s meaning in cases where its judicially enforceable original meaning is exhausted or indeterminate:

[T]he alternatives are not between a living constitutionalism sustained by a flexible interpretive method and an inflexible constitutionalism imposed by an interpretive method emphasizing the past. Rather, the choice is between two forms of living constitutionalism: one imposed by the judiciary on the political branches, and one created and sustained by electoral politics itself.<sup>53</sup>

Jack Balkin continues to expand originalism, even beyond the framework that Whittington contemplates. To meet dead hand concerns, Balkin argues that the Constitution should be interpreted in light of its original public meaning, proposing a method of text and principle to enforce the Constitution’s general provisions that liberates interpretation of these provisions from the founders’ expected applications.<sup>54</sup> No longer is originalist

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51. See, e.g., Edwin Meese III, *Perspectives on the Authoritativeness of Supreme Court Decisions: The Law of the Constitution*, 61 TUL. L. REV. 979, 981–89 (1987) (contending that there is a distinction between “constitutional law,” or judicial interpretations of the Constitution binding only on the courts and parties before them, and “the Constitution,” which all branches of government are charged to apply and interpret); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 225–26 (1994) (arguing for departmentalism on originalist grounds).

52. KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 205 (1999).

53. *Id.*

54. Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 434–36 (2007); see *id.* at 448–49 (footnotes omitted):

[T]he turn to original meaning was not designed to drive a wedge between the text’s public meaning and how the framing generation would have expected the text would be applied. . . .

. . . [Yet] Ronald Dworkin, Randy Barnett, Mark Greenberg, and Harry Litman have pointed out that the move to original meaning had an unintended consequence. Fidelity to original meaning did not require following what the framing generation thought the consequences of adopting the words would be. . . . Once we understand the logical consequences of moving from original intention and original understanding to original meaning, we see that

interpretation constrained, as even Whittington claims. Balkin embraces Whittington's concept of construction as a practice in which all *three* branches of government engage.<sup>55</sup> In short, Balkin openly embraces originalism as a practice of living constitutionalism. He rejects the first-generation understanding of originalism as an interpretive method designed to constrain judges, and replaces it with an understanding of the Constitution as a delegation to future generations. In his version of originalism, the Constitution's meaning ranges as widely as the imagination of the Americans who mobilize to make claims on it.<sup>56</sup>

As this brief survey of originalism's response to the dead hand problem suggests, first-generation originalist theories offered no constitutional remedy for the dead hand problem other than the method's promise of judicial restraint, while second-generation originalist theories that have seriously addressed the dead hand question have responded in ways that transform the normative basis and interpretive practice of originalism in nontrivial ways. Second-generation originalist theories that engage with the problem of dead hand control recognize the authority of precedent, tradition, construction, and other forms of living constitutionalism, and as they incorporate these understandings and practices, lose many of their distinctive methodological constraints as *originalist* theories of constitutional interpretation.

## II. HELLER, ORIGINALISM'S DEAD HAND IN PRACTICE

Justice Scalia's recent decision for the Court in *District of Columbia v. Heller*<sup>57</sup> proudly offers itself as an exemplar of originalist reasoning, and was immediately greeted as such.<sup>58</sup> In *Heller*, the Court struck down a gun control

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original meaning originalism—or at least the version I offer here—is actually a form of living constitutionalism.

55. *Id.* at 435.

56. *Id.* at 464:

The method of text and principle, I believe, serves the multiple functions of a constitution—as basic law, higher law, and our law—far better than other forms of originalism. An originalism that strongly distrusts delegation to future generations and demands that open-ended provisions must be closely connected to original expected application is defective in all three respects.

57. 128 S. Ct. 2783 (2008).

58. See Linda Greenhouse, *SIDEBAR: 3 Defining Opinions*, N.Y. TIMES, July 13, 2008, at WK 4; see also Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13 (“Justice Scalia’s opinion is the finest example of what is now called ‘original public meaning’ jurisprudence ever adopted by the Supreme Court.”); Posting of Dale Carpenter to The Volokh Conspiracy, [http://volokh.com/archives/archive\\_2008\\_06\\_22-2008\\_06\\_28.shtml#1214599824](http://volokh.com/archives/archive_2008_06_22-2008_06_28.shtml#1214599824) (June 27, 2008, 16:50 EST), (“[T]he fact that . . . every justice on the Court, in this rare and pristine constitutional moment, grasped for originalism as at least a cover for their views indicates that something

law as violating the Second Amendment, for the first time in the Second Amendment's history. The Court presented this new understanding of the Second Amendment as the original public meaning of the Second Amendment<sup>59</sup> and attributed to those who ratified the Second Amendment the decision to invalidate the District of Columbia's hand gun ban:

The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.<sup>60</sup>

But the *Heller* Court sharply divided on the question whether those who ratified the Second Amendment prohibited hand gun bans such as the District of Columbia's. The dissenters asserted that the Second Amendment was ratified for the republican purposes set forth in the Amendment's first clause—to prevent the federal government from disbanding the state militias—and thus protects only “a right to use and possess arms in conjunction with service in a well-regulated militia,”<sup>61</sup> and not “the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense.”<sup>62</sup> The majority, however, read the Second Amendment to preserve the militia by codifying the common law right of self-defense, and declared that the Amendment “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>63</sup>

In *Heller*, we confront a practical illustration of dead hand control; or rather, we would confront such a case, if, as Justice Scalia insists, the decision to prohibit the District of Columbia's hand gun ban was made by the Second Amendment's eighteenth-century ratifiers. If, on the other hand, the decision to prohibit the hand gun ban was attributed to the Amendment's ratifiers by

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more profound has happened in our constitutional culture.”); David G. Savage, *Supreme Court Finds History Is a Matter of Opinions*, L.A. TIMES, July 13, 2008, at A14 (“This year the Supreme Court relied more than ever on history and the original meaning of the Constitution in deciding its major cases.”); Lawrence B. Solum, *Analysis of Heller*, Legal Theory Blog (June 26, 2008), <http://lsolum.typepad.com/legaltheory/2008/06/analysis-of-hel.html> (“It is difficult to imagine a clearer or more thoroughgoing endorsement of original public meaning originalism.”).

59. See *Heller*, 128 S. Ct. at 2805.

60. See *id.* at 2821 (denouncing an interest-balancing test proposed by Justice Breyer).

61. *Id.* at 2831 (Stevens, J., dissenting).

62. *Id.* at 2822.

63. *Id.* at 2821; 2801 (majority opinion) (“[T]he *Second Amendment's* prefatory clause announces the purpose for which the right was codified: to prevent the elimination of the militia.”).

its twenty-first-century enforcers, we would instead find ourselves facing originalism's answer to the dead hand problem: an *originalist* practice of living constitutionalism.

In my recent Comment on the decision, I read *Heller* as enforcing understandings forged in popular constitutionalism.<sup>64</sup> My views about *Heller*'s animating logic are not idiosyncratic. Commentators across the spectrum, from Jack Balkin, Sandy Levinson, and Cass Sunstein to Richard Posner and J. Harvie Wilkinson have remarked on the political energies fueling *Heller*'s originalism.<sup>65</sup>

In what follows, I reprise several points from a much longer account of the ways *Heller*'s originalism enforces understandings forged in popular constitutionalism. I focus first on the reasoning of the decision itself, and then situate the decision in political context.

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64. See Siegel, *supra* note 3. For theoretical accounts of originalism as conservatives' living constitution, see sources cited *supra* note 9.

65. For Sunstein's and Wilkinson's remarks, see *supra* text accompanying notes 14–15. For Posner's commentary, see *infra* text at note 71. From the moment the decision issued, both conservatives and progressives characterized *Heller*'s originalism as the expression of contemporary politics and, hence, as a form of living constitutionalism. See Dave Kopel, *Conservative Activists Key to DC Handgun Decision*, HUMAN EVENTS, June 27, 2008, <http://www.humanevents.com/article.php?id=27229> (reporting that a member of the Cato Institute who helped argue *Heller* attributes both its result and its originalist reasoning to twentieth-century social movements: "The 5–4 margin shows that Supreme Court appointments and Senate confirmations really do matter. Had a President Mondale, Dukakis, Gore, or Kerry been appointing Justices, the result today would have been different, and the Second Amendment would have been nullified."). Progressive commentators on *Balkinization* struck this note as well. See Sandy Levinson, *Some Preliminary Reflections on Heller*, BALKINIZATION, June 26, 2009, <http://balkin.blogspot.com/2008/06/some-preliminary-reflections-on-heller.html> ("One of the most remarkable features of Justice Scalia's majority opinion . . . and Justice Stevens's dissent . . . is the view that the Second Amendment means only what it meant at the time of its proposal and ratification in 1789–91. . . . Both opinions exhibit the worst kind of 'law-office history,' in which each side engages in shamelessly (and shamefully) selective readings of the historical record in order to support what one strongly suspects are pre-determined positions."); Jack Rakove, *Thoughts on Heller From a "Real Historian,"* BALKINIZATION, June 27, 2008, <http://balkin.blogspot.com/2008/06/thoughts-on-heller-from-real-historian.html> (observing that although they both rely on "originalist analysis," "neither of the two main opinions in *Heller* would pass muster as serious historical writing"); Jack Balkin, *"This Decision Will Cost American Lives": A Note on Heller and the Living Constitution*, BALKINIZATION, June 27, 2008, <http://balkin.blogspot.com/2008/06/this-decision-will-cost-american-lives.html> ("No matter how much the arguments in *Boumediene* and *Heller* are dressed up in originalist garb, they show us that that living constitutionalism is alive and well. . . . [T]he result in *Heller* would have been impossible without the success of the conservative movement and the work of the NRA and other social movement actors who, over a period of about 35 years, succeeded in changing Americans' minds about the meaning of the Second Amendment, and made what were previously off-the-wall arguments about the Constitution socially and politically respectable to political elites. This is living constitutionalism in action.").



A. *Heller's* Justification for the Constitutional Right of Self-Defense—  
Positive Law or Common Law?

In *Heller*, the majority holds that the Second Amendment codifies the common law right of self defense. The majority substantiates this claim, over the dissenters' bitter objection that the Amendment did not concern "the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense,"<sup>66</sup> by modes of argument that are unusual for a decision that claims to enforce the understandings of the Second Amendment's eighteenth-century ratifiers. To establish that the Second Amendment codified the common law of self-defense, the *Heller* majority invokes sources ranging from the seventeenth to the twentieth centuries.<sup>67</sup> Though the majority presents these authorities as establishing the original public meaning of the Amendment's text, their distance in time from the Amendment's ratification raises the possibility that the majority may not be focused on reconstructing the reasoning of the Amendment's ratifiers, but instead on establishing the Amendment's meaning through forms of reasoning conventionally associated with common law rather than positive law claims.<sup>68</sup>

There is more evidence in the majority opinion establishing the existence of a common law right of self defense than there is demonstrating that such a right was constitutionalized by the Second Amendment's eighteenth-century ratifiers. Before *Heller*, historians of the founding era challenged the claim that this was the ratifiers' purpose;<sup>69</sup> since *Heller*, commen-

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66. *Heller*, 128 S. Ct. at 2831 (Stevens, J., dissenting); *id.* at 2822.

67. For examination of these features of *Heller's* argument, see Siegel, *supra* note 3, at 196–98.

68. See *id.* at 198 ("Either the evidence the majority marshals to demonstrate that it was 'widely understood' that the Second Amendment codified an individual right of self-defense accurately captures the understanding of those who ratified the amendment in 1791, or the majority is presenting as the original public meaning an understanding of the amendment that emerged in common law-like fashion in the decades after the amendment was ratified.").

69. For historical accounts of the Second Amendment that emphasize its republican pedigree, see AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 324 (2005) (observing that "Founding history confirms a republican reading of the Second Amendment, whose framers generally envisioned Minutemen bearing guns, not Daniel Boone gunning bears," and noting that a military usage of arms similarly appears in state constitutions and the English Bill of Rights of 1689); SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 *CHI.-KENT L. REV.* 103 (2000). These historians emphasize that the Second Amendment was responsive, not to the need for private self-defense, but rather to a deep fear of a standing army and the debate over how control over militias would be allocated between the federal and state government. Rakove, *supra*, at 103. Indeed, the first laws resembling contemporary gun control were not passed until after the War of 1812, well after ratification. See CORNELL, *supra*, at 142; see also Sanford Levinson, *Guns and the Constitution: A Complex Relationship*, 36 *REV. AM.*

tators, including Akhil Amar, have remarked on the evidentiary weakness of the majority's case.<sup>70</sup> For present purposes it suffices to observe that the *Heller* opinion goes about demonstrating the purposes and understandings of those who ratified the Second Amendment in what are at best methodologically irregular ways.

The strange disjuncture between the majority's theory of interpretation and temporal range of its evidence may be what has prompted the incredulity of several prominent conservative judges. Shortly after the decision Judge Posner observed:

The true springs of the *Heller* decision must be sought elsewhere than in the majority's declared commitment to originalism. The idea behind the decision—it is not articulated, of course, and perhaps not even consciously held—may simply be that turnabout is fair play. Liberal judges have used loose construction to expand constitutional prohibitions beyond any responsible construal of original meaning; and now it is the conservatives' turn.<sup>71</sup>

Judge Harvie Wilkinson was less understanding and offered the supreme conservative insult of likening the *Heller* decision to *Roe v. Wade*.<sup>72</sup>

## B. What Original Understanding Defines the Scope of the Right?

To this point we have considered only the uneasy fit between the majority's argument and evidence offered in support of its claim that the ratifiers of the Second Amendment codified the common law right of self-defense. As commentators observed as soon as the decision was handed down, the majority abandons even the pretense of reasoning from the

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HIST. 1, 5 (2008) (observing that Saul Cornell's work weakens the originalist case for an "individual, non-militia-related right to bear arms").

70. See Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 171 (2008) ("Justice Scalia cited no decisive historical evidence from the drafting or ratification of the Second Amendment that the Amendment aimed to protect the English common law right to have a weapon for personal self-defense. The limited evidence from 1787 to 1791 in fact tends to cut the other way.") (citation omitted); see also Sunstein, *supra* note 14, at 255–57.

71. Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 32, 33. Posner called loose construction the more truly originalist practice and one sometimes warranted by dead hand concerns, but he chastised Justice Scalia for employing it to judicially entrench the norms of the politically powerful. *Id.* at 34 ("The proper time for using loose construction to enlarge constitutional restrictions on government action is when the group seeking the enlargement does not have good access to the political process to protect its interests, as abortion advocates, like gun advocates, did and do.")

72. 410 U.S. 113 (1973); see Wilkinson, *supra* note 15. Posner initially drew this comparison. See Posner, *supra* note 71, at 34 (quoted *supra* note 71). Cass Sunstein compared *Heller* to *Griswold*. See Sunstein, *supra* note 14.

ratifiers' understandings when it explains the reach of the Second Amendment right it is recognizing:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."<sup>73</sup>

The majority sanctions certain familiar forms of gun control regulation because they are familiar, reasoning from tradition and contemporary common sense, rather than original understanding.

There is, of course, nothing wrong with reasoning in common law fashion or appealing to tradition and common sense; but acknowledging that the opinion depends on this form of reasoning locates the authority undergirding the judgment in the present, and in the discretion of the court. It is no longer credible to attribute the judgment to strike the District of Columbia's hand gun ban to the eighteenth-century Americans who ratified the Second Amendment, as Justice Scalia does.<sup>74</sup> Adam Winkler described the majority's reasoning about the scope of the right as "living constitutionalism."<sup>75</sup> Judge Wilkinson makes this point in the form of a conservative slur: "The Constitution's text," he wrote, "has as little to say about restrictions on firearm ownership by felons as it does about the trimesters of pregnancy."<sup>76</sup>

C. Why Would an Originalist Exclude Protection for the Kinds of Weapons Best Suited to Vindicate the Amendment's Republican Aims?

Most remarkably, the majority goes out of its way to explain that regulation of military-style weapons will be permissible under *Heller's* reasoning, insisting that the Second Amendment doesn't protect "weapons that are most useful in military service,"<sup>77</sup> even if it means that the right to

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73. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816–17 (2008).

74. See *supra* text accompanying note 60.

75. See Adam Winkler, *Justice Scalia's Living Constitution*, HUFFINGTON POST, June 27, 2008, [http://www.huffingtonpost.com/adam-winkler/justice-scalias-living-co\\_b\\_109728.html](http://www.huffingtonpost.com/adam-winkler/justice-scalias-living-co_b_109728.html) ("One of the most intriguing aspects of Justice Scalia's opinion . . . is its use of living constitutionalism . . . [W]hat explains the reasonable regulations that Scalia's opinion recognizes? America's living tradition of the right to bear arms. . . . In the end, the list is a product of that lived experience and development of the right to bear arms, not originalist interpretive method.")

76. Wilkinson, *supra* note 15, at 23.

77. *Heller*, 128 S. Ct. at 2817.

bear arms can no longer be exercised for the republican purpose of preventing tyranny that the text of the Second Amendment specifies. While the majority and dissent disagree about whether the Amendment codifies the common law right of self-defense, the justices all agree that the Second Amendment was ratified to secure republican liberties.<sup>78</sup> Yet the majority reaches out to explain that government can ban military-style weapons, without explaining why this constraint on the Second Amendment's purpose is warranted. Why would a court claiming to enforce the original public meaning of the Second Amendment arrive at such a conclusion?

Judge Posner thinks this aspect of the *Heller* decision reflects basic common sense and *not* the Second Amendment's original meaning.<sup>79</sup> Alan Gura, the lawyer for *Heller*, acknowledges as much, reasoning that, in order to win, he had to offer an argument to the Court that would enable it to hold that restrictions on automatic weapons were still constitutional—a position he defended in the gun community after oral argument.<sup>80</sup> In embracing limits on the scope of the right, gun rights advocates were implicitly ceding ground to gun control advocates, whose case for incrementalist gun control regulation (such as the assault weapons ban) was immeasurably strengthened by militia activities of the 1990s—in particular Timothy McVeigh's 1995 bombing of the federal building in Oklahoma City.<sup>81</sup>

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78. See *supra* note 63 (quoting *Heller* majority).

79. See Posner, *supra* note 71, at 33 (“[T]he Framers and the ratifiers of the amendment probably did think that the right of militiamen to keep and bear arms entitled them to keep their weapons in their homes. . . . To use this ‘original’ understanding to allow members of the National Guard to store military weapons (machine guns, grenades, Hummers, and so on) would be preposterous, and it is disclaimed in the majority opinion.”).

80. In oral argument, Alan Gura, *Heller*'s lawyer, offered the Court a framework for allowing the regulation of military weapons—a limit on his claim he subsequently said was necessary to win the case. See Brian Doherty, *How the Second Amendment Was Restored: The Inside Story of How a Gang of Libertarian Lawyers Made Constitutional History*, REASON, Dec. 2008, available at <http://www.reason.com/news/show/129991.html>:

Many Internet gun-rights activists accused Gura of selling out on the machine gun issue. “We wanted to win,” Gura responds. “And you win constitutional litigation by framing issues in as narrow a manner as possible. I could not tell the justices honestly that I hadn't thought about machine guns. ‘Gee, I don't know, maybe . . .’ That's a bunch of crap. I would have lost credibility, it would have been obviously a lie and I'm not going to lie to the Court, and I would have lost the case.”

Gura's position was discussed at length in the gun rights community, where many seek constitutional protection for automatic weapons. See, e.g., The Michael Bane Blog, <http://michaelbane.blogspot.com/2008/03/guras-response-on-machine-guns.html> (Mar. 20, 2008, 11:17 AM); Sharp as a Marble, <http://blog.robballen.com/archive/2008/03/20/Alan-Gura-on-machine-guns.aspx> (Mar. 20, 2008, 1:28:45 PM).

81. The Oklahoma City bombing, which killed 168 people, was staged on the anniversary of the Battle of Lexington and Concord and the government's raid on the militia compound in Waco, Texas, and was modeled on the FBI bombing recounted in the racialized gun control dystopia

Any or all of these accounts suggest that *Heller's* restriction on military style weapons reflects the constraints of public opinion. Other passages in *Heller* reason directly from popular conviction. When Justice Scalia explains why he will not defer to *stare decisis* and interpret the Second Amendment as hundreds of federal judges before him, the *Heller* opinion appeals directly to history and to the beliefs of millions of mobilized Americans:

As for the “hundreds of judges” who have relied on the view of the Second Amendment Justice Stevens claims we endorsed in *Miller*: If so, they overread *Miller*. And their erroneous reliance upon an uncontested and virtually unreasoned case cannot nullify the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms.<sup>82</sup>

History's authority in this passage is not impersonal. It reflects understandings around which people have built their lives. Memory of this kind is living, and passionate, and, as *Heller* illustrates, the locus of contemporary constitutional conflict.

### III. ORIGINAL UNDERSTANDING AND COLLECTIVE MEMORY

The debates over originalism considered in Part I sharply differentiate between past and present. Both originalists and their critics point to history as a constraint on the Constitution's current interpreters. Originalists celebrate the discipline history promises, while their critics protest the forms of dead hand control it threatens. But in the practice of originalism examined in Part II, the past and present are no longer so sharply differentiated. As *Heller* itself

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depicted in the novel, *The Turner Diaries*. See LOU MICHEL & DAN HERBECK, AMERICAN TERRORIST: TIMOTHY MCVEIGH & THE OKLAHOMA CITY BOMBING 108 (2001) (account of bombing based on interviews with McVeigh during the period of his incarceration); see also *id.* at 39 (recounting influence of *The Turner Diaries* on McVeigh, which told the story of a “gun enthusiast who reacts to tighter firearms laws by making a truck bomb and destroying the FBI headquarters building in Washington” and which “suggests that blacks and Jews are inherently evil, and advocates killing them”); *id.* at 226–28 (recounting that McVeigh chose April 19 as the date of the Oklahoma City bombing because it was the 220th anniversary of the Battle at Lexington and Concord that began the American Revolution and because it was the second anniversary of the Waco raid, and that McVeigh prepared for his capture by taking with him to the bombing a collection of documents including a pamphlet on the militia movements of 1775, a copy of the Declaration of Independence, and a quote from the protagonist of *The Turner Diaries*). For an account of the NRA's involvement with the militias before and after Oklahoma City, see Siegel, *supra* note 3, at 230–31.

82. *Heller*, 128 S. Ct. at 2815 n.24 (emphasis omitted). In *United States v. Miller*, 307 U.S. 174 (1939), the Supreme Court rejected a challenge to the National Firearms Act, holding that “[i]n the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia . . . the Second Amendment [does not] guarantee[] the right to keep and bear such an instrument.” *Id.* at 178 (no citation provided for internal quotation).

suggests, the memory of the founding era plays a central role in the ways Americans understand gun rights. And as *Heller* so richly demonstrates, the struggle for authority to establish the meaning of a shared past structures conflicts over gun rights today.

Even our brief encounter with *Heller* suggests several ways in which the past exerts authority that do not conform to the positivist lawmaking model common in originalism debates. Claims about the past express contemporary identities, relationships, and concerns, and express deep normative convictions. As we have seen, some in the modern gun rights movement understand gun rights in classically republican terms, and have organized as militia to express estrangement from the state.<sup>83</sup> *Heller* self-consciously disassociates the gun rights claim it recognizes from this anti-statist ethic when it holds that the Second Amendment “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home,”<sup>84</sup> and excludes military-style weapons from the Second Amendment’s protection. The Second Amendment that the majority recognizes is a law and order Second Amendment which honors and elevates the “law abiding citizen”<sup>85</sup> over the criminal. This understanding of the Second Amendment also reflects urgent contemporary concerns. The movement seeking constitutional recognition of the right of self defense grew in response to twentieth-century developments, including the growth of the welfare state, the growth of crime, and the growth of a civil rights regime from which many Americans felt estranged.<sup>86</sup>

When Charleton Heston assumed leadership of the NRA in the wake of the Oklahoma City bombing, he worked to guide the gun rights movement

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83. See *supra* note 81 and accompanying text. For an in-depth analysis of the militia movement’s claims on the Second Amendment, see DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* 191–219 (2003); see also LANE CROTHERS, *RAGE ON THE RIGHT: THE AMERICAN MILITIA MOVEMENT FROM RUBY RIDGE TO HOMELAND SECURITY* 25–31 (2003).

84. *Heller*, 128 S. Ct. at 2821.

85. See *supra* text accompanying note 84; *infra* text accompanying note 90.

86. See Siegel, *supra* note 3; *id.* at 240–41 (footnotes omitted):

The mobilization of living Americans around the text and history of the Second Amendment did more than tutor popular and professional intuitions about the amendment’s core and peripheral purposes; it imbued the amendment with compelling contemporary social meaning by connecting the right to bear arms to some of the most divisive questions of late twentieth-century constitutional politics. These debates made arguments for Second Amendment rights intelligible as arguments about guns, and much more. Commonly, advocates asserted Second Amendment rights in a language of law and order that associated restoration of the constitutional order with restoration of the traditional social order.

away from the militia movement<sup>87</sup> and paramilitary<sup>88</sup> activity, and emphasized that the quest for recognition of Second Amendment rights was instead a “cultural war.”<sup>89</sup> He appealed to the founders to bolster the identity of twentieth-century Americans who might feel ignored or threatened by contemporary constitutional politics:

Our founders refused to ratify a constitution that didn't protect individual liberties. Maybe they're just a bunch of wise, old, dead, white guys, but they meant what they said. The Second Amendment isn't about the National Guard or the police or any other government entity. It is about law-abiding, private U.S. citizens, period. You are of that same bloodline. You are sons and daughters of the Boston tea-spillers.<sup>90</sup>

As Heston explained to an audience assembled at the conservative Free Congress Foundation in 1997:

Rank-and-file Americans wake up every morning, increasingly bewildered and confused at why their views make them lesser citizens. . . . Heaven help the God-fearing, law-abiding, Caucasian, middle class, Protestant, or—even worse—Evangelical Christian, Midwest, or Southern, or—even worse—rural, apparently straight, or—even worse—admittedly heterosexual, gun-owning or—even worse—NRA-card-carrying, average working stiff, or—even worse—male working stiff, because not only don't you count, you're a downright obstacle to social progress. . . . That's why you don't raise your hand. That's how cultural war works. And you are losing.<sup>91</sup>

Heston's speeches for the NRA illustrate how memories of the past can anchor expressions of collective identity, and so articulate deep social division. Claims on the founding not only express contemporary concerns; they express contemporary conflicts. After all, only five justices hold that the Second Amendment “elevates above all other interests the right of law-abiding,

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87. *Id.* at 231–32 (“With Heston’s takeover, the NRA began visibly to cultivate a new, more family-friendly public image. . . . Heston gave the law-and-order Second Amendment a constitutional pedigree, emphasizing that the Second Amendment guaranteed Americans the ability to defend themselves against threats to liberty ‘whether it be King George’s Redcoats or today’s criminal predators,’ and spoke of gun ownership as a family ‘tradition’ that parents had a duty to teach their children.”) (footnotes omitted).

88. *See id.* at 232 (“In this period, some prominently positioned interpreters of the Second Amendment emphasized the forms of gun control the Constitution allowed, while others excluded from the amendment’s protection paramilitary activity.”).

89. *See infra* text accompanying note 91.

90. Siegel, *supra* note 3, at 232.

91. *Id.* at 233.

responsible citizens to use arms in defense of hearth and home.”<sup>92</sup> Four justices dispute this claim at length. The meaning of the historical record becomes a focal point for contemporary normative struggle. And as all contemporary observers of the Court understand, the alignment of the justices in this interpretive dispute is not accidental.

The day after *Heller* was decided, Dave Kopel, a policy analyst for the Cato Institute and one of three lawyers who assisted Alan Gura at oral argument, declared:

The 5–4 margin shows that Supreme Court appointments and Senate confirmations really do matter. Had a President Mondale, Dukakis, Gore, or Kerry been appointing Justices, the result today would have been different, and the Second Amendment would have been nullified.

....

A second influence of the conservative and libertarian movements could be seen in the dissent authored by Justice Stevens. . . . Both Scalia and Stevens delve very deeply into 18th and 19th century sources on the meaning of words, and the original public understanding of the Second Amendment. At least in terms of the Second Amendment, we are all originalists now.<sup>93</sup>

As Kopel emphasizes, in *Heller* majority and dissent join in struggle over the historical record. They agree about what counts as relevant authority, but then passionately dispute its meaning and contemporary implications. Kopel counts it as a success of the conservative movement that the dissenters express their claims about the Second Amendment through the history of its eighteenth-century ratification.<sup>94</sup>

If Kopel is correct, then it is an index of the continuing strength of progressive constitutional movements that only a year earlier, the same block of the Court expressed its views about the constitutionality of race-conscious admissions as a claim about the history and meaning of *Brown v. Board of Education*.<sup>95</sup> In *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>96</sup> conservative and liberal justices fought over the *post*-ratification history of the Fourteenth Amendment; *neither* side bothered to argue about the ratification history of the Fourteenth Amendment. Chief Justice Roberts succinctly described the conflict in the case: “The parties and their amici

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92. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008).

93. Dave Kopel, *Conservative Activists Key to DC Handgun Decision*, HUMAN EVENTS, June 27, 2008, <http://www.humanevents.com/article.php?id=27229>.

94. *Id.*

95. 347 U.S. 483 (1954).

96. 127 S. Ct. 2738 (2007).



debate which side is more faithful to the heritage of *Brown*.<sup>97</sup> Roberts quoted Robert Carter's argument for the plaintiffs in *Brown*, while Justice Thomas spent much of his concurring opinion arguing that the dissenters, who "[d]isfavor[ed] a color-blind interpretation of the Constitution . . . would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in *Brown v. Board*"—with Justice Thomas urging that "[t]his approach is just as wrong today as it was a half-century ago."<sup>98</sup> Despite his avowed originalism, Justice Thomas derived his account of the Fourteenth Amendment's meaning from litigation of the mid-twentieth century, not the Amendment's mid-nineteenth-century ratification. Recall Kopel's careful qualification: "At least in terms of the Second Amendment, we are all originalists now."<sup>99</sup>

There are striking similarities in the ways that historical evidence exerts authority in *Parents Involved* and *Heller*. In each case, argument over past constitutional lawmaking supplies a locus for contemporary normative dispute. Leaders of the past are powerful icons of reverence, pride, and shame; the conflicts in which they engaged culminate in symbolic moments of reconciliation to which Americans today appeal. Americans socialized into the constitutional order acquire this collective memory, wherever they were born. Literate members of the constitutional order share allegiance to these collective memories and know how to speak through them, paradoxically, by disagreeing about their contemporary normative implications. Collective memory of these kinds provides resources for Americans of very different normative views to make authoritative claims about who we are and what we owe one another. Collective memory thus constitutes community and then supplies a language for its members to argue with one another about the community's grounds and aims, enabling it to evolve in history.

Looking back at *Heller* from the standpoint of *Parents Involved*, we can see that history matters in constitutional dispute, but often not in the ways presupposed by originalism in its positivist forms or by originalism's dead hand critics. The positivist, lawmaking model imagines constitutional lawmaking of the past as exerting controlling authority over the present. First-generation originalist theory offered no persuasive account of why or how the dead hand of the past should be endowed with this kind of authority, and second-generation originalists are still revising the model to supply a better answer to this question. But our examination of *Heller* suggests that

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97. *Id.* at 2767.

98. *Id.* at 2768.

99. Kopel, *supra* note 93.

originalism in practice does not conform to the positive law model that first-generation originalists employed to describe and justify their method. If *Heller* exemplifies original public meaning originalism, it is by demonstrating how the dead hand of the past can vindicate a living constitution, supplying resources through which a community expresses its identity and debates how it is to live together.<sup>100</sup>

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100. See Reva B. Siegel, *Text in Contest, Gender and the Constitution From a Social Movement Perspective*, 150 U. PENN. L. REV. 297, 343 (2001):

Considered from the standpoint of constitutional culture, then, history matters, but not for the reasons constitutional theory most commonly identifies: as a source of law or compulsion. However much we venerate the Founders, we do not live under the Constitution as a regime of paternal authority, as the law of the father. Rather, we live under the Constitution as “our” Constitution, as a framework in which we make decisions through which we are constituted and for which we are responsible, as a people. On the latter account, the past exerts force, not as it binds our choices but as it informs our choices—as it guides them and gives them meaning. We look to the past as we make pragmatic judgments about how to vindicate constitutional values in the present. And we look to the past as we struggle to define ourselves as a nation acting in history, united imaginatively and ethically across generations as well as communities.