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THE ORIGINAL MEANING OF ORIGINAL UNDERSTANDING: A NEO-BLACKSTONIAN CRITIQUE

SAUL CORNELL*

The emergence of a new variant of constitutional originalism has been heralded by its supporters as a major step forward in constitutional theory. The new originalism claims to have met the profound objections leveled at earlier versions of this theory by shifting attention away from a focus on the subjective belief of the Framers of the Constitution.[1] Rather than concentrate on original intent, this "new" method focuses on the plain meaning the text would have had to Americans at the time it was adopted.[2] Randy Barnett, one of the leading partisans of this method, describes it as follows: "In constitutional interpretation, the shift is from the original intentions, or will of the lawmakers, to the objective original meaning that a reasonable listener would have placed on the words used in the constitutional provision at the time of its enactment."[3] Ironically, this new variant of originalism may be at odds with the dominant modes of constitutional interpretation in place at the time the Constitution was debated and ratified.[4] This new theory is also subject to challenge on methodological grounds as well. The methods of original meaning originalism ignore many of the most basic rules of historical inquiry. In essence, the "new" originalism is really nothing more than the old law- office history under a new guise.[5]

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* Professor of History, Ohio State University, and Director of the Second Amendment Research Center, John Glenn School of Public Affairs. I would like to thank Mark Graber, Kurt Lash, and the participants in the Maryland Constitutional Law Schmooze. Invaluable research assistance for this Essay was provided by Nathan Kozuskanich.

1. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 609 (2004).

2. Whittington, *supra* note 1, at 609.

3. Barnett, *supra* note 1, at 621.

4. *See* discussion *infra* Part I.

5. The debate on originalism as a method for constitutional interpretation is immense. *See generally* JACK N. RAKOVE, INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (1990). For overviews of the debate, see Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988). A detailed philosophical discussion of originalism may be found in KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION (1999). For the most recent attempt to defend this methodology, see Barnett, *supra* note 1, at 613; Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105–08 (2001). For another recent

While it is beyond the scope of a short essay to fully explore the range of interpretive practices in place at the time the Constitution was first proposed and ratified, there is good reason to doubt that plain-meaning originalism is a historically accurate reflection of how many contemporaries would have interpreted the Constitution.[6] Similarly, a brief comment could not possibly catalogue all of the methodological problems in plain-meaning originalism.[7] These caveats aside, it is easy to expose some of the more glaring problems with plain-meaning originalism as an interpretive practice.

I. WILLIAM BLACKSTONE AND THE FOUNDING ERA'S COMMITMENT TO CONTEXTUALISM

One important strain within the founding generation's constitutionalism was deeply contextualist in approach and in many respects antithetical to plain-meaning originalism.[8] The irony at the core of plain-meaning originalism is easily discernible if one examines the writings of Sir William Blackstone, one of the leading jurisprudential thinkers in the eighteenth-century Anglo-American world. Although Blackstone's methods were never hegemonic in the founding era, his influence was profound.[9] Clear echoes of Blackstonian modes of constitutional interpretation are evident in sources contemporaneous with the ratification of the Constitution.[10] Although his influence waned somewhat in the decades after ratification, there is equally strong evidence that many of his rules of interpretation continued to shape the way lawyers, judges, and legislators approached constitutional texts well into the Civil War era.[11]

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endorsement of this method, see John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 391 (2003). On the notion of standards for originalists, see H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987). For trenchant critiques of this method and its lack of historical sophistication, see Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 523–29 (1995); Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387 (2003); Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 913–14 (1996).

6. *See* discussion *infra* Part I.

7. One useful starting place is Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003). On the Founders' views of the matter, see Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77 (1988); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

8. *See, e.g.*, DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 128 (1958).

9. On Blackstone's influence, see Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1 (1996).

10. *See infra* text accompanying notes 21–43.

11. *See, e.g.*, Alschuler, *supra* note 9, at 7.

Although Blackstone's Toryism caused him to be the object of some hostility in the post-revolutionary era, his *Commentaries on the Laws of England* remained an important influence on early-American constitutional and legal thought.[12] For those who consulted Blackstone for guidance on legal matters, the English jurist provided clear rules for interpreting legal texts.[13] At first glance, Blackstone's rules seem to vindicate the methodological approach of plain-meaning originalism. The learned judge noted that "[w]ords are generally to be understood in their usual and most known signification."[14] While this method would seem to support the methods of plain-meaning originalism, this was only one of several steps necessary to discern the true meaning of a legal text. Blackstone noted an important exception to this general rule in cases where the words at issue were terms of art, or technical terms, in which case, he noted, they "must be taken according to the acceptation of the learned in each art, trade, and science."[15] Thus, plain meaning was not always the meaning to be sought when interpreting legal and constitutional texts. Even more important than these two guidelines was another paramount interpretive rule that trumped both of these considerations: "the most universal and effectual way of discovering the true meaning of a law," Blackstone declared, was to inquire into "the reason and spirit of it; or the cause which moved the legislator to enact it."[16] According to this method, the meaning of a specific constitutional provision was to be gleaned from its immediate historical context. Specifically, one had to discover the evil a provision was intended to remedy. Context is generally given short shrift in plain-meaning originalism which is deeply anti-contextualist in approach.[17] While the constitutional historian's credo is usually the more context, the better, the opposite is true for plain-meaning originalists.[18] "[M]ore 'historical context,'" Barnett claims "is not automatically preferred."[19] In his view, too much attention to context "may instead cloud what was otherwise a fairly clear meaning."[20] While plain-meaning originalists might find context inconvenient, the same was not true for the founding genera-

12. ALLAN C. GUELZO, ABRAHAM LINCOLN: REDEEMER PRESIDENT 77 (1999); WILLARD STERNE RANDALL, THOMAS JEFFERSON: A LIFE 109 (1993).

13. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 59–61 (1803).

14. *Id.* at 59.

15. *Id.*

16. *Id.* at 61 (emphasis omitted).

17. Barnett, *supra* note 5, at 107.

18. Flaherty, *supra* note 5, at 550.

19. Barnett, *supra* note 5, at 107.

20. *Id.*

tion. Rather than simply seek the plain meaning of the text, the Founders—at least those who took their cues from Blackstone—were deeply concerned with the context that gave rise to specific constitutional provisions. Rather than lead away from context, the original understanding of originalism leads back to rigorous contextualism.

Sorting out how pervasive Blackstone's theories of constitutional construction were in the era of the Constitution is itself an enormously complex historical question. Yet, there are tantalizing suggestions that Blackstone's methodology had permeated significant parts of American legal culture and even spilled over into popular culture as well. One good place to discover the prevalence of Blackstonianism is in the popular press. Consider the lively debate between two pseudonymous writers, "Scribble Scrabble" and "Senex," who discussed the meaning of the Massachusetts Constitution of 1780 during the winter of 1786–87.[21] One of the issues that attracted their notice was the meaning of the right to keep and bear arms. One of the two, adopting the Roman persona of Senex, argued that constitutional protection for the right to bear arms was limited by the purpose of the provision, which was to provide for the common defense.[22] Following Blackstonian modes of construction Senex reminded his audience that in "defining this article, we ought to consider the evil intended to be remedied."[23] In Senex's view, the right to bear arms was included in the Massachusetts Constitution as a means of preventing the disarmament of the militia. As Senex noted, "[t]he idea, that Great Britain meant to take away their arms, was fresh in the minds of the people."[24] The march of British regulars on Concord that triggered the shot heard around the world, it is worth recalling, was aimed at crippling the militia by seizing its gun powder, which was stored at a public magazine.[25] As one contemporary historian recalled, "orders were issued to the provincial governors to deprive the people of the means of resistance."[26] A similar account was penned by another revolutionary-era historian who noted that the British targeted "powder

21. Senex, CUMB. GAZETTE (Portland), Jan. 12, 1787; Scribble Scrabble, CUMB. GAZETTE (Portland), Dec. 8, 1786 & Jan. 26, 1787. Maine was still part of Massachusetts at this time.

22. Senex, *supra* note 21.

23. *Id.*

24. *Id.*

25. ROBERT MIDDLEKAUF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763–1789, at 266–67 (1982).

26. J.W. CAMPBELL, A HISTORY OF VIRGINIA FROM ITS DISCOVERY TILL THE YEAR 1781, at 154 (1813).

and warlike stores."[27] During the congressional debate over the Second Amendment, Elbridge Gerry made a similar point. Gerry reminded his fellow congressmen that the British had "used every means in their power to prevent the establishment of an effective militia." Gerry's comments did not address the right of individual self-defense or the right to hunt; his comments reflected the widespread concern that the British had been engaged in a systematic attempt to disarm the militia and cripple America's capacity for collective self-defense.[28]

Neither the debate between Scribble Scrabble and Senex, nor Elbridge Gerry's important speech in Congress, supports the claims of gun rights originalists who insist that the right to bear arms was generally understood to include both the private right of personal self-defense and the public right of collective self-defense. The right of individual self-defense was well grounded in common law, and nothing the British did during the Revolution deprived Americans of this right. British policy aimed to disarm the militia and undermine collective self-defense.[29] Given these facts, there would have been little need to carve out an explicit protection for the right of individual self-defense or a general right to hunt. Scribble Scrabble addressed this issue directly and noted that the constitutional right to keep and bear arms aimed to guard "the people's right to keep and bear arms for a particular purpose" which "is secured to them against any future acts of the legislature."[30] For this writer, the militia focus of this provision was unmistakable. The personal right to use arms, however, was another matter entirely. As far as this author was concerned, "the legislature have a power to control it in all cases, except the one mentioned in the bill of rights, whenever they shall think the good of the whole require it."[31] Echoing a broader view familiar to the Founders, Scribble Scrabble noted that the private use of firearms was legally distinct from uses connected to the militia and hence ought to be governed by different legal standards.[32] Civilian uses of firearms, including the

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27. 1 MERCY OTIS WARREN, HISTORY OF THE RISE, PROGRESS AND TERMINATION OF THE AMERICAN REVOLUTION 101 (1988). This useful modern edition of Warren's early history of the Revolution provides an excellent illustration of the strongly civic republican character of American culture in the founding era.

28. Elbridge Gerry, Remarks at the U.S. House of Representatives (Aug. 17, 1789), *in* CREATING THE BILL OF RIGHTS 182 (Helen E. Veit et al. eds., 1991).

29. SAUL CORNELL, A WELL-REGULATED MILITIA 13 (2006) [hereinafter A WELL REGULATED MILITIA].

30. Scribble Scrabble, *supra* note 21.

31. *Id.*

32. *Id.* Although the Founders did not frame constitutional issues in terms of modern theories of judicial scrutiny, their approach to gun regulation appears consistent with mod-

common law right of self-defense, were subject to regulation in accordance with the state's ample police powers.[33] Senex and Scribble Scrabble each approached the Massachusetts Constitution's arms-bearing provision in a manner consistent with the mode of legal construction described by Blackstone. The constitutional protection for this particular use had to be interpreted with its original purpose in mind, i.e., common defense. Neither of these newspaper essayists questioned the accepted belief that bearing arms within the militia was different than bearing a gun in self-defense or for hunting. The use of firearms in connection with militia service, however, was expressly protected by the Constitution and was entitled to a higher level of constitutional protection.[34]

Additional evidence about the original understanding of the right to bear arms can be gleaned from textual and structural analysis.[35] Blackstone's rules of construction also included the following guidelines:

> If words happen to be still dubious, we may establish their meaning from the *context*; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point.[36]

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ern theories of rational basis review. On the long tradition of using rational basis review in firearms regulation in modern American law, see Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686–87 (2007) ("[T]he courts of every state to consider [an individual's right to bear arms] apply a deferential 'reasonable regulation' standard.").

33. For a detailed discussion of the difference between these two legal ideals, see A WELL -REGULATED MILITIA, *supra* note 29, at 9–70.

34. Senex, *supra* note 21; Scribble Scrabble, *supra* note 21.

35. For a useful summary of these modalities of constitutional interpretation, see Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 643 (1989) (discussing briefly the rhetorical structures of the right to bear arms).

36. TUCKER, *supra* note 13, at 60. In the case of the Second Amendment, the preamble is essential to discovering the original understanding of this text. *See* David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "the Right of the People to Keep and Bear Arms,"* 22 LAW & HIST. REV. 119, 120 (2004). Thus, Blackstone's rules directly contradict the suggestion of Eugene Volokh, that preambles were simply non-binding justification clauses. *See* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 795 n.8 (1998).

One of the key texts cited by Second Amendment originalists is the Pennsylvania Constitution of 1776.[37] If one were to interpret the meaning of bearing arms in that text according to Blackstonian rules, one would need to compare the use of the phrase "bear arms" with other occurrences of that phrase in the same text.[38] The first occurrence of the term actually appears in a provision that exempted conscientious objectors from having to bear arms. Because the government could not force one to bear arms in self-defense, but only in some types of militia-related activity, this use clearly fit the military sense of the term.[39] In this case, the Blackstonian method clearly demonstrates that the individual-rights interpretation of the phrase "bear arms" misrepresents the original understanding of the Pennsylvania Constitution. There are other contextual clues in the Pennsylvania Constitution that lend additional support for interpreting the phrase in its orthodox militia-based sense. The right to bear arms was paired with an attack on standing armies, another sign that the term "bear arms" was understood to be a term synonymous with the use of arms in some militia context.[40] Finally, one would need to note the fact that the Pennsylvania Constitution included a separate provision on hunting, which provided additional evidence that civilian firearms and military use of firearms were constitutionally distinct.[41]

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37. Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 246–48 (2004) (reviewing H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT (2002)); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 222 (1983). For a genuinely historical analysis of the Pennsylvania Constitution's arms-bearing provision that demonstrates that it was originally understood in civic, not individual terms, see Nathan Ross Kozuskanich, "For the Security and Protection of the Community:" The Frontier and the Makings of Pennsylvanian Constitutionalism (2005) (unpublished Ph.D. dissertation, Ohio State University), *available at* www.ohiolink.edu/etd/send-pdf.cgi?osu1133196585. On the nature of eighteenth-century Pennsylvania radicalism and its anomalous character, see GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 226–37 (1969).

38. *See supra* notes 35–36 and accompanying text.

39. For a discussion of this important distinction, see Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 STAN. L. & POL'Y REV. 571, 572–75 (2006). The example of the Quakers illustrates this point nicely. Quakers were religious pacifists who were opposed to bearing arms. Bearing a gun, by contrast, was not a problem for Quakers who were not vegetarians. Although opposed to hunting for sport, Quakers accepted the use of firearms in the context of hunting for subsistence. DAVID HACKETT FISCHER, ALBION'S SEED 554 (1989).

40. PA. CONST. of 1776, art. XIII. The same juxtaposition of the right to bear arms and the opposition to standing armies is also evident in the North Carolina Constitution, Vermont Constitution, and Massachusetts Constitution. For the text of these documents, see SOURCE OF OUR LIBERTIES 356, 366, 376 (Richard L. Perry ed., 1978).

41. PA. CONST. of 1776, § 43.

The persistence of Blackstonian theories of construction in the post-constitutional era is equally clear. One can see clear echoes of this methodology in *Aymette v. State*, one of the most important antebellum cases on the meaning of the right to bear arms. Aymette was charged with having a Bowie knife, a particularly lethal type of edged weapon, hidden on his person.[42] Rather than approach the case in the manner suggested by modern plain-meaning originalists, the judges in *Aymette* used Blackstonian contextualist methods. Indeed, the judges took a long historical detour to trace the history of the right to bear arms back to the English struggle against standing armies. The court asserted that the right preserved to the people was done so that "they may as a body, rise up to defend their just rights, and compel their rulers to respect the laws."[43] The court further noted that the right had to be understood in terms of the grievances that had prompted its inclusion into fundamental law, a clear echo of Blackstonian method. "The complaint was against the *government*. The grievances to which they were forced to submit, were for the most part of a public character, and could have been redressed only by the people rising up for their *common defence* to vindicate their rights."[44] The court also adopted the orthodox understanding of the phrase bearing arms:

> A man in the pursuit of deer, elk, and buffaloes, might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had *borne arms*, much less could it be

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42. Aymette v. State, 21 Tenn. (2 Hum.) 154, 155 (1840). On the importance of *Aymette*, see JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES 498 (1873), and *The Right to Keep and Bear Arms for Private and Public Defence*, 1 CENT. L.J. 259, 261 (John F. Dillon & Seymour D. Thompson eds., 1874). The case was also cited by the Supreme Court in United States v. Miller, 307 U.S. 174, 178 (1939). It is important to note that no constitutional texts protect a right to have guns, but rather founding-era constitutions talk about bearing arms, a term which included edged weapons as well. Indeed, edged weapons were part of the standard arms required by law for Minutemen in Massachusetts, and would have enjoyed greater protection than handguns. The one important counter example would be a horseman's pistol, which was standard equipment for cavalry units. For a good illustration of this, see An Act for Forming and Regulating the Militia within the Colony of the Massachusetts-Bay, in New England, and for repealing all the Laws heretofore made for that Purpose ch. 1, at 15–22 (1775); An Act for forming and regulating the Militia within the Commonwealth of Massachusetts, and for repealing all the Laws heretofore made for that Purpose (March 3, 1781), Acts and laws of the Commonwealth of Massachusetts, ch. XXI, at 32–43; Act for regulating and governing the Militia of the Commonwealth of Massachusetts, and for repealing all Laws heretofore made for that Purpose (March 10, 1785), Acts and laws of the Commonwealth of Massachusetts, ch. I, at 219–30. There is little historical foundation for the claim that handguns would have enjoyed constitutional protection in the founding era, apart from horsemen's pistols.

43. *Aymette*, 21 Tenn. (2 Hum.) at 157.

44. *Id.*

> said, that a private citizen *bears arms*, because he has a dirk or pistol concealed under his clothes, or a spear in a cane.[45]

To dispel any ambiguity, the court categorically asserted that the right "does not mean for *private defence* [sic]."[46]

II. THE ANTI-FEDERALIST REVIVAL AND PLAIN-MEANING ORIGINALISM

One of the most remarkable changes in legal scholarship over the last two decades has been the elevation of the Anti-Federalists within the legal canon.[47] Once dismissed as "men of little faith," the Anti-Federalists have risen from the ash heap of history to become the "other Founders" of our constitutional tradition.[48] While there is no question that Anti-Federalism is essential to understanding the dynamics of the debate over the Constitution and the origins of the Bill of Rights, this is not quite the same as treating them as if they were the authors of the Constitution or various provisions of the Bill of Rights. No area in American constitutional law has been more effectively recast in Anti-Federalist terms than the Second Amendment.[49] To com-

45. *Id.* at 161.

46. *Id.* at 157. Modern gun rights advocates and scholars routinely assert that all nineteenth-century commentators embraced the individual-rights view of the Second Amendment. David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1505 (1998). In part, this anachronistic reading reflects the tendency of those involved in the modern gun control debate to read the modern-collective/individual-rights dichotomy back into the past. If one simply reads authors such as Joseph Story historically, it is clear that they viewed the Second Amendment within the context of the militia. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 83–95 (1833). Indeed, Story lamented that rising individualism was slowly eroding popular support for militia regulation which Story believed was essential to preserving the original spirit of the Second Amendment. *See* Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123, 1130–31 (2006) ("Story shared Tucker's view that the Second Amendment had been adopted to assuage Anti-Federalists' fears about the potential disarmament of the state militias."). After the Civil War, Joel Prentiss Bishop also treated the Second Amendment in the context of the militia. BISHOP, *supra* note 42, at 497.

47. Saul A. Cornell, *The Changing Historical Fortunes of the Anti-Federalists*, 84 NW. U. L. REV. 39, 40 (1990); Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 223 (2004).

48. On the idea of the Anti-Federalists as "men of little faith," see MEN OF LITTLE FAITH: SELECTED WRITINGS OF CECELIA KENYON 31–67 (Stanley Elkins et al. eds., 2002). For the view that the Anti-Federalists were in some sense, other Founders, see SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA 1788–1828, at 1–15 (1999) [hereinafter THE OTHER FOUNDERS]. For the view that Anti-Federalists were losers, see Paul Finkelman, *Turning Losers into Winners: What Can We Learn, If Anything, from the Antifederalists?*, 79 TEX. L. REV. 849, 854–55 (2001) (reviewing THE OTHER FOUNDERS, *supra*).

49. Paul Finkelman, *"A Well-Regulated Militia": The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 196–97 (2000); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 112–13 (2000).

pound the irony of this turn to Anti-Federalist originalism, Second Amendment revisionists have latched onto one of the most radical Anti-Federalist texts: *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents*.[50]

Quite apart from the fact that the *Dissent* gave voice to a radical strain of Anti-Federalist constitutionalism, it is even more remarkable that a theory of originalism purporting to be based on what the average rational man on the street believed would use a hastily-drafted protest that was never copied by any other state ratification convention as the foundation for an argument about original meaning. Not only was the *Dissent*'s odd formulation of the right to bear arms not copied by other state conventions, but its idiosyncratic usage was not emulated by any major writer during ratification. Indeed, the Dissenters were so far out of step with mainstream thinking within their own state that none of them won election to the First Congress that actually drafted the Bill of Rights.[51] Rather than serve as a reference point for orthodoxy, the *Dissent* functioned in almost exactly the opposite way. For those who sat in the First Congress its words were not taken as some type of constitutional gold standard. In fact, quite the opposite was the case. The *Dissent* was actually cited as an example of the most extreme and radical Anti-Federalist demands.[52] It was never invoked in the way modern gun rights supporters use it: as a text that reflected the views of the typical rational man on the street. Madison did not even include it among various proposals he collected when he began formulating his own list of possible amendments.[53] Finally, one must also acknowledge that its own authors later dismissed its ranting as exaggerated and emotionally overwrought.[54] Yet, despite the overwhelming historical evidence that this text was not typical, or ultimately influential, or even entirely rational, gun rights scholars insist on using it as though it were dispositive of the meaning of the Second Amendment.[55] In essence, plain-meaning originalists have taken their theory in the direction of an alternate history, science-fiction fantasy in which the Anti-Federalist losers are miraculously transformed into the authors of the Second Amendment. One might as well argue that

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50. The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents (Dec. 18, 1787), *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT 154, 160 (David E. Young ed., 1991). *See also* Barnett, *supra* note 37, at 246–48; Kates, *supra* note 37, at 222; Kopel, *supra* note 46, at 1406–07.

51. Finkelman, *supra* note 49, at 206; Rakove, *supra* note 49, at 135.

52. THE OTHER FOUNDERS, *supra* note 48, at 158.

53. A WELL-REGULATED MILITIA, *supra* note 29, at 59.

54. THE OTHER FOUNDERS, *supra* note 48, at 225.

55. Barnett, *supra* note 37, at 246–48.

the Second Amendment was drafted by Daniel Shays, not James Madison, a view consistent with the belief of modern gun rights supporters that any body of armed citizens is a militia with a constitutional right to take up arms against its government.[56] The Founders would have viewed this latter interpretation as a repudiation of their constitutional ideals, not a vindication of them. In their view an armed mob was not a well-regulated militia.[57]

There is little question that the radical Anti-Federalist ideology in the *Dissent* reflects an important minority voice from the founding era. Nor is it surprising that modern originalist supporters of gun rights would use these voices to attempt to construct a historical basis for a modern libertarian vision of gun rights. In that vein, scholar Randy Barnett recently quoted a letter from a Maine Anti-Federalist to George Thatcher, a Federalist representative serving in the First Congress.[58] In that letter the Anti-Federalist, Nasson, discussed guns in terms quite similar to the Pennsylvania Dissenters. Indeed, this letter is one of the few texts from the founding era that frame the right to keep arms outside of the context of bearing them in a well-regulated militia.

> I find that Ammendments [sic] are once again on the Carpet. I hope that such may take place as will be for the Best Interest of the whole. A Bill of rights well secured that we the people may know how far we may Proceade [sic] in Every Department then their [sic] will be no Dispute Between the people and rulers in that may be secured the right to keep arms for Common and Extraordinary Occations [sic] such as to secure ourselves against the wild Beast and also to amuse us by fowling and for our Defence [sic] against a Common Enemy.[59]

Interestingly, Barnett shows much more interest in the views of Anti-Federalist Nasson than he does in the views of Federalist Thatcher,[60] even though Thatcher sat in the Congress that drafted the Second Amendment. This topsy-turvy method of establishing the

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56. For a discussion of the genre of alternate history, and the use of Anti-Federalist texts to conjure up an alternate history of the Second Amendment, see Saul Cornell, *A New Paradigm for the Second Amendment*, 22 LAW & HIST. REV. 161, 164 (2004).

57. A WELL-REGULATED MILITIA, *supra* note 29, at 76–85.

58. Barnett, *supra* note 37, at 252.

59. Letter from Samuel Nasson to George Thatcher (July 9, 1789), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 260–61 (Helen E. Veit et al. eds., 1991).

60. Barnett, *supra* note 37, at 252–54.

original understanding is typical of plain-meaning-originalist methodology.

The question that ought to concern us is not how Nasson viewed the right to bear arms, but how Thatcher viewed the scope and meaning of this right. This is especially true because Thatcher became a respected jurist, served on both the Massachusetts and Maine Supreme Courts, and authored one of the most detailed examinations of the right to bear arms in the founding era. Writing under his favorite pen name, Scribble Scrabble, Thatcher defined the scope of his own state's arms bearing provision:

> The Bill of Rights secures to the people the use of arms in common defense; so that, if it be an alienable right, one use of arms is secured to the people against any law of the legislature. The other purposes for which they might have been used in a state nature, being a natural right, and not surrendered by the constitution, the people still enjoy, and may continue to do so till the legislature shall think fit to interdict.[61]

The fact that Americans in the founding era made a decision to elevate one particular class of arms used for one particular purpose to the highest level of constitutional protection does not mean that civilian guns enjoyed no other legal protection in the founding era. Rather, it means that in the founding era civilian guns were treated like any other type of property. Thatcher's conception of the right to bear arms provides the clearest refutation of the gun-rights slogan that there is no contemporary evidence from the founding era to support the militia based view of the right to bear arms.

In the upside down world of originalism, the anomalous Pennsylvania Constitution of 1776 is more important than the more influential Massachusetts State Constitution of 1780. In this universe, the rejected constitutional model of Pennsylvania becomes dispositive, while the document that became the future model for all subsequent

61. Scribble Scrabble, *supra* note 21. For evidence of Thatcher's authorship, see Letter from Christopher Gore to Rufus King (June 28, 1787), *in* 1 THE LIFE AND CORRESPONDENCE OF RUFUS KING 226 (Charles R. King ed., 1894). These comments were made about the Massachusetts Constitution's provision on the right to keep and bear arms. Gun rights advocates both within and outside of the academy have long maintained that the militia-based view of the right to bear arms is a modern invention. STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED 83 (1984); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 471–75 (1995). The Massachusetts Constitution, the most influential state constitution in the founding era, clearly does not fit the model of gun advocates. The fact that Thatcher was one of the framers of the Second Amendment underscores the absurdity of the gun rights claim.

constitutions, including the Federal Constitution, is ignored. This error is compounded by the treatment of the legislative history of the drafting of the Second Amendment. For Second Amendment originalists, the voices of Anti-Federalists have effectively supplanted the views of Federalists who actually sat in the First Congress that wrote the Second Amendment.[62]

III. BEARING A GUN VS. BEARING ARMS

Although gun-rights originalists have been writing about the Second Amendment for almost three decades, it is astonishing that they have not been able to produce a significant body of sources to support their claim that bearing arms was generally understood to include both military and non-military uses of arms during the founding era. The list of sources provided turns out to be rather small. In addition to the *Dissent*, plain-meaning originalists have cited a "Bill for the Preservation of Deer," that Madison submitted while in the Virginia legislature.[63] The law penalized persons who "shall bear a gun out of his inclosed [sic] ground, unless whilst performing military duty."[64] It seems strange to use a law that does not even mention the phrase bear arms to support a conclusion about what bear arms meant, but this sort of sleight of hand has become common in Second Amendment scholarship. What Madison's bill demonstrates is that bearing a gun had no military connotation. One might bear a gun in pursuit of a deer, but bearing a gun in a military context was identical to bearing arms. A careful reading of the Virginia game bill actually leads to the opposite conclusion of the one suggested by individual-rights partisans. Indeed, this bill only underscores the point made by George Thatcher: that the state clearly retained the right to regulate the use of firearms and differentiated between the level of restrictions that might be placed on bearing a gun and bearing arms.[65]

If one were truly interested in interpreting the Constitution according to its original understanding, one would be better advised to simply follow standard historical methods and abandon originalist techniques entirely. Ascertaining the influence of any historical text is

62. DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS (1980).

63. A Bill for Preservation of Deer (1785), *in* 2 THE PAPERS OF THOMAS JEFFERSON 443–44 (J. Boyd ed., 1950).

64. *Id.*

65. *Id.* The bill was introduced twice but the House took no action on it. Virginia had enacted two earlier game laws, a 1738 law and another in 1772. Strangely, Barnett argues that this source proves that bearing arms included non-military use of arms despite the fact that the phrase is never used in the source. *See* Barnett, *supra* note 37, at 245.

a complex historical undertaking. Still, intellectual historians routinely engage in precisely this sort of enterprise, and originalists would be well advised to follow their methodological precepts.[66] Obviously, the first step in such an inquiry must be to immerse oneself in the sources. Only after one has completed this arduous process is it possible to determine how a particular text such as the *Dissent* fits within the intellectual universe of the founding era. Rather than engage in this arduous process, plain-meaning originalists have simply cherry-picked quotes from disparate texts paying little heed to an author's intentions or influence.[67] To determine if the *Dissent*'s use of the term bear arms was standard or nonstandard, one would have to compare its usage with other contemporary works in a comprehensive manner. Only once this task has been completed could one make any meaningful claims about how its use of the phrase bear arms compared to other contemporaneous sources.[68]

The methods of intellectual history that I have briefly described are hardly the exclusive province of historians. Indeed, Michael Dorf, a leading constitutional scholar, systematically examined the use of the phrase bear arms in congressional texts from the founding era. Dorf's conclusions are an important first step toward ascertaining what this term meant in the founding era. In every instance, Dorf found that bear arms fit the military understanding of the term. In fact, Dorf found no evidence in these sources for the individual-rights view.[69]

If one expands beyond the congressional documents examined by Dorf, the evidence also vindicates the militia-based reading of the phrase bear arms. A survey of the press revealed more than one hundred uses of this term in print sources from the period between the Declaration of Independence and the adoption of the Second

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66. For examples of the intellectual historians' craft, see DAVID A. HOLLINGER, IN THE AMERICAN PROVINCE: STUDIES IN THE HISTORY AND HISTORIOGRAPHY OF IDEAS (1985); LEONARD KRIEGER, IDEAS AND EVENTS: PROFESSING HISTORY (1992); G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY, at xi–xvi (1980).

67. Saul Cornell, *"Don't Know Much About History" The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 681 (2002).

68. On the methodological breadth of modern intellectual history, see NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY, at xi–xix (John Higham & Paul K. Conkin eds., 1979), and ENCYCLOPEDIA OF AMERICAN CULTURAL & INTELLECTUAL HISTORY (Mary Kupiec Cayton & Peter W. Williams eds., 2001).

69. Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 292 (2000). Dorf took advantage of advances in digital searching in his research. While digital searching can be useful, it ought not to be seen as a shortcut around the arduous task of mastering the full body of primary sources surviving from the founding era; Dorf's findings were replicated by David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 597 (2000).

Amendment. Ninety-six percent of the texts in which this term was used conformed to the military understanding of the term.[70] Originalist supporters of the individual-rights thesis have never been able to produce more than a handful of texts to support their claims.[71] Rather than cite dozens of texts, plain-meaning originalists prefer to cite the same text dozens of times. Needless, to say, one of the texts they have endlessly recycled is the Anti-Federalist *Dissent.* Until supporters of the individual-rights view can locate a comparable body of evidence to the one produced by supporters of the militia-based reading of the Second Amendment, then the issue of what bearing arms meant ought to be viewed as settled as a matter of historical fact. The dominant understanding of the phrase bear arms in the founding era, and therefore the understanding incorporated into the Second Amendment, was indisputably the orthodox military one. To suggest otherwise, as many Second Amendment originalists have done, is to engage in a form of sophistry that borders on intellectual fraud.[72]

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70. The figure was obtained by searching the Evans Early American imprints and newspaper collections, which includes most of the major newspapers from the founding era and all of the published books, broadsides, and pamphlets. For a complete list of these occurrences, see Saul Cornell, *Occurance and Usage of Bearing Arms in Books, Pamphlets, and Broadsides in the Evans Digital Collection, 1776–1791* (April 2007) (unpublished table, on file with the *Maryland Law Review*). For an effort to place the *Dissent* in its intellectual and political context, see BEYOND THE FOUNDERS: NEW APPROACHES TO THE POLITICAL HISTORY OF THE EARLY AMERICAN REPUBLIC 251–73 (Jeffrey L. Pasley et al. eds., 2004).

71. For a discussion of this feature of Second Amendment originalism, see Rakove, *supra* note 49, at 113–14.

72. When faced with such overwhelming evidence, gun rights advocates sometimes fall back on the word "keep," noting that even if bear arms was widely understood to have a military meaning then the word "keep" ought to be viewed as strictly private in nature. Of course there is no evidence of any constitutional text from the founding era affirming a separate and distinct right to keep arms apart from the obligation to bear them in a well-regulated militia. Following the same logic one would have to conclude that the Constitution would allow cruel or unusual punishments, prohibiting only cruel and unusual punishments. The effort to cleave keeping arms from bearing them is profoundly anachronistic. Founding-era militia statutes routinely required citizens to purchase their own arms, which they were required to use to meet their legal obligation to participate in the militia. Thus, in practice, keeping arms was hardly ever divorced from the obligation to bear them. Saul Cornell, *Early American Gun Regulation and the Second Amendment: A Closer Look at the Evidence*, 25 LAW & HIST. REV. 197, 200, 202–03 (2007). Another common historical error in originalist scholarship stems from the conflation of the language of eighteenth-century constitutionalism with that of the Jacksonian Era. The language of state constitutionalism shifted in the early-nineteenth century. Thus, Pennsylvania's revolutionary-era Constitution affirmed a right of the people to bear arms in defense of themselves and the state. Mississippi's Jacksonian Era Constitution employed a more individualistic language affirming a right of each citizen to bear arms in defense of himself and the state. If the earlier language had protected an individual right there would have been little need to change it. On this point see Robert Weisberg, *The Utilitarian and Deontological Entangle-*

IV. CONCLUSION

The examples cited above are not meant to provide an exhaustive survey of American views of constitutional interpretation in the tumultuous decades between the American Revolution and the rise of Jacksonian democracy.[73] Nor can this evidence come close to capturing the rich and deeply contested early history of the right to bear arms.[74] Setting aside the normative questions about the value of originalism as a method of constitutional interpretation, one thing seems clear: in its current incarnation this methodology is deeply flawed. Plain-meaning originalism is inconsistent with many of the founding era's own interpretive principles. Moreover, plain-meaning-originalism's methodology fails to meet the rigorous standards of serious historical inquiry. In its current form, plain-meaning originalism is little more than an intellectual façade for ideologically-driven scholarship. Unless originalists are willing to master and apply standard historical methods with some rigor, their methodology will never be much more than the old law office history with a new coat of paint.

ment of Debating Guns, Crime, and Punishment in America, 71 U. CHI. L. REV. 333, 338–45 (2004) (reviewing GUNS, CRIMES, AND PUNISHMENT IN AMERICA (Bernard E. Hardcourt ed., 2003)). Indeed, the debates in Jacksonian Era constitutional conventions clearly demonstrate that Americans understood the difference between these two different formulations of the right to bear arms. On this shift, see A WELL-REGULATED MILITIA, *supra* note 29, at 42.

73. The development of ratifier intent as the appropriate guide to constitutional interpretation based on a compact theory of the union and robust theory of popular sovereignty clearly occurred in the Jeffersonian Era. *See* Lofgren, *supra* note 7, at 94–95; Powell, *supra* note 7, at 916.

74. For a detailed discussion of this early history, see A WELL-REGULATED MILITIA, *supra* note 29.