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HELLER HIGH WATER? THE FUTURE OF ORIGINALISM

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Heller High Water? The Future of Originalism

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Abstract

This Article considers the future of originalism in the wake of the Supreme Court's 2008 decision in District of Columbia v. Heller. It argues that, although Heller is in many ways a triumph for proponents of originalism, it might also represent a high water mark for the doctrine and for the political movement that supports it. There is little reason to believe that the cases of relative first impression that originalism feeds on will be readily available in the near future, and the politics of the Court and of the country do not augur the appointment of additional originalist judges. These observations recommend that progressive advocates focus on availing themselves of the nation's ethical shift to themes of change and mutual responsibility, so as to emphasize the Constitution's dynamic future rather than its static past.

INTRODUCTION

Has originalism won? It's easy to think so, judging from some of the reaction to the Supreme Court's decision last Term in *District of Columbia v. Heller*.¹ The *Heller* Court held that the District of Columbia could neither ban possession of handguns nor require that all other firearms be either unloaded and disassembled or guarded by a trigger lock. In finding for the first time in the Court's history that a gun control law violated the Second Amendment, Justice Scalia's opinion for the 5-4 majority appeared to be a sterling exemplar of originalism, the method of constitutional interpretation that he has helped to popularize. More surprising to most observers, the dissenting opinion of Justice Stevens also seemed to be in the originalist tradition.² Hence the claim advanced by some in the decision's wake that "we are all originalists now."³

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¹ 128 S. Ct. 2783 (2008).

² *Id.* at 2822 (Stevens, J., dissenting).

³ See, e.g., Seth Barrett Tillman & Steven G. Calabresi, Debate, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility*

If that claim is true, it is profoundly important to the future of constitutional law. Originalists believe that judges generally should prioritize the original understanding of constitutional provisions over contemporary understandings that avail themselves of social and intellectual progress. Since this is not how constitutional law has been made for much of our history, a serious commitment by the Supreme Court to originalism would destabilize some of our most familiar and cherished political traditions. If the claim is not true, then constitutional lawyers, particularly progressives, must take care to separate the rhetoric of originalists from the impact of originalism on actual constitutional cases.

This Essay argues that the claim is not true and then some. Not only are we not *all* originalists now, but very few of us are originalists *now*. Of course, a handful of judges and many legal academics (more than ever, perhaps) maintain a theoretical devotion to some version of originalism. But in practice, originalism is most useful in two categories of cases. The first category comprises cases of constitutional first impression. But now that *Heller* has laid the foundations of Second Amendment doctrine, this category describes a virtual null set. The second category includes those issues that the political movement behind the recent originalist revival has tagged as vulnerable to attack on originalist grounds: abortion, religious establishment, limitations on capital punishment, and so forth. The problem here is that the doctrinal cobwebs surrounding these issues are too thick for originalism's blade. So long as the only originalists of influence feel constrained by *stare decisis*, originalism will remain more rallying cry than decision procedure.

Blurring these distinctions has been vital to the strategy that has made originalism relevant to our constitutional politics. Recognizing them will likewise be vital to progressives' efforts to commandeer those politics in favor of their own constitutional ends. This Essay describes the past and present of originalism in order to glimpse its future. Part I defines originalism and discusses its history in

Clause, 157 U. PA. L. REV. PENUMBRA 134, 135 (2008), available at <http://www.pennumbra.com/debates/debate.php?did=19> pdfs/GreatDivorce.pdf; Dave Kopel, *Conservative Activists Key to D.C. Handgun Decision*, HUMAN EVENTS, June 27, 2008, <http://www.humanevents.com/article.php?id=27229>; *Heller* on a First Read, Posting of Dale Carpenter to the Volokh Conspiracy, <http://volokh.com/posts/1214514180.shtml> (June 26, 2008, 17:03 EST); see also Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. (forthcoming 2009) (manuscript at 7, on file with the Harvard Law School Library) (citing Linda Greenhouse's reference to *Heller* as a "triumph of originalism"); Dahlia Lithwick, *The Dark Matter of Our Cherished Document: What You See in the Constitution Isn't What You Get*, SLATE, Nov. 17, 2008, <http://www.slate.com/id/2204377/> ("The liberals and conservatives [in *Heller*] took turns trying to outdo one another as 'textualists' and 'originalists' and 'strict constructionists.'").

case law and political rhetoric. That history exposes originalism as an otherwise plausible interpretive methodology that has been radicalized and weaponized by conservative activists over the last three decades. Part II discusses the Court's opinion in *Heller* and explains why originalism will not likely be relevant to the doctrinal exposition of the Second Amendment going forward. *Heller* reveals both the potency and the weaknesses of originalism. The opinion could not have been written thirty years ago, but it is difficult to conceive of an analogously originalist opinion being written anytime soon. Part III elaborates several reasons why. Originalist judges—particularly those who feel relatively unconstrained by precedent—are unlikely appointees to the Supreme Court for the foreseeable future. Moreover, the sorts of legal issues that the Court's agenda will likely comprise are poor candidates for originalist appeals. In short, even if *Heller* is a triumph for originalism, it might also be its high water mark. Part III concludes, then, with a prescription for progressive lawyers to reemphasize the Constitution's dynamic potential and to let originalism fade, for the moment, into history.

I. THE HISTORY OF ORIGINALISM

The historian of originalism must proceed with an ironic caution. Originalism means different things to different people and in different times. Deciphering what one means by “originalism” first requires deciding whether it refers to the views of politicians or constitutional lawyers, to academic theory or judicial practice, to the 1980s or the present decade, and to law or linguistics. Each combination of points along those spectra describes a different idea with a distinct intellectual history. The irony within the caution becomes apparent when one considers the little common ground among most originalists: that the meaning of the Constitution is fixed at a historical moment in time and is available to interpreters. Nevertheless, if we marry that view to the corollary that judges in constitutional cases should make their best efforts to discern and apply that fixed meaning, we have a working definition nearly adequate to the present task.⁴

An originalist opinion is not merely one in which the outcome of the case is consistent with the original understanding. By that definition, virtually all judges and many—if not most—opinions would qualify: emphasis on consistency with historical understandings is a relevant and persuasive form of American

⁴ The many efforts to construct a definitive taxonomy of originalism have been heroic and, inevitably, contradictory. See, e.g., Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1086–1087 (1989); Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 8–37 (2009); Lawrence B. Solum, *Semantic Originalism* 2–12 (Illinois Pub. Law & Legal Theory Research Papers Series, Paper No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244>.

constitutional argument.⁵ Rather, an originalist opinion is one whose result is compelling solely or primarily because of that consistency. And an originalist judge is one who is committed to originalist opinions, who believes that such opinions would predominate in the best of worlds.

An additional distinction is necessary to make the historical inquiry intelligible. Most academic lawyers draw a sharp line between original public meaning and original subjective intent. The Framers of the Constitution had various expectations as to the meaning and scope of particular constitutional provisions; those expectations might not only have differed internally—between Alexander Hamilton and Charles Pinckney, say—but might have diverged from how the Constitution’s *audience* would have reasonably understood those provisions. Most academic originalists insist that the latter, the original public meaning of the Constitution, is the relevant object of interpretation because the Constitution became legally binding through the actions of its ratifiers, not its framers.⁶

There is little evidence that even well-educated and legally trained members of the public appreciate the distinction between original meaning and original intent,⁷ but it is difficult to assess the status of originalism at the nation’s founding without confronting this difference. The members of the founding generation were not original-intent originalists, as that category is now understood. As H. Jefferson Powell detailed in his classic treatment, Revolutionary views on constitutional interpretation arose from a competing set of norms—an anti-interpretation bias derived from British Protestantism and the Enlightenment, and the evolutionary norms of a common law approach to statutory interpretation.⁸ Neither of those traditions looked favorably upon vesting the subjective intentions of statutory drafters with legal authority. To be sure, one frequently finds reference to the “intention of the law giver” and similar formulations in eighteenth and nineteenth century British and American judicial opinions and treatises. But

⁵ See PHILIP BOBBITT, *CONSTITUTIONAL FATE* 9–24 (1982); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1198–99 (1987).

⁶ See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143–44 (1990); Cass R. Sunstein, *Second-Order Perfectionism*, 75 FORDHAM L. REV. 2867, 2871 (2007).

⁷ See Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 687–88 (2009) (describing the public reaction to *Heller*, much of which conflated original intent and original meaning).

⁸ See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888–902 (1985).

that intention was generally considered intrinsic to the text itself; it was not to be gleaned from extrinsic sources such as legislative debate or drafting notes.⁹

By contrast, the intellectual presuppositions of the Revolutionary generation fit quite comfortably with the notion that the original *meaning* of the enacted text should be dispositive. The Framers were what one might call dated textualists; they intended the express meaning of the Constitution's words to hold sway for later interpreters, regardless of social change.¹⁰

That the founding generation shared this interpretive premise with many modern originalists does not in itself link the present originalism movement to ancient hermeneutic tradition. Many of the great contemporary debates between originalists and their opponents do not reflect differences over original meaning so much as differences over present-day application. As Ronald Dworkin observed in his well known colloquy with Justice Scalia, many of the Constitution's trouble spots, such as "cruel and unusual punishment" and "due process of law," refer to principles that the founding generation—drafters and audience alike—would have considered compatible with dynamic application.¹¹ There is little evidence, for example, that a late eighteenth century reasonable person would have understood "liberty" as incapable *in principle* of encompassing a right to have an abortion.¹²

Nonetheless, we should hesitate before ascribing to founding-era Americans a Dworkinian view of the the level of generality at which future interpreters should understand constitutional text. Those Americans would not have contemplated—nor can they be presumed to have consented to—an evolving Constitution that safeguards an ever expanding set of individual rights against the government. The disputes over individual rights that form Dworkin's paradigm cases were largely foreign to the docket of the early Court. Most of the Bill of Rights was inapplicable to the states until well into the twentieth century and, as Mark Graber writes, the federal law docket of the antebellum Supreme Court was largely restricted to "politically uncontroversial land cases, technical questions of

⁹ PHILIP A. HAMBURGER, *LAW AND JUDICIAL DUTY* 298–301 (2008); Powell, *supra* note 8, at 894–96. *But see* JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 400 (Carolina Acad. Press 1987) (1833).

¹⁰ *See* Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 325 (1989). I borrow the "dated" formulation from Ronald Dworkin, who calls Justice Scalia's brand of originalism by the same name. *See* Ronald Dworkin, *Comment*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 115, 121 (Amy Gutmann ed., 1997).

¹¹ *See* Dworkin, *supra* note 10, at 119–23.

¹² *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 311–12 (2007). I leave aside the question of whether the relevant audience belongs to the original founding generation or the Reconstruction era.

federal jurisdiction, and other issues of similar political insignificance.”¹³ In that context, John Marshall’s famous dictum that the Constitution is “intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs”¹⁴ is best understood as counseling judicial restraint, not judicially engineered constitutional adaptation.

Indeed, Marshall’s statements in other cases seem sympathetic with modern originalist premises. In declaring section 13 of the Judiciary Act of 1789 unconstitutional in *Marbury v. Madison*, Marshall wrote, “The constitution is either a superior, paramount law, *unchangeable by ordinary means*, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.”¹⁵ Later, dissenting in *Ogden v. Saunders*, Marshall defended his view that the Contracts Clause should apply to prospective as well as retrospective legislation:

To say that the intention of the [Constitution] must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers;—is to repeat what has been already said more at large, and is all that can be necessary.¹⁶

Justice Scalia could hardly have said it better himself. Similar expressions of the view that the Constitution should be understood in contemporary times as it was understood at the founding can be found in numerous other nineteenth century cases.¹⁷ It is for this reason that many originalists, including Scalia and Robert Bork, have concluded that as originalists they are engaged in a project of constitutional restoration rather than a radical departure from settled practice.¹⁸

To whatever extent a version of originalism was the settled practice in the nineteenth century, it began to be unsettled around the turn of the twentieth

¹³ Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73, 116 (2000).

¹⁴ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

¹⁵ 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

¹⁶ 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J., dissenting).

¹⁷ See, e.g., *Pollock v. Farmers Loan & Trust Co.*, 157 U.S. 429, 558 (1895); *Ex Parte Bain*, 121 U.S. 1, 12 (1887); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 426 (1857); see also *South Carolina v. United States*, 199 U.S. 437, 448–49 (1905) (“The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now.”).

¹⁸ See BORK, *supra* note 6, at 143; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852–54 (1989).

century. Progressive era academics such as Abbott Lawrence Lowell and, later, Woodrow Wilson analogized government to an organism, rejecting the Newtonian notion of government as a machine.¹⁹ Language comparing the Constitution to a living creature peppers the judicial opinions of Justices Holmes and Brandeis and the writings of Benjamin Cardozo.²⁰ Those judges, along with Harlan Fiske Stone, formed the intellectual core of the New Deal Court that eventually freed states to pursue labor regulations and permitted President Roosevelt and his Democratic Congresses to revolutionize the administrative state. The most prominent originalist opinions of the 1930s—Justice Sutherland’s writings in *Home Building & Loan Association v. Blaisdell*²¹ and *West Coast Hotel v. Parrish*²²—were in dissent.

Originalism remained firmly on the margins of constitutional law for the next four decades. With the notable exception of Hugo Black, no justice of the Supreme Court and few prominent legal academics were self-avowed originalists for most of that period. That is not to say that there were no Supreme Court majority opinions that relied on the authority of original intent, nor is it to say that members of the bench and bar considered the original understanding of constitutional provisions irrelevant to the interpretive exercise. There would otherwise have been no need for the Court to request additional briefing on the original understanding of the Equal Protection Clause after the first argument in *Brown v. Board of Education*.²³ But in conspicuously disregarding evidence that the Congress that drafted the Fourteenth Amendment did not anticipate it being read to mandate school desegregation,²⁴ the *Brown* Court foreshadowed an era in which a contrary original understanding proved no significant obstacle to results that the Justices believed fundamental justice required.

The Warren Court had its critics, of course, prominently including Felix Frankfurter disciples such as Alexander Bickel and Philip Kurland,²⁵ but attacks

¹⁹ See A. LAWRENCE LOWELL, *ESSAYS ON GOVERNMENT* 1–4 (1889); WOODROW WILSON, *THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE* 46–48 (1913); see also MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 19–20 (1986).

²⁰ See, e.g., *Gompers v. United States*, 233 U.S. 604, 610 (1914) (Holmes, J.); *Olmstead v. United States*, 277 U.S. 438, 472–73 (1928) (Brandeis, J., dissenting); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 17 (photo. reprint 1998) (1921).

²¹ 290 U.S. 398 (1934) (upholding a moratorium on mortgage foreclosures against a Contracts Clause challenge).

²² 300 U.S. 379 (1937) (upholding a state minimum wage statute and overruling *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923)).

²³ See *Brown v. Bd. of Educ.*, 345 U.S. 972, 972–73 (1953).

²⁴ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954).

²⁵ See ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 45–47 (Yale Univ. Press 1978) (1970); PHILIP KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT*, at xx–xxii (1970).

on its work did not typically take originalist form prior to the publication of Raoul Berger's *Government by Judiciary* in 1976. Richard Nixon campaigned in 1968 on the promise of appointing "strict constructionists" to the Court,²⁶ but by that term he meant only that he sought "men that interpret the law and don't try to make the law."²⁷ So defined, "strict constructionism" begs the question and is therefore useless jurisprudentially. Originalism was far more promising. Although Berger described himself as a liberal, his book's sharp, hyperbolic critiques of the Warren Court for diverging from the original intentions of the framers of the Fourteenth Amendment dramatically reinvigorated the academic debate over originalism.

Armed with a coherent judicial philosophy and abetted by the election of Ronald Reagan to the presidency in 1980, the originalism-promoting Federalist Society was formed in 1982 and the conservative Center for Judicial Studies opened the following year. The Center published an influential bimonthly journal called *Benchmark*, which would "subscribe[] to the maxim that Rule of Law demands adherence to the original intent of the Constitution."²⁸ On the left, scholars such as Powell, John Hart Ely, and Paul Brest attacked originalism as simplistic, prone to anachronistic thinking, inconsistent with the text and history of the document itself, and dangerously sanguine about the capacity of judges to do the work of historians.²⁹

The debate reached a thunderous crescendo in 1987 over then-Circuit Judge Robert Bork's failed Supreme Court nomination. At the start of Reagan's second term, Edwin Meese III had taken over as Attorney General. Almost immediately, in a series of speeches, Meese announced that the Justice Department would devote itself to "a jurisprudence of original intention."³⁰ Consistent with that program, Bork refused during his confirmation hearings to back down from his views that not only *Roe v. Wade*,³¹ but also *Griswold v. Connecticut*³² and *Bolling v. Sharpe*³³ (among other staples) were incorrectly

²⁶ See THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* 111–13 (2004).

²⁷ *Id.* at 112.

²⁸ James McClellan, *Editor's Brief*, *BENCHMARK: A BIMONTHLY REPORT ON THE CONSTITUTION*, Fall 1983, at 1.

²⁹ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 11–41 (1980); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. REV.* 204, 229–34 (1980); Powell, *supra* note 8, at 885–88.

³⁰ Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 *S. TEX. L. REV.* 455, 465 (1986) (emphasis omitted).

³¹ 410 U.S. 113 (1973).

³² 318 U.S. 479 (1965).

³³ 347 U.S. 497 (1954).

decided or reasoned.³⁴ Notice that by this point in our story the originalists' cause had become unmoored from that of the prudentialists—those who, like Bickel and Kurland, opposed the Warren Court for proceeding too dramatically, too haphazardly, and without sufficient attention to settled expectations or public support.³⁵ By 1987, originalists had little affection for *stare decisis*. And there was sense in this. The Warren Court had altered the status quo of constitutional law; as cases like *Griswold*, *Reynolds v. Sims*,³⁶ and *Miranda v. Arizona*³⁷ developed cultural resonance and social reliance, the argument from continuity, once so powerful, became less available to the originalism movement that those cases spawned.

Relatively overlooked during the dust-up over the Bork nomination (and the controversial elevation of William Rehnquist to Chief Justice the year prior) was the 1986 nomination and appointment of Justice Scalia to the Court. Perhaps no one bears greater responsibility for the current prominence of originalism in case law and political and legal discourse than Scalia. It is frequently remarked that Scalia has suffered from the sharpness of his dissenting pen, which has been blamed for his inability to build coalitions among his colleagues and in particular for his alienation from Justice O'Connor.³⁸ But that very sharpness has conspired with Scalia's equally witty academic writings, his frequent lectures, his feistiness during oral argument, his affable personality off the bench, and the prominence of his pulpit to create a cult of personality around him.³⁹ Rush Limbaugh has called Scalia the person "whose brain I would like if I didn't have mine."⁴⁰ Charles Krauthammer has written, "Some people have John Grisham. Others Tom Clancy. Not me. For sheer power, stiletto prose and verbal savagery, I'll take Antonin Scalia."⁴¹ In 2004, former Republican lobbyist Kevin Ring published a sycophantic compilation of Scalia's most memorable dissents entitled *Scalia Dissents: Writings of the Supreme Court's Wittiest, Most Outspoken Justice*;⁴² the

³⁴ See *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 115, 184–85, 286–87 (1987).

³⁵ Indeed, Kurland surprised many in opposing Bork's nomination to the Court.

³⁶ 377 U.S. 533 (1964).

³⁷ 384 U.S. 436 (1966).

³⁸ See JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 199–200* (2007); JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 55–56, 191–92, 317–18 (2007).

³⁹ See Greene, *supra* note 7, at 710.

⁴⁰ Rush Limbaugh, *Limbaugh Fundamentals: What is Originalism?*, THE LIMBAUGH LETTER (Dec. 2005), <http://www.rushlimbaugh.com/home/menu/limfunoriginalism.guest.html>.

⁴¹ Charles Krauthammer, *Supreme Hypocrisy*, WASH. POST, Jun. 30, 2000, at A31.

⁴² KEVIN RING, *SCALIA DISSENTS: WRITINGS OF THE SUPREME COURT'S WITTIEST, MOST OUTSPOKEN JUSTICE* (2004). The inside cover reads: "Brilliant. Colorful. Visionary. Tenacious."

book was well received in conservative circles.⁴³ George W. Bush called Scalia (along with Clarence Thomas) one of the two justices he most admired. Even Democratic Senate Majority Leader Harry Reid has said that Justice Scalia would be an acceptable Chief Justice because “I disagree with many of the results that he arrives at, but his reason[s] for arriving at those results are very hard to dispute.”⁴⁴

Scalia has been originalism’s social entrepreneur *par excellence*, and his mark can be seen not just in politics and conservative popular culture but in the legal academy and, most recently, in actual Court opinions. Justice Scalia’s relatively early emphasis on original meaning rather than original intent provided, for some, a decisive rebuttal to the criticisms of Brest and Powell, and it has helped to drive the latter formulation to the fringes of the legal academy.⁴⁵ And although Scalia’s originalist appeals were usually in dissent during his early years on the Court,⁴⁶ the majority has used originalist arguments to overrule longstanding precedents or to alter settled understandings several times in recent years.

For example, Justice Scalia wrote for the 5–4 majority in *Printz v. United States* that, based in part on the original assumptions of the founding era, the federal government could not direct state executive officers to enforce federal law without the state’s consent.⁴⁷ More broadly, *Printz* seemed to depart from the post-New Deal consensus that the Tenth Amendment was not an independent obstacle to actions otherwise within the power of Congress.⁴⁸ Likewise, in *Alden v. Maine*, the Court held that the history and structure of the Constitution—“confirmed” by the Tenth Amendment—prevented the federal government from subjecting non-consenting states to private damages suits in their own courts for violations of federal law.⁴⁹ In *Apprendi v. New Jersey*, the Court fatally undermined its 1990 decision in *Walton v. Arizona* and revolutionized sentencing law with an originalist holding that any fact that increased a defendant’s sentence

Witty. Since his appointment to the Supreme Court in 1986, Associate Justice Antonin Scalia has been described as all of these things and for good reason.” *Id.* at inside cover.

⁴³ See, e.g., NRO Symposium, *Bring a Book to the Beach*, NAT’L REV. ONLINE, July 1, 2005, <http://search.nationalreview.com/> (enter “bring a book to the beach” in Search Terms and click on Search; follow “Bring a Book to the Beach” hyperlink).

⁴⁴ *Meet the Press* (NBC television broadcast Dec. 5, 2004), available at <http://www.msnbc.msn.com/id/6646457/>.

⁴⁵ See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620–21 (1999).

⁴⁶ See, e.g., *McIntyre v. Ohio Elec. Comm’n*, 514 U.S. 334, 371 (1995) (Scalia, J., dissenting); *Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting); *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

⁴⁷ See 521 U.S. 898, 905–10 (1997).

⁴⁸ See *id.* at 942–43 (Stevens, J., dissenting); *United States v. Darby*, 312 U.S. 100, 123–24 (1941).

⁴⁹ 527 U.S. 706, 713–15 (1999).

beyond the statutory maximum for his underlying offense had to be submitted to a jury and proven beyond a reasonable doubt.⁵⁰ More recently, in *Crawford v. Washington*, Justice Scalia wrote an opinion holding, based on the original meaning of the Confrontation Clause, that testimonial hearsay was inadmissible in criminal trials where defendants are not granted the right to confrontation and cross-examination.⁵¹ *Crawford* overruled the Court's decision in *Ohio v. Roberts*.⁵²

Finally, of course, there is *Heller*. Justice Scalia's brazenly originalist opinion in that case owes a debt not just to Marshall (as Scalia might have it) but to Meese. It could not have been written thirty years earlier; doctrinaire originalism was not then a politically acceptable judicial philosophy. The next Part discusses the uses of originalism in Second Amendment doctrine. It demonstrates that, although *Heller* itself is pointedly originalist, the future of the Second Amendment in constitutional law will likely be firmly doctrinal.

II. EVOLVING STANDARDS OF SELF-DEFENSE

Heller was a test case engineered by lawyers at the libertarian Cato Institute and the Institute for Justice in the wake of dramatic shifts in elite opinion in favor of an individual rights view of the Second Amendment.⁵³ Dick Heller is a libertarian activist and a security guard at the Federal Judicial Center, which sits less than a half mile away from the Supreme Court building and serves in part as an annex for the Supreme Court's library. From 1976 until *Heller* was decided, Washington, D.C. had among the strictest gun control laws in the country, essentially prohibiting possession of handguns, requiring that all other guns be either unloaded and disassembled or bound by a trigger lock, and preventing Dick Heller from registering a gun for use in his D.C. home.⁵⁴

Prior to *Heller*, the Court's Second Amendment precedents were few and far between but were generally unfavorable to the claim that the Amendment protects the right of an individual unaffiliated with an organized militia to carry a gun for self-defense. The Court held in *Presser v. Illinois* that the State of Illinois could forbid unofficial militias without offense to the Second Amendment, although the Court's statements as to the scope of the Amendment were

⁵⁰ 530 U.S. 466, 482–84 (2000). *Walton*, 497 U.S. 639 (1990), was later overruled on the authority of *Apprendi*. See *Ring v. Arizona*, 536 U.S. 584, 603 (2003).

⁵¹ 541 U.S. 36, 53–54 (2004).

⁵² 448 U.S. 56 (1980).

⁵³ See Brian Doherty, *How the Second Amendment was Restored*, REASON, Dec. 2008, at 52; Reva B. Siegel, The Supreme Court, 2007 Term—Comment: *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 226–236 (2008).

⁵⁴ See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008).

technically dicta.⁵⁵ More to the point, in the 1939 case of *United States v. Miller*, the Court unanimously affirmed the indictment of two men accused of carrying an unregistered sawed-off shotgun across state lines in violation of the National Firearms Act.⁵⁶ A whiff of sarcasm attends Justice McReynolds’s statement 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’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”⁵⁷ It wasn’t so much that sawed-off shotguns had no military use—of course they do—but that they were the preferred weapons of bank robbers, which the defendants Jack Miller and Frank Layton most assuredly were.⁵⁸ As the government’s brief stated, “sawed-off shotguns, sawed-off rifles, and machine guns[] clearly have no legitimate use in the hands of private individuals but, on the contrary, frequently constitute the arsenal of the gangster and the desperado.”⁵⁹

Miller is a sloppy mess of an opinion. It is best read to hold that, whatever the scope of the Second Amendment, it does not protect the right of career criminals to arm themselves with their weapons of choice. This is a delicate reed on which to build a jurisprudence, but until 2001 every Court of Appeals to consider whether the Second Amendment protected the right to bear arms held that the scope of the right is moored to militia service.⁶⁰ The Supreme Court itself said in dicta that the federal felon-in-possession statute does not “trench upon any constitutionally protected liberties,” and it cited to *Miller*, which the Court took to hold that “the Second Amendment guarantees no right to keep and bear a firearm that does not have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia.’”⁶¹ This all led Justice Stevens to state in his *Heller* dissent that “hundreds of judges have relied on the view of the [Second] Amendment we endorsed [in *Miller*],” and that the Court itself “affirmed it in 1980.”⁶²

At its purest, originalism is competitive with stare decisis, and, true to form, Justice Scalia dismissed the authority of the *Miller* line of cases with

⁵⁵ 116 U.S. 252, 264–65 (1886). The Court held, relying on *United States v. Cruikshank*, 92 U.S. 542 (1875), that the Second Amendment is a restriction on Congress, not the states. *Id.* at 265.

⁵⁶ 307 U.S. 174, 183 (1939).

⁵⁷ *Id.* at 178.

⁵⁸ See Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J.L. & LIBERTY 48, 48 (2008).

⁵⁹ Brief for the United States at 7, *United States v. Miller*, 307 U.S. 174 (1939) (No. 696).

⁶⁰ See *Heller*, 128 S. Ct. at 2823 n.2 (Stevens, J., dissenting) (collecting cases).

⁶¹ *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980).

⁶² *Heller*, 128 S. Ct. at 2823 (Stevens, J., dissenting).

startling alacrity. For our purposes, more significant than his particular reasons for rejecting *Miller* and its progeny is the relatively little weight he placed on those precedents and any reliance those cases might have generated. Justice Stevens discussed the weight of precedent on the second page of his opinion; Justice Scalia's discussion comes on the twenty-sixth page of his. Scalia devoted the preceding twenty-five pages to a thorough examination of the text and history of the Second Amendment in an effort to glean the original meaning of what he termed the "operative" clause—"the right of the people to keep and bear Arms, shall not be infringed."⁶³ So fastidious was Justice Scalia's devotion to the legal authority of the original *meaning* of this clause that he was unmoved by his own concession that the "prefatory" clause—"a well-regulated militia, being necessary to the security of a free state"—announces that the Amendment's original *purpose* was military related.⁶⁴ This preference for meaning over purpose is consistent with Justice Scalia's announced devotion to original meaning over original intent.⁶⁵

Justice Stevens's opinion was history-laden as well, leading some to declare that he, too, had taken the red pill of originalism.⁶⁶ As I have discussed in other work, that interpretation over-reads his historicism, which is directed not at original meaning but at original purpose. So understood, the approach is broadly consistent with Justice Stevens's prior judicial work.⁶⁷ But even if Justice Stevens was a temporary convert in *Heller*, there is little reason to expect a permanent transformation in future Second Amendment cases. Indeed, there is little reason to expect a majority of the Court, perhaps including Justice Scalia, to hold firm to originalism as Second Amendment doctrine evolves.

Consider first the rule announced in *Heller* itself. The Court did not endorse an unqualified right of individuals to carry guns. Rather, the Court stated without analysis that "nothing 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."⁶⁸ Moreover, Justice Scalia wrote, the category of weapons protected by the Second Amendment is limited to those "in common

⁶³ *See id.* at 2789–90 (majority opinion).

⁶⁴ *See id.* at 2801.

⁶⁵ Justice Scalia's stance on this score also loosely parallels his deference to text over legislative intent in the statutory context.

⁶⁶ *See* Greene, *supra* note 7, at 687.

⁶⁷ *See id.*

⁶⁸ *Heller*, 128 S. Ct. at 2816–17.

use.”⁶⁹ Handguns quintessentially qualify because they are “the most popular weapon chosen by Americans for self-defense in the home.”⁷⁰

Neither of the Court’s prescriptions with respect to two of the big debates that will follow the *Heller* decision—which restrictions and which weapons—rely on the original understanding of the Second Amendment. We can expect future courts faced with gun control statutes to reason by analogy, in the manner of the common law judge, from the Court’s *ipse dixit* endorsement of felon-in-possession statutes, bans on carrying in schools and government buildings, and commercial regulations. To the chagrin of many in the gun rights community, the dozens of lower court opinions rejecting *Heller*-based challenges to all manner of gun control laws, from concealed weapons bans to misdemeanor-in-possession laws, have reasoned largely by analogy to Justice Scalia’s list of permissible regulations.⁷¹ As Judge Copenhaver wrote in *United States v. Chafin*—which addressed the constitutionality of the federal ban on possessing a gun while using or addicted to controlled substances—“*Heller* sanctioned some well-rooted, public-safety-based exceptions to the Second Amendment right that appear consistent with Congress’ determination that those unlawfully using or addicted to controlled substances should not have firearms at the ready.”⁷² Indeed, the case arising from the changes made to D.C. laws post-*Heller*, filed by none other than Dick Heller, will likely be resolved through careful examination of the *Heller* opinion, not through historical inquiry.⁷³ It is, to coin a phrase, “the common law returned.”⁷⁴

The challenge to the D.C. machine gun ban also may test the second big debate likely to emerge from *Heller*: which weapons may be prohibited. Lower courts that have considered whether *Heller* permits machine gun bans have uniformly held that it does. Most prominently, the Eighth Circuit held, relying on *Heller*, that such weapons “fall within the category of dangerous and unusual weapons that the government can prohibit for individual use.”⁷⁵ This has always

⁶⁹ *Id.* at 2817.

⁷⁰ *Id.* at 2818.

⁷¹ See Adam Liptak, *Few Ripples from Supreme Court Ruling on Guns*, N.Y. TIMES, Mar. 16, 2009, at A14; Winkler, *supra* note 3, at 15–16.

⁷² *United States v. Chafin*, No. 2:08-00129, slip op. at 2 (S.D. W. Va. Nov. 18, 2008).

⁷³ See Amended Complaint, *Heller v. District of Columbia*, No. 1:08-cv-01289 (D. D.C. July 29, 2008). The changes made include a self-defense exception to the handgun ban, a prohibition on semi-automatic guns, and an exception to the trigger lock and safe storage law for a “reasonably perceived threat of immediate harm.”

⁷⁴ ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (1997).

⁷⁵ *United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008); see also *United States v. Gilbert*, No. 07-30153, 2008 U.S. App. LEXIS 15209, at *2 (9th Cir. July 15, 2008) (rejecting the defendant’s objection to a jury instruction stating that he had no Second Amendment right to possess a machine guns or a short-barreled rifle); *Hamblen v. United States*, No. 3:08-1034, 2008

been a tricky subject for many Second Amendment originalists. If the original purpose behind the Second Amendment was to ensure the effectiveness of the militia, keeping the Amendment fresh would seem to support a right to keep and bear hand grenades and anti-tank missiles, or at the very least an M16 assault rifle, which is standard issue in the United States military. That reading becomes even more compelling if one ridicules the argument—as Justice Scalia did—that only founding era weapons are protected by the Second Amendment.⁷⁶ If the scope of the Amendment is informed by neither its original purpose nor its original meaning, then originalism is doing precious little work in crafting a decision rule. Justice Scalia’s solution is to protect the right to keep and bear the modern day equivalent of the sorts of weapons used in eighteenth-century militias, namely those in common use.⁷⁷ That is to say, Justice Scalia, who is unwilling to adopt an evolving standards of decency test for the meaning of “cruel and unusual punishments” in the Eighth Amendment, is downright eager to adopt an evolving standards of self-defense test for the meaning of “arms” in the Second Amendment.

The other big question in the wake of *Heller*—whether the Second Amendment is incorporated against the states—will likely be answered in the affirmative, and sooner rather than later. The *Heller* majority broadcast that result loudly and clearly twice in its opinion. First, in discussing *United States v. Cruikshank*, which held that the Second Amendment does not apply to the states, the *Heller* Court added a gratuitous footnote noting that *Cruikshank* “also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases.”⁷⁸ Second, the *Heller* Court mounted its case in favor of an individual rights view by referring to the debates over the Fourteenth Amendment in which Senator Pomeroy described the right to bear arms for self-defense as an “indispensable . . . safeguard[] of liberty,”⁷⁹ and Senator Nye suggested that the right was implicit in United States citizenship.⁸⁰

As with the questions of “which restrictions” and “which weapons,” the incorporation question is not likely to be decided on originalist grounds. As the Court’s footnote on *Cruikshank* indicates, incorporation analysis follows a

U.S. Dist. LEXIS 98682, at *11 (M.D. Tenn. Dec. 5, 2008) (holding that the defendant had no Second Amendment right to possess a machine gun); *cf.* *United States v. Perkins*, No. 4:08 CR 3064, 2008 U.S. Dist. LEXIS 72892, at *1 (D. Neb. Sept. 12, 2008) (holding that the defendant had no Second Amendment right to possess a silencer).

⁷⁶ *See Heller*, 128 S. Ct. at 2791.

⁷⁷ *See id.* at 2817.

⁷⁸ *Id.* at 2813 n.23.

⁷⁹ *Id.* at 2811 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866)).

⁸⁰ *Id.* (citing CONG. GLOBE, 39th Cong., 1st Sess. 1073 (1866)). The *Heller* opinion mistakenly identifies Senator Nye as a House member.

doctrinal prescription. The standard formulation mandates selective incorporation of those Bill of Rights guarantees that the Court deems “fundamental.”⁸¹ This route to incorporation is more treacherous than an originalist one. The Court has conspicuously refused to decide whether the Fifth Amendment right to a grand jury or the Seventh Amendment right to a civil jury clears the bar of fundamentality,⁸² what is to prevent five Justices from holding that the Second Amendment is significant but not *that* significant? By contrast, the best evidence of the original understanding of the Fourteenth Amendment is that it incorporates not “fundamental rights” *per se* but rather the then-recognized privileges and immunities of citizenship.⁸³ There is ample evidence that the right to keep and bear arms qualified as of 1866.⁸⁴

It is natural, of course, that elaboration of a constitutional guarantee initially mined through originalism would proceed doctrinally. That pattern is evident in the sentencing revolution, whose major constitutional landmarks since *Apprendi—Blakely v. Washington*⁸⁵ and *United States v. Booker*⁸⁶—contained not a whit of historical analysis. The same is true of the Confrontation Clause cases. Although *Crawford* was thoroughly originalist, its progeny *Davis v. Washington* relied on “our own Confrontation Clause jurisprudence” to define “testimonial” statements.⁸⁷ More recently, the Court relied on original understanding to determine that a defendant does not forfeit his Confrontation Clause rights when his own wrongful acts cause the unavailability of the witness in question.⁸⁸ But there the Court was merely following its own instruction in *Crawford* to permit only those exceptions to the right of confrontation that were recognized at the founding.⁸⁹ We can expect an analogous but even less historically sensitive future for *Heller*’s posterity: careful, incremental analysis whose essential reference is not the founding but rather *Heller* itself.

III. ORIGINALISM’S FUTURE

⁸¹ See *Benton v. Maryland*, 395 U.S. 784, 794 (1969); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 139–40 (1998).

⁸² See AMAR, *supra* note 81, at 220.

⁸³ See *id.* at 163–80; ELY, *supra* note 29, at 22–30.

⁸⁴ See Michael K. Curtis, *The Politics of Judicial Interpretation: Courts, Department of Justice and Civil Rights, 1866- 1876*, 56 U. CIN. L. REV. 551, 553 (1987) (book review); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. REV. 1359, 1447–54.

⁸⁵ 542 U.S. 296 (2004).

⁸⁶ 543 U.S. 220 (2005).

⁸⁷ *Davis v. Washington*, 547 U.S. 813, 824 (2006).

⁸⁸ *Giles v. California*, 128 S. Ct. 2678, 2693 (2008).

⁸⁹ *Id.* at 2682 (citing *Crawford v. Washington*, 541 U.S. 36, 54 (2004)).

Part II demonstrated that, for all its originalist bells and whistles, *Heller* has a conventional future in store. It will not, in the way of *Lochner v. New York* or *Trop v. Dulles*, have a *methodological* progeny that fundamentally, or even subtly, alters the way we think about unearthing constitutional rights.⁹⁰ Rather, in the way of *Trop*, its future will be the evolutionary stuff of the common law, liable over time to slink away from the original understanding of the amendment it seeks to interpret. This Part will show that originalist decisions are practically bound to follow this pattern in case law, and that their other lifeline—politics—has practically dried up.

It would be deeply unsettling for originalism never to play nice with stare decisis. As the Court has said, “[N]o judicial system could do society’s work if it eyed each issue afresh in every case that raised it [T]he very concept of the rule of law underlying our Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”⁹¹ Justice Scalia dissented vociferously from the application of that sentiment to the case just quoted,⁹² but in his quieter moments he has suggested substantial agreement with the general principle. Justice Scalia is what he himself has described as a “faint-hearted” originalist, one who recognizes the need to “adulterate [originalism] with the doctrine of stare decisis.”⁹³ And his faint-heartedness does not just extend to cases, like *Blakely* and *Davis*, that he agrees with anyway. For example, he seems unsympathetic with Justice Thomas’s apparent willingness to restore the Commerce Clause to its neutered pre-New Deal state.⁹⁴ Justice Scalia is also willing to apply dormant commerce clause jurisprudence even though he regards it as “an unjustified judicial invention,”⁹⁵ and he has swallowed hard and applied punitive damages doctrine that he disagrees with.⁹⁶

This posture is understandable, perhaps even compelled by the norms of the judicial role, but faint-hearted originalism by its nature carries an expiration date. For originalism of this sort to continue to prosper it needs to feed continually

⁹⁰ Although heightened means-ends scrutiny for violations of unenumerated liberty rights did not originate with *Lochner*, 198 U.S. 45 (1905), *Lochner* is by far its most prominent early example. *Trop*, 356 U.S. 86 (1957), is the font of the “evolving standards of decency” test for violations of the Eighth Amendment. *See id.* at 101.

⁹¹ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 853 (1992).

⁹² *See id.* at 979 (Scalia, J., dissenting).

⁹³ Scalia, *supra* note 18, at 861. Justice Scalia was reported to have said publicly in response to a question about the difference between himself and Justice Thomas, “I am an originalist. . . . but I am not a nut.” TOOBIN, *supra* note 38, at 103.

⁹⁴ *See Gonzales v. Raich*, 545 U.S. 1, 57 (2005) (Thomas, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

⁹⁵ *See, e.g., Dep’t of Revenue v. Davis*, 128 S. Ct. 1801, 1821 (2008) (Scalia, J., concurring in part).

⁹⁶ *See, e.g., Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 443 (2001) (Scalia, J., concurring in the judgment).

on issues of first impression, and those cases are hard to come by. As originalist scholar Randy Barnett said of *Heller*, “This may be one of the only cases in our lifetime when the Supreme Court is going to be interpreting the meaning of an important provision of the Constitution unencumbered by precedent.”⁹⁷ Justice Stevens would beg to differ as to this characterization of *Heller*, but the point stands that it is rare for the Supreme Court these days to interpret a constitutional provision on which it has not already spoken. The Third Amendment comes readily to mind, but most issues the Court has not touched are those it considers judicially untouchable, such as political questions involving, for example, war powers, impeachments, the Guarantee Clause, and the like. Without a steady diet of these sorts of cases, the faint-hearted originalist morphs into the cantankerous doctrinalist.

Perhaps I have been too quick, however. In the age of the discretionary Supreme Court docket, is it not true that *every* Supreme Court constitutional case is either one of first impression or a reconsideration—and potential repudiation—of prior precedent? The typical Court case may not involve an issue like the Second Amendment, on which it has said nothing of significance for sixty-nine years, but the Court generally is looking to clarify its prior pronouncements and, incidentally or intentionally, extend doctrine this way or that. In doing so, it is not uncommon for the Court to rely, in part at least, on the original understanding of a relevant constitutional provision. But if that is originalism, then we are indeed all originalists now and always have been. If instead originalism embraces the notion that, notwithstanding precedent, there is something *dispositive* about the original understanding, then it remains a rare breed of constitutional interpretive theory.

A difficulty remains. Have we not recently seen originalism in action in cases that were not matters of first impression, such as *Printz* and *Alden* and *Apprendi* and *Crawford*?⁹⁸ How do we know that an originalist turn is not forthcoming in other areas of constitutional law we now believe to be settled, such as the selective incorporation doctrine? I would caution against referring to the four opinions just mentioned as wholly originalist. It is surely wrong, for example, to attribute Justice Stevens’s majority opinion in *Apprendi* or Justice Breyer’s majority vote in *Crawford* to a preference for originalism.⁹⁹ That said, one must admit the possibility that the Court will surprise us with a truly originalist

⁹⁷ Robert Barnes, *D.C.’s Gun Ban Gets Day in Court*, WASH. POST, Mar. 16, 2008, at A01.

⁹⁸ See *supra* notes 47–52 and accompanying text.

⁹⁹ Cf. John Paul Stevens, U.S. Supreme Court Justice, Speech Before the Federal Bar Association (Oct. 23, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 28 (1986) (defending “[t]he importance of evaluating subsequent developments in the law, as well as the original intent of the Framers”); STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 117 (2005) (describing the “unsatisfactory nature” of an originalist interpretive approach).

repudiation of prior doctrine, such as the reinvigoration of the Privileges or Immunities Clause.¹⁰⁰

But in the nature of surprises, this seems rather unlikely in the near future. The reason relates to the nature of faint-hearted originalism. In theory, it means that one's willingness to be originalist varies inversely with the fortitude of the doctrinal infrastructure in one's path, but in Justice Scalia's hands it has meant adhering to originalism in a superficially meandering pattern. More than originalism, Scalia's formalist preference for rules over standards and guidelines best explains *Apprendi* and *Crawford*.¹⁰¹ Indeed, that preference outright predominates over originalism in affirmative action cases.¹⁰² This is not so much faint-hearted as selective originalism; it is deployed or reserved based not on the weight of contrary precedent but on the substantive values of the judge.

What, then, is left for Justice Scalia to be selectively originalist about? As discussed, the Second Amendment's future is solidly doctrinal, and it was one of the few areas of constitutional first impression in which judicial review was likely. The Court has already nudged some of its federalism jurisprudence in an arguably originalist direction,¹⁰³ but the current Court appears disinclined to go much further.¹⁰⁴ Even for issues on which Justice Scalia might take an originalist position—extraterritorial habeas rights, say—on which of those issues are there five votes for an originalist opinion? Justice Thomas is a generally reliable originalist vote, but Chief Justice Roberts and Justice Alito both suggested during their confirmation hearings that they are *not* originalists,¹⁰⁵ and neither has demonstrated strong originalist tendencies on the bench. They were nominated and confirmed in a climate in which the conservative constitutional cause *du jour* was not abortion or gay rights or school prayer but rather executive power, and, if anything, originalism favors a weak executive over a strong one.¹⁰⁶ If any other theme has emerged from the votes of Chief Justice Roberts and Justice Alito, it is

¹⁰⁰ See *infra* note 115 and accompanying text.

¹⁰¹ See Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 11 (2006); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989).

¹⁰² See Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 429–31 (1997).

¹⁰³ See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999); *United States v. Lopez*, 514 U.S. 549 (1995).

¹⁰⁴ See *Gonzales v. Raich*, 545 U.S. 1 (2005).

¹⁰⁵ See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 158, 181–82, 298–99 (2005); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 465 (2006).

¹⁰⁶ See Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 849–54 (1975); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 736–39 (1988).

an apparent hostility to litigation¹⁰⁷—continuing the views of their predecessors—and on this issue there is no evidence that either Justice is substantially motivated by respect for original understandings. Justice Kennedy, the last of the *Heller* majority, has never been an originalist and disagrees with Justice Scalia as often as not in divided cases.¹⁰⁸ The other four current members of the Court are not only non-originalists, but they disagree with Justice Scalia more than they agree with him in divided cases.¹⁰⁹

Politics, moreover, does not favor originalism. President Obama will likely appoint at least two justices, and perhaps three or four if he is elected to a second term. It is improbable that any of his federal court nominees will be originalists. Obama took office with a strongly Democratic Congress and an agenda—fiscal stimulus, energy, education and health care reform, and the restoration of the country’s global reputation—that is not obviously destined for an originalist constitutional challenge. Jack Balkin and Sandy Levinson have written that large-scale changes in constitutional doctrine result from so-called “partisan entrenchment,” the gradual stocking of the judiciary by members of a

¹⁰⁷ For just a sampling of the many closely divided cases in which Roberts and Alito have ruled against plaintiffs seeking to vindicate their rights through civil litigation, see *Ashcroft v. Iqbal*, No. 07-1015, 2009 U.S. LEXIS 3472, at *8 (May 18, 2009) (holding that supervisory liability was inapplicable to Bivens actions and employing a cramped definition of plausibility in a complaint); *Wyeth v. Levine*, No. 02-1249, 2009 U.S. LEXIS 1774, at *85 (Mar. 4, 2009) (Alito, J., dissenting) (arguing that FDA approval of drug labels preempted state tort claims alleging failure to warn); *Stoneridge Investment Partners LLC v. Scientific-Atlanta*, 128 S. Ct. 761, 769 (2008) (holding that the implied private right of action under § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10(b) does not extend to aiding-and-abetting liability); *Hein v. Freedom from Religion Foundation*, 127 S. Ct. 2553, 2559 (2007) (plurality opinion) (rejecting taxpayer standing to challenge discretionary executive action alleged to violate the Establishment Clause); *Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007) (denying the right to file a federal habeas appeal where the inmate filed his notice of appeal three days late in reliance on an erroneous order of the district court); *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007) (Roberts, C.J., dissenting) (arguing that a state lacks standing to sue based on injuries allegedly caused by global warming); and *Lawrence v. Florida*, 127 S. Ct. 1079, 1081 (2007) (holding that a petition for writ of certiorari challenging denial of an application for state post-conviction relief does not toll the one-year filing period for federal habeas petitions under the Antiterrorism and Effective Death Penalty Act of 1996). See also *Bell Atlantic v. Twombly*, 127 S. Ct. 1955, 1960 (2007) (partially overruling *Conley v. Gibson*, 355 U.S. 41 (1957), to hold that factual allegations in a complaint must be “plausible”); see generally Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEX. L. REV. 1097 (2006).

¹⁰⁸ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (majority opinion of Kennedy, J.) (“History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

¹⁰⁹ See *The Supreme Court, 2007 Term: The Statistics*, 122 HARV. L. REV. 516, 519 (2008).

dominant political party.¹¹⁰ Over time, doctrine begins to reflect the ideological commitments of that party. President Obama seems temperamentally better suited to entrench pragmatists than ideologues.¹¹¹ The most likely identifiable methodological commitment of his judicial nominees will be to the incorporation of contemporary international and transnational legal norms into constitutional adjudication. That is nothing if not originalism's opposite.¹¹²

Politics and case law are interrelated. As Part I sought to demonstrate, originalism is a historically contingent set of rhetorical demands.¹¹³ Its recent iteration has been an instrument of the restorative politics President Reagan inspired, but its juris-generative life may have ended with *Heller* and the election of President Obama. Originalism's last refuge is the academy, where it continues to thrive, albeit in stylized form. It remains interesting to theorize about the democratic bona fides of temporally extended commitments,¹¹⁴ to ponder the relationship between the authority of original authorial intentions and fidelity to the author's language,¹¹⁵ and to take an external perspective on the process by which a jurisprudence succeeds politically through a set of culturally resonant ethical claims.¹¹⁶ Moreover, so long as there is a place in the academy for historians, and for thoughtful revisionism, there will be room for originalists. But for the foreseeable future, the debate over originalism is likely to remain academic.

If all I have said is correct, it has important implications for progressive lawyering. Democrats currently control two branches of government and have the opportunity to shape the third; Republican political elites no longer focus centrally on social issues; and originalism is, and will likely remain, "faint-hearted" in practice. For these reasons, the originalism movement that has dominated constitutional discourse for the last three decades is in decline and is not likely to produce significant victories in constitutional cases. There has nevertheless been significant interest from progressive lawyers and academics in emphasizing the liberal implications of a serious examination of original understandings. Balkin has prominently advocated a version of "liberal"

¹¹⁰ Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–68 (2001).

¹¹¹ The nomination of Sonia Sotomayor to replace Justice Souter is fully consistent with that temperament.

¹¹² See Greene, *supra* note 7, at 713.

¹¹³ See *id.*; Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 563–64 (2006).

¹¹⁴ See JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 89–98 (2005).

¹¹⁵ See Richard S. Kay, *Adherence to Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226–29 (1988).

¹¹⁶ See Greene, *supra* note 7, at 708–16; Post & Siegel, *supra* note 110, at 549.

originalism that manipulates the level of generality at which one assesses the original meaning of constitutional provisions.¹¹⁷ James Ryan and Douglas Kendall have expressly advocated cooptation of originalist methods to liberal ends.¹¹⁸ And Kendall, whose Constitutional Accountability Center is devoted to “fulfilling the progressive promise of our Constitution’s text and history,” has filed a brief in *McDonald v. City of Chicago*, which challenges Chicago’s gun control laws, arguing that the Second Amendment is incorporated against the states by way of the Privileges or Immunities Clause rather than the Due Process Clause.¹¹⁹

These efforts emerge from a defensive crouch that, while understandable in 2008, may no longer be appropriate in 2009. The substantive progressive agenda to be served by an emphasis on originalism might well include continued protection for, among other things, abortion rights, affirmative action, and broad congressional power under Section 5 of the Fourteenth Amendment, but it is difficult to imagine what more is to be gained. Dangers, by contrast, include legitimizing conservative views on gun control, on a host of social issues, on religious establishment, on capital punishment, sentencing policy, and prisoners’ rights, and on the power of Congress under the Commerce Clause. Reliance on the Privileges or Immunities Clause as the path of incorporation could have disturbing implications, moreover, for resident aliens and undocumented immigrants, whom the text of the Clause excludes from its protection.

This Essay’s argument implies that, rather than giving originalism the oxygen that conservatives are decreasingly likely to supply, progressives are better off emphasizing more dynamic rhetoric. When change is “in,” why not glorify our Constitution’s impressive ability to adapt to a changing world—to embrace its future rather than its past? In an era of global competition, foreclosures, bailouts, and outsized executive bonuses, why not argue that our Constitution protects a right to a living wage, to a decent education, to adequate housing?¹²⁰ Why not ride an ethical wave away from naked individualism and toward mutual responsibility? Why not emphasize that our Constitution is limited not by the historical understandings of its framers and ratifiers but by our own generation’s ambition, energy, and imagination? Conservatives have demonstrated that reorienting constitutional rights toward one’s preferred political orientation is a generations-long process. If begun too timidly, the process can and will run out of gas.

¹¹⁷ See Balkin, *supra* note 12, at 293.

¹¹⁸ See Douglas T. Kendall & James E. Ryan, *Liberal Reading*, NEW REPUBLIC, Aug. 6, 2007, at 14.

¹¹⁹ See Brief of Constitutional Law Professors as Amici Curiae in Support of Reversal, *McDonald v. City of Chicago*, No. 08-4241 (7th Cir. Feb. 4, 2009).

¹²⁰ As President Obama has himself implied, constitutionalizing affirmative rights need not necessarily mean judicializing them. See *Odyssey: The Court and Civil Rights* (WBEZ radio broadcast Jan. 18, 2001), available at <http://apps.wbez.org/blog/?p=639>.

CONCLUSION

This Essay has suggested that, if originalism has won, its victory may be bittersweet. The idea that the original understanding of constitutional provisions should be dispositive has been at the periphery of constitutional law since at least the New Deal era. In recent years originalism has lived on occasionally in the Court's cases but more stridently in conservative popular culture and judicial politics. As the Reagan and Meese judicial agenda fades into history and a Democratic political era dawns, the prospects for future originalist triumphs are bleak.

For now, at least. We do not know the precise form it will take—history, after all, is “merely a list of surprises”¹²¹—but we can be sure that originalism will be back. It will reemerge, as it always has, when a political constituency issues a call for constitutional restoration following an era of constitutional flux. It will breathe life into the words of Aldous Huxley, that “from age to age, nothing changes and yet everything is completely different.”¹²²

¹²¹ KURT VONNEGUT, JR., *SLAPSTICK, OR LONESOME NO MORE!*, 226 (1976).

¹²² ALDOUS HUXLEY, *THE DEVILS OF LOUDUN* 246 (The Folio Society 1986) (1952).