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Tinhatting the Constitution: Originalism as a Fandom

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TINHATTING THE CONSTITUTION: ORIGINALISM AS A FANDOM

*Stacey M. Lantagne**

Abstract

Several recent Supreme Court cases, most notably *Bruen* and *Dobbs*, have employed originalist methods to interpreting the Constitution, seeking to give the Second and Fourteenth Amendments, respectively, the meaning that was understood by the public in 1791 and 1868. In this imaginative exercise compiling massive amounts of textual evidence to arrive at conclusions regarding what unknown people were thinking, originalism resembles a type of fandom practice called RPF, or Real Person Fiction. This type of fan activity likewise compiles massive amounts of textual evidence to arrive at conclusions regarding what unknown people were thinking. It’s just that RPF revolves around celebrities instead of the Framers.

This Article seeks to interrogate originalism through a fandom lens, viewing it as a type of RPF. Doing so can provide a different perspective on some of the criticisms that have been leveled at RPF, including its lack of neutrality and diversity. This Article finds that originalism is actually a particular RPF phenomenon known as “tinhattng,” in which those engaging in the imaginative exercise believe their conclusions to be the truth. Tinhatters are maligned in fandom, leading to query why originalists are not so easily dismissed.

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INTRODUCTION

The most recent Supreme Court term delivered a number of blockbuster decisions, two of which in particular that unsettled long-standing law. *Dobbs* overruled the nearly fifty-year-old precedent of *Roe v. Wade*.¹ *Bruen* declared unconstitutional a New York statute that had been over a hundred years old.²

Although these decisions caused upheaval in long-established laws that had been part of the history and tradition of the legal landscape for decades, the decisions claimed to be overturning the laws based on that same history and tradition.³ In fact, at one point the Court bluntly stated, “To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with the Nation’s historical tradition of firearm regulation.”⁴ There could be no clearer statement of the primacy of historical tradition over all other things, including important government interests.

Dobbs and *Bruen* specifically stand as vindications of the triumph of an interpretive tool known as originalism:⁵ that the words of the Constitution, its amendments, and other statutes should be interpreted according to their “original” meaning.⁶ Proponents of originalism claim that it is the only reliable way of deciding thorny constitutional questions,

1. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

2. See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

3. See also *D.C. v. Heller*, 554 U.S. 570, 639 (2008) (Stevens, J., dissenting) (describing the Court’s originalist analysis of the Second Amendment as “a dramatic upheaval in the law”); *id.* at 722 (Breyer, J., dissenting) (stating that the decision “throw[s] into doubt” laws around the United States).

4. *Bruen*, 142 S. Ct. at 2126.

5. See Michael Waldman, *Originalism Run Amok at the Supreme Court*, BRENNAN CTR. FOR JUST. (June 28, 2002), <https://www.brennancenter.org/our-work/analysis-opinion/originalism-run-amok-supreme-court> [<https://perma.cc/585F-CBFW>].

6. See Tom McCarthy, *Amy Coney Barrett is a constitutional ‘originalist’ – but what does it mean?*, THE GUARDIAN (Oct. 26, 2020), <https://www.theguardian.com/us-news/2020/oct/26/amy-coney-barrett-originalist-but-what-does-it-mean> [<https://perma.cc/82YF-3ELU>]; see also Amy C. Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1921 (2017).

and that any other method of interpreting the Constitution will inevitably and unacceptably require the personal views of judges.⁷

This Article interrogates the value of originalism as an interpretive tool through a unique lens: that of the fan creativity known as real person fiction, or RPF. This Article argues that key insights can be gained by considering how originalism resembles the RPF practices of internet fandoms. Part I of this Article explains in more detail what RPF is, including the phenomenon of “tinhatting.” Part II of this Article examines how originalism has operated in recent Supreme Court jurisprudence. Finally, Part III of this Article establishes originalism as a type of RPF practice known as “tinhatting,” which presents the results of its research as incontrovertible fact. This Article concludes by arguing that seeing originalism as a type of “tinhatting” can help evaluate its utility as an interpretive tool.

I. REAL PERSON FICTION AS A FAN ACTIVITY

Fanfiction, or “fic,” as it is often shortened, is usually defined as the act of writing fiction about other people’s characters, meaning that the writers borrow the intellectual property of another in order to produce further stories.⁸ An example might be continuing the adventures of Harry Potter. While all fanfiction might fall into this general definition, pieces of fanfiction can be wildly different from each other. Some are only a hundred words, while others are closer to a million words. Some are sexually explicit, while others are appropriate for all audiences. Some are romantic stories, while others have no element of romance to them. Some adhere closely to the original work (known as “canon” in fandom terms), while others depart from it drastically, by changing the characters’ ages, genders, sexualities, and/or races; putting the characters in dramatically new settings; or changing other details such as professions or romantic choices.⁹ These fanfiction stories can be incredibly popular. The most read fanfiction on the Internet website Archive of Our Own (AO3), a site dedicated to fanfiction,¹⁰ is a Harry Potter fic that has over seven million

7. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2326; see also *Heller*, 554 U.S. at 634–35; see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989).

8. See Stacey M. Lantagne, *When Real People Become Fictional: The Collision of Trademark, Copyright, and Publicity Rights in Online Stories About Celebrities*, 7 CASE W. RES. J.L. TECH. & INTERNET 39, 48 (2016).

9. See, e.g., ARCHIVE OF OUR OWN (last visited July 21, 2022), <https://archiveofourown.org/> [https://perma.cc/8CBY-YEAE].

10. See *About the OTW*, ARCHIVE OF OUR OWN (last visited July 21, 2022), <https://archiveofourown.org/about> [https://perma.cc/CZ5Z-S4NA].

views.¹¹ A *Twilight* fanfiction was the basis for the blockbuster *Fifty Shades of Grey* trilogy.¹²

There is, however, another type of storytelling activity that fans engage in, where they tell stories about real people rather than fictional characters. This type of storytelling is known within fandom circles as real person fic, or RPF.¹³ RPF shares many of the characteristics held by fanfiction: it is often created and shared non-commercially in the same areas of the internet where fanfiction can be found, and those who engage in RPF may also engage in fiction about fictional people (FPF) as well. For instance, AO3 has a sizable RPF segment used by authors whose stories can also be found in FPF fandoms.¹⁴

A. *The Operation of an RPF Fandom*

Like FPF, RPF runs an enormous gamut of creativity. Some RPF stories are long, while others are short. Ratings range from general audiences to explicit ones. The “real people” discussed in the stories might closely resemble their public persona (e.g., might be a movie star still acting in movies, or a musician still performing in a boyband). They could also be in an “alternate universe,” or AU, meaning that the “real people” have been shifted into a different setting or profession or have had their identity otherwise altered in some way (including switching gender, sexuality, age, and/or race).¹⁵

As this description might indicate, RPF is aggressively and unapologetically fictional. The “real people” in the RPF stories are merely the “protagonists” of “fictional narratives that supplement and enhance” the real-life details.¹⁶ RPF might be ostensibly about real people, but in fact, RPF “consciously fictionalizes . . . reality.”¹⁷ Those

11. See MsKingBean89, *All the Young Dudes*, Archive of Our Own (Nov. 12, 2018), <https://archiveofourown.org/works/10057010> [<https://perma.cc/5L53-ZFAP>].

12. See Hayley C. Cuccinello, *Fifty Shades of Green: How Fanfiction Went From Dirty Little Secret To Money Machine*, *Forbes* (Feb. 10, 2017, 12:20 PM), <https://www.forbes.com/sites/hayleycuccinello/2017/02/10/fifty-shades-of-green-how-fanfiction-went-from-dirty-little-secret-to-money-machine/?sh=62ff16c6264c>.

13. See Melanie Piper, *Real Body, Fake Person: Recontextualizing Celebrity Bodies in Fandom and Film*, 20 *TRANSFORMATIVE WORKS & CULTURES* ¶ 1.1 (2015).

14. See ARCHIVE OF OUR OWN (last visited July 21, 2022), https://archiveofourown.org/media/Celebrities%20*a*%20Real%20People/fandoms [<https://perma.cc/A3LB-3LYH>].

15. See *id.*; see also Sooyun (Clara) Hong, *The Real K-Pop Idols of Fanfiction: Reclaiming “Real Person” Fanfiction as K-Pop Industry Practice at 28* (June 2020) (B.A. Thesis, McGill University); see also Ross Hagen, “*Bandom Ate My Face*”: *The Collapse of the Fourth Wall in Online Fan Fiction*, 38 *POPULAR MUSIC & SOC’Y* 44, 46 (2015); see also Kristina Busse, “*I’m Jealous of the Fake Me*”: *Postmodern Subjectivity and Identity Construction in Boy Band Fan Fiction*, in *FRAMING CELEBRITY: NEW DIRECTIONS IN CELEBRITY CULTURE* (Holmes & Redmond, Routledge eds., 2006).

16. Busse, *supra* note 15, at 4.

17. *Id.*

who write RPF “consciously declare their writing to be fictional.”¹⁸ The repetition of “consciously” is important: Those who engage in RPF write their stories with a clear-eyed understanding that they are writing works of fiction, even if that fiction contains characters that share the name and some “real-life” details with real people. Indeed, many RPF writers are so cognizant of the fabrication of their works that they place disclaimers at the front of their stories, proclaiming their fictional nature.¹⁹

The fictional nature of RPF can be very easy to immediately grasp. Many of the stories contain impossible scenarios, like boybands on spaceships²⁰ or movie stars working as baristas in coffee shops.²¹ Here is how one scholarly work describes a particular piece of RPF involving Justin Timberlake: “Justin Timberlake, who wants to temporarily escape the limelight, hides out as a high school student in rural Kansas”²² Another piece of RPF about Justin Timberlake is one in which “Justin loses his memory and must piece together his past.”²³ In another story focused on other members of the band *NSYNC, “JC and Chris are fantastically given the ability to make things come true simply by voicing them: whatever they say out loud to the media becomes reality.”²⁴ In another, “Chris changes into a woman, [and] he and Joey fall in love.”²⁵ This latter fic is an example of a fic that engages in “shipping,” pairing two characters together in a relationship.²⁶

As the heavy fictionalization in the previous examples might indicate, the fandom is, for the most part, in on the joke. Fans know that writers are riffing off of real people to construct fictional worlds. “[F]ans are not indiscriminate remixers, incapable of recognizing the boundary between ‘real’ and ‘fictional,’ but in fact constantly aware of fanworks’ status as

18. *Id.*

19. See Catherine Hoad, *Slashing through the boundaries: Heavy metal fandom, fan fiction and girl cultures*, 3 METAL MUSIC STUD. 5, 16 (2017) (“Writers on Rockfic usually include a disclaimers that they are ‘borrowing’ the persona for the purposes of non-profitable fiction.”); *Tinhat*, FANLORE (last visited July 21, 2022), <https://fanlore.org/wiki/Tinhat> [<https://perma.cc/3LQB-25EQ>] (“Many RPF fanfic contain an explicit disclaimer in the header emphasizing that the story is fiction and denying any implication that the writer thinks the people in question are actually a couple.”).

20. See Hong, *supra* note 15, at 56.

21. See harriet_vane, *Ten Cups of Coffee (A Love Story)*, ARCHIVE OF OUR OWN (Jan. 16, 2012), <http://archiveofourown.org/works/321697> [<https://perma.cc/F2D6-7EXD>].

22. Busse, *supra* note 15, at 7.

23. *Id.*

24. *Id.*

25. *Id.*

26. See Aja Romano, *Canon, fanon, shipping and more: a glossary of the tricky terminology that makes up fan culture*, VOX (June 7, 2016), <https://www.vox.com/2016/6/7/11858680/fandom-glossary-fanfiction-explained> [<https://perma.cc/JJ9D-88LM>] (hereinafter Romano, *Canon*).

derivative.”²⁷ So, fans know that Justin Timberlake did not hide out in rural Kansas, nor did he ever lose his memory. Fans know that the members of *NSYNC do not possess the magical ability to make whatever they say out loud a reality, and that one of them did not “change” into a woman.

Given how obviously fictional so much of RPF is, where does the “real people” aspect come in? Despite the fact that they wholeheartedly embrace the fictional nature of their stories, members of RPF fandoms still demand a measure of verisimilitude for the stories to be successful. Without this verisimilitude, the stories would operate as original stories and not as RPF. For this reason, the characters in the stories, no matter how outrageously altered their circumstances might be, should still reference the “real people” in question.²⁸ This is more than just sharing a name. The success of RPF depends on copious amounts of research regarding the “real people” that act as the characters in the stories.²⁹ Members of RPF fandoms compile as much information as they can, using things like interviews, social media accounts, and paparazzi footage as their canon source texts.³⁰ The trick of RPF is to heavily fictionalize characters that are still simultaneously recognizable as the “real people,” and that is hard and detail-oriented work. “The attempt to imagine a ‘real’ self as realistically as possible . . . requires extensive research, ranging from concert performances and interviews to articles and personal interaction.”³¹

Once the RPF fans have gathered their research about the real person subject, they then interpret this information into the RPF stories that they write and post. For instance, the learned fact, gleaned through the research of the source text, that a particular celebrity dislikes cucumbers might be referenced in an RPF fic when the corresponding character in RPF refuses cucumbers.³² A fic about the actors Jesse Eisenberg and Andrew Garfield during the filming of the movie *The Social Network* would “include . . . [real] details . . . , such as how many takes have been done and how late the shoot has gone on to this point,” gathered, again, from source text interviews.³³ However, the fic would then take those real details as the starting point for “imagin[ing] off-the-record moments.”³⁴

27. Hong, *supra* note 15, at 29.

28. *See id.* at 27 (“RPF writers . . . use ‘real’ details, such as real names.”).

29. *See* Hagen, *supra* note 15, at 46 (“RPF participants . . . value an author’s research. . .”).

30. *See* Hong, *supra* note 15, at 47–48.

31. Busse, *supra* note 15.

32. *See* Hong, *supra* note 15, at 53.

33. Piper, *supra* note 13, ¶ 7.6.

34. *Id.*

B. “Tinhattling”

RPF is a popular and enduring fandom activity. AO3 lists a copious number of RPF fandoms present on its fanfiction archive, starting with “6th Century CE RPF” and ending with “Zodiac (2007) RPF.”³⁵ RPF is especially popular on Wattpad, a site that is not dedicated to fanworks the way AO3 is but instead hosts a large amount of original fiction as well.³⁶ The One Direction RPF fandom was especially active on Wattpad, with the series *After* making the mainstream jump in the same way as *Fifty Shades of Grey*.³⁷

However, despite its enduring popularity, RPF is also controversial within fandom circles.³⁸ Many fans who enthusiastically engage in FPF refuse to engage in RPF.³⁹ One commentator described the practice as being “widely reviled by wider fan fiction communities.”⁴⁰ Another commentator called it “pathological.”⁴¹ There are a number of reasons for this,⁴² but one of them is the danger of “blur[ring] the lines between fiction and reality.”⁴³ This is primarily a danger when it comes to shipping—pairing two real people in a fictional relationship together.⁴⁴ Although others might worry that RPF shippers are confusing fiction and reality, this trait is “not synonymous with being an RPF shipper, despite many people’s misconception that it is, as most RPF shippers of non-canon celebrity pairings do not believe that the ship is real.”⁴⁵ As one commentator notes, “[I]n many parts of fandom there’s an understanding

35. See ARCHIVE OF OUR OWN (last visited July 21, 2022), https://archiveofourown.org/media/Celebrities%20*a%20Real%20People/fandoms [<https://perma.cc/EKZ3-A9MJ>].

36. See WATTPAD (last visited July 21, 2022), <https://www.wattpad.com/> [<https://perma.cc/CF9L-M8AJ>]. Wattpad also is a profit-making enterprise dedicated to getting their writers discovered, which explains the increased presence of original fiction, *see id.*, while AO3 is a non-profit dedicated to noncommercial fanworks; *see also About the OTW*, ARCHIVE OF OUR OWN (last visited July 21, 2022), <https://archiveofourown.org/about> [<https://perma.cc/S656-26FF>].

37. See Elizabeth Minkel, *The truth behind that six-figure deal for Harry Styles fan fiction*, NEWSTATSMAN (June 24, 2014 4:45 AM), <https://www.newstatesman.com/culture/2014/06/truth-behind-six-figure-deal-harry-styles-fan-fiction> [<https://perma.cc/2JFT-WBRR>].

38. See Piper, *supra* note 13, ¶ 2.3.

39. See Hong, *supra* note 15, at 78 (“[M]any ‘traditional’ fanfiction reader-writers disavow RPF as a genre”); *see also* Piper, *supra* note 13, ¶¶ 1.1-1.2.

40. Hoad, *supra* note 19, at 11.

41. Hong, *supra* note 15, at 16.

42. See Hoad, *supra* note 19, at 7; *see also* Hong, *supra* note 15, at 8.

43. Hagen, *supra* note 15, at 48.

44. See Romano, *Canon*, *supra* note 26.

45. *Tinhat*, *supra* note 19.

that if you're shipping real people, you're only shipping the *idea* of them being in a relationship."⁴⁶

Members of the RPF fandom recognize that they carry this dubious reputation. They can be sensitive to accusations that they believe their made-up stories and are defensively "quick to distance themselves" from such an implication.⁴⁷ Nevertheless, the suggestion exists precisely because there are some members of RPF fandoms who *do* blur the line of reality and start to believe the fiction they're creating.

Fandom has a name for such people who start to believe the RPF stories being cooked up by the fandom: tinhatters. A tinhatter is someone who is "unable to recognize the difference between fictional stories about real people and their actual lives."⁴⁸ One famous example of tinhatting occurred in the One Direction fandom when a number of fans became convinced that Harry Styles and Louis Tomlinson were in fact secretly dating each other.⁴⁹ These fans, known as Larries, "argue[d] the ship [Harry Styles and Louis Tomlinson] [was] real, not merely the subject of [RPF]."⁵⁰

Tinhatters are the minority in RPF fandom.⁵¹ In fact, many RPF members don't *want* their stories to mimic real life too closely: "From a purely creative standpoint, the characters and situations become less pliable for reinterpretation when the imaginary becomes an actuality."⁵² Too much truth destroys the joyful make-believe fun: "[A]n element of fantasy and 'pretend' may be necessary for RPF to function effectively."⁵³ Nevertheless, some of those who engage in telling stories about real people become convinced of the reality of their beliefs and will insist upon the truth of their fiction, no matter what.⁵⁴

46. Aja Romano, *Larry Stylinson, the One Direction conspiracy theory that rules the internet, explained*, VOX (Apr. 18, 2016), <https://www.vox.com/2016/4/18/11384118/larry-stylinson-one-direction-conspiracy-theory> [<https://perma.cc/84GJ-FGLN>]. (hereinafter Romano, *Larry Stylinson*).

47. Hagen, *supra* note 15, at 48.

48. Hannah McCann & Clare Southerton, *Repetitions of Desire: Queering the One Direction Fangirl*, 12 GIRLHOOD STUD. 49, 50; *see also* *Tinhat*, *supra* note 19.

49. *See* Romano, *Larry Stylinson*, *supra* note 46.

50. McCann & Southerton, *supra* note 48, at 50.

51. *See* Romano, *Larry Stylinson*, *supra* note 46 ("Usually tinhatters comprise just a small portion of an otherwise diverse fandom.").

52. Hagen, *supra* note 15, at 54.

53. *Id.*

54. *See* Romano, *Larry Stylinson*, *supra* note 46.

II. RECENT ORIGINALISM AT THE SUPREME COURT

A. Background

Much of the law depends on the interpretation of common texts. Originalism is one proposal for this interpretation, asserting that one should interpret the words of a document according to the meaning given to that document at the time it was written.⁵⁵ “its plain words as originally understood.”⁵⁶ “[O]riginalist methods must enable us to determine what the original meaning is and which actions are consistent with that meaning.”⁵⁷ And then, once that original meaning is determined, it is “a relatively hard constraint.”⁵⁸

Originalist ideas can be found in Supreme Court opinions from years before 2022, of course, often supported by Justice Scalia or Justice Thomas. The majority opinion in *Heller*, written by Justice Scalia, is notably originalist in establishing that the scope of the Second Amendment extends beyond the “well regulated Militia” mentioned in its text.⁵⁹ Justice Scalia’s dissent in *Obergefell* likewise contains originalist ideas, when Justice Scalia argued against the protection of same-sex marriage by referring to the meaning of the Fourteenth Amendment as it was understood when it was ratified in 1868: “When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so.”⁶⁰ Displaying the originalist focus on contemporaneous public understanding, the dissent asserts that it was “unquestionable that the People who ratified that provision did not understand it” to include same-sex marriage.⁶¹ Justice Thomas, in a dissent last year, attacked abortion rights on the same originalist grounds that would ultimately triumph in *Dobbs*: “[T]he idea that the Framers of the Fourteenth Amendment understood the Due Process Clause to protect a right to abortion is farcical.”⁶²

The current composition of the Supreme Court possesses a majority of originalists,⁶³ and therefore, originalism has rushed to the forefront of

55. See Edwin Meese III, *Toward A Jurisprudence of Original Intent*, 11 HARV. J. L. & PUB. POL’Y 5, 7 (1988); see also Jonathan Gienapp, *Constitutional Originalism and History*, PROCESS: A BLOG FOR AM. HIST. (Mar. 20, 2017), <http://www.processhistory.org/originalism-history/> [https://perma.cc/N4PJ-A8JQ].

56. Meese, *supra* note 55, at 10.

57. Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 270 (2017); see also Scalia, *supra* note 7, at 852.

58. Barrett, *supra* note 6, at 1924.

59. See D.C. v. *Heller*, 554 U.S. 570 (2008).

60. *Obergefell v. Hodges*, 576 U.S. 644, 715 (2015) (Scalia, J., dissenting).

61. *Id.*

62. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2151 (2020) (Thomas, J., dissenting).

63. See Gienapp, *supra* note 55.

recent Supreme Court opinions. Again and again, the focus in recent opinions returns to history and tradition.⁶⁴ Justice Gorsuch, in a concurrence in *West Virginia v. Environmental Protection Agency*, a case about the extent to which the EPA could address the very twenty-first-century problem of climate change, cited *The Federalist Papers*⁶⁵ (from an era so separated from our era of global warming that they were in the middle of the Little Ice Age).⁶⁶ The Court's ruling in *Brown v. Davenport*, a *habeas corpus* case, likewise centered itself in history, starting its discussion with seventeenth-century British law.⁶⁷ *Dobbs*, the abortion-centered case that overturned *Roe*, stated that a right must be "rooted in the Nation's history and tradition" in order to exist.⁶⁸ *Bruen*, a gun control case, stated that history is the only inquiry that matters when it considered the New York statute in question.⁶⁹ The opinion states, "[M]odern firearms regulations [must be] consistent with the Second Amendment's text and historical understanding."⁷⁰ *Kennedy*, a school prayer case, also endorsed "[a]n analysis focused on original meaning and history."⁷¹

The ultimate goal of this focus on history and tradition is to discover the original meaning of either the Founders or the other people who drafted the source text in question,⁷² as is reiterated in recent cases time and time again. Courts must make decisions that "faithfully reflect the understanding of the Founding Fathers."⁷³ The first (and now only) step in evaluating the constitutionality of a law under the Second Amendment is to "ascertain the original scope of the right based on its historical meaning."⁷⁴ As the opinion goes on to elucidate, "[T]he scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted

64. See also Barrett, *supra* note 6, at 1923.

65. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2617–18 (2022) (Gorsuch, J., concurring).

66. See Benjamin V. Gaglioti et al., *Timing and Potential Causes of 19th-Century Glacier Advances in Coastal Alaska Based on Tree-Ring Dating and Historical Accounts*, FRONTIERS IN EARTH SCI. 1 (May 3, 2019), <https://www.frontiersin.org/articles/10.3389/feart.2019.00082/full> [<https://perma.cc/L25F-JSXE>].

67. See *Brown v. Davenport*, 142 S. Ct. 1510, 1520(2022).

68. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022); see also *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

69. See *N.Y. State Rifle & Pistol Ass'n, v. Bruen*, 142 S. Ct. 2111, 2131 (2022).

70. *Id.*

71. *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2428 (2022).

72. See, e.g., *D.C. v. Heller*, 554 U.S. 570, 625 (2008) (adopting the "original understanding of the Second Amendment"). At times, though, it is not always clear exactly who the relevant people might be. See also *Davenport*, 142 S. Ct. at 1520 (wishing to "return the Great Writ closer to its historic office").

73. *Kennedy*, 142 S. Ct. at 2428 (internal quotes omitted).

74. *Bruen*, 142 S. Ct. at 2126.

in 1791.”⁷⁵ If eighteenth-century society had a problem that it was unable to solve, that is a good indication that solving that problem in the twenty-first century would be unconstitutional.⁷⁶ As *Heller* told us and *Bruen* reiterated, “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.”⁷⁷ This is the standard operating procedure for originalism: Words in the Constitution should be given the meaning “known to ordinary citizens in the founding generation.”⁷⁸

But how does one determine what an eighteenth- or nineteenth-century public thought about the text of the Constitution or the text of an amendment? As one might expect, determining the original meaning of a centuries-old document requires considering centuries-old law.⁷⁹ And that is exactly how the Supreme Court proceeds in the two most originalist cases of the term: *Dobbs* and *Bruen*.

B. *Dobbs*

In *Dobbs*, the Court considered the constitutionality of a Mississippi law that prohibited abortion in most cases after fifteen weeks.⁸⁰ An abortion clinic in Mississippi filed a lawsuit to challenge the law, claiming that the statute violated the Supreme Court’s precedents governing abortions.⁸¹ The Supreme Court, rather than deciding the case based solely on *stare decisis*,⁸² turned to the public’s understanding of the Fourteenth Amendment to decide whether *Roe* and its progeny were decided correctly in the first place.⁸³

Although the Fourteenth Amendment was passed in 1868,⁸⁴ the Supreme Court went back considerably further in time to establish the thought process of these nineteenth-century people. Its analysis began with “Henry de Bracton’s 13th-century treatise” before moving on to “Sir Edward Coke’s 17th-century treatise,” “[t]wo treatises by Sir Matthew Hale” that appear to be from the eighteenth century, and then writings by William Blackstone, “writing near the time of the adoption of our Constitution.”⁸⁵ The opinion also pulled together “English cases dating

75. *Id.* at 2137.

76. *See id.* at 2131.

77. *Id.* at 2119 (quoting *Heller*, 554 U.S. at 634–35).

78. *D.C. v. Heller*, 554 U.S. 570, 577 (2008).

79. *See, e.g., id.* at 592 (“Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents”).

80. *See Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022).

81. *See id.* at 2244.

82. *See id.*

83. *See id.* at 2247.

84. *See id.* at 2253.

85. *Id.* at 2249.

all the way back to the 13th century,”⁸⁶ citing a case from 1732 and an indictment from 1602.⁸⁷ The opinion, copious and thorough in its research, also located cases from the colonial period, notably from Maryland in 1652.⁸⁸ Its ultimate conclusion from its journey through time was that “an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of common law,” leading to “[t]he inescapable conclusion . . . that a right to abortion is not deeply rooted in the Nation’s history and traditions.”⁸⁹

C. *Bruen*

In *Bruen*, the Court considered the constitutionality of New York’s licensing schemes for firearms, which had been in place since “the early 1900s.”⁹⁰ The Plaintiffs sued, alleging that the statutes in question were unconstitutional under the Second Amendment.⁹¹ To determine the question, the Court required an assessment of whether the “firearm regulation [was] consistent with this Nation’s historical tradition.”⁹² As in *Dobbs*, however, deciding the question of what is consistent with this Nation’s history requires looking far earlier in history, predating the founding of the nation by quite some time. The opinion analyzed gun control laws from Tudor England to the Western Territories.

Bruen presented some debate as to whether the Supreme Court should consider the thoughts of people of 1791 or 1868, but the Supreme Court concluded, despite the 77 years between them, that “the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry.”⁹³ The Court discussed in depth England’s 1328 Statute of Northampton,⁹⁴ proclamations of Kings Henry VIII and James I regarding handguns,⁹⁵ the 1686 trial in England of Sir John Knight,⁹⁶ and various seventeenth- and eighteenth-century Colonial statutes.⁹⁷ The Court also acknowledged a “slight uptick in gun regulation during the late-19th century,”⁹⁸ although that history was given little weight for concerning the “Western

86. *Id.*

87. *See id.*

88. *See id.* at 2251.

89. *Id.* at 2253.

90. *N.Y. State Rifle & Pistol Ass’n, v. Bruen*, 142 S. Ct. 2111, 2123.

91. *See id.* at 2125.

92. *Id.* at 2126.

93. *Id.* at 2138.

94. *See id.* at 2139.

95. *See id.* at 2140.

96. *See id.* at 2040–41.

97. *See id.* at 2142–44.

98. *Id.* at 2153–54.

Territories” and not the states.⁹⁹ At any rate, not enough information about these regulations existed, the Court concluded, to “inform the origins and continuing significance of the [Second] Amendment.”¹⁰⁰ At the end of this long journey through the Anglo-American history of public carry, “[the Court] conclude[d] that respondents [did not] meet their burden to identify an American tradition justifying the State’s proper-cause requirement.”¹⁰¹

III. ORIGINALISM AS RPF FANDOM

Proponents defend originalism as objective truth, and hence superior to any other interpretive method that could be employed.¹⁰² It is, purportedly, “the only democratically legitimate way to interpret and apply the Constitution.”¹⁰³ As the Court in *Dobbs* explained, other forms of interpretation are “freewheeling” and “unprincipled.”¹⁰⁴ They “risk endorsing [things] that our ancestors would never have accepted.”¹⁰⁵ Originalism, by contrast, helps “guard against the natural human tendency to [project] the Court’s own ardent views” into the interpretation of the Constitution.¹⁰⁶ In this way, it protects against liberties being “subtly transformed into the policy preferences of the Members of this Court.”¹⁰⁷ Instead, “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”¹⁰⁸ Judges who adhere to originalism, therefore, avoid the error of “render[ing decisions] not on the basis of what the Constitution originally meant, but on the basis of what the judges currently [think] it desirable for it to mean.”¹⁰⁹

However, originalism has much in common with RPF fandoms: They both use historical source texts to reach conclusions about the thoughts of the people behind those texts. Seeing originalism in this way helps to expose its weaknesses, since, as with any form of RPF, the act of originalist interpretation is not as objective as it is professed to be. Indeed, originalism can be understood as a form of tinhatting, where the fans

99. *Id.* at 2154.

100. *Id.* at 2121.

101. *Id.* at 2156.

102. See Waldman, *supra* note 5 (“Supposedly it would take the politics out of judging.”). (Direct quote doesn’t match source)

103. Barrett, *supra* note 6, at 1925.

104. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2248 (2022).

105. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2133 (2022).

106. *Dobbs*, 142 S. Ct. at 2247.

107. *Id.* at 2247–48 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

108. *D.C. v. Heller*, 554 U.S. 570, 634–35 (2008).

109. Scalia, *supra* note 7, at 852.

reading the source text believe that the fiction they are constructing must be reality.

A. *Telling Stories Using Historical Analysis*

The Supreme Court's intense historical analysis in *Bruen* and *Dobbs* purports to arrive at the “inescapable” meaning of the Second and Fourteenth Amendments.¹¹⁰ The conclusions in these cases are presented as being unassailable: the Court *knows* for a fact what the people thought in 1868, or 1791, or at whatever date is relevant. Based on its compilation of reams of historical evidence, the Court makes statements on “public understanding”: that the public at the time of ratification definitely understood the text to mean one thing and not to mean another.¹¹¹

This, however, is nothing more than an act of imagination similar to what members of RPF infandom perform. After all, the Court was not alive during any of the relevant dates, nor is there anyone alive from any of the relevant dates who we can ask for their understanding of the scope of the Second Amendment or the permissibility of abortion. While originalist interpretation may rely on historical texts, it still requires the imagination of a type similar to imagining how a celebrity feels based on their interviews.

One critic of the interpretive tool described originalism in broad, mocking strokes as “try[ing] to guess what the ghost of [T]homas [J]efferson really meant.”¹¹² Another referred to it as “consult[ing] the vapors of history.”¹¹³ While these might be exaggerations,¹¹⁴ they have a core of truth: originalism *is* trying to determine what dead people thought about things. Justice Scalia himself characterized the process as “somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day.”¹¹⁵

Although presented as fact, what the Court is doing when it engages in the activity of pronouncing the thoughts of unknown and unknowable eighteenth-century people is strikingly similar to what RPF writers do when pronouncing the thoughts of unknown and unknowable celebrities.

110. *Dobbs*, 142 S. Ct. at 2253.

111. *Id.* at 2253; *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2136 (2022); *see also* *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2151 (2020) (Thomas, J., dissenting); *Obergefell v. Hodges*, 576 U.S. 644, 15 (2015) (Scalia, J., dissenting).

112. WandysChoiceTweeter (@ChoiceWandys), TWITTER (July 6, 2022, 4:35 PM), <https://twitter.com/ChoiceWandys/status/1544782068105637888> [<https://perma.cc/6HAJ-NNCM>].

113. Waldman, *supra* note 5.

114. *See also* William G. Merkel, *The District of Columbia v. Heller and Antonin Scalia's Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349, 380 (2009) (“Scalia and company flatter themselves respecting their ability to divine unambiguous historical truth from mystic séances with the spirits of 1787.”).

115. Scalia, *supra* note 7, at 856–57 (1989).

In impulse, therefore, originalism shares commonalities with RPF. They both use tools to interpret a common “text” (the Constitution or a real person). In RPF, the sources consulted include “TV appearances, interviews, some stalkerish/blurry candid snapshots, [and] anecdotal ‘fanaccounts.’”¹¹⁶ In originalism, the sources consulted include “the Constitutional Convention, the ratification debates, the Federalist and Anti-Federalist Papers, actions of the early Congresses and Presidents, and early opinions of the federal courts.”¹¹⁷

Once all the information is gathered and examined, both originalists and writers of RPF conclude what it means. Is Harry Styles in a secret relationship with Louis Tomlinson? Did the ratifiers of the Second Amendment understand that guns could be regulated and in what ways? To answer either of these questions, you must imagine what people are thinking. What does Harry Styles think about Louis Tomlinson? What did the people who drafted and ratified the Bill of Rights think about guns?

Originalism imagines what people thought and felt as they worked on the Second Amendment. A historian describing originalism states that it poses questions like, “[W]hat were the Constitution’s framers, or at least James Madison and Alexander Hamilton, thinking when they wrote it? What were the document’s ratifiers thinking when they voted for or against it?”¹¹⁸ Such questions are answered by composing RPF. Here’s how one fic in the *Hamilton* fandom begins, imagining what Hamilton was thinking as he read one of the Federalist Papers:

The New York Packet publishes ‘On the Authority of the Judiciary’ on March 11th, 1788. It’s signed Publius. Alexander reads it with a certain amount of perturbation. He’s been occupied writing on the executive branch and had meant to make a start on the judiciary in April. The style doesn’t read like Madison’s usual, but John Jay is still in the throes of illness and hasn’t been able to write since rallying to start ‘The Powers of the Senate,’ which Alexander had concluded.¹¹⁹

116. Hong, *supra* note 15, at 47–48; *see also* Romano, *Larry Stylinson*, *supra* note 46; Busse, *supra* note 15; Piper, *supra* note 13, ¶ 2.2 (explanatory parenthetical).

117. Barrett, *supra* note 6, at 1923; *see also* Scalia, *supra* note 7, at 852 (“He sought to do so by examining various evidence, including not only, of course, the text of the Constitution and its overall structure, but also the contemporaneous understanding of the President’s removal power (particularly the understanding of the First Congress and of the leading participants in the Constitutional Convention), the background understanding of what ‘executive power’ consisted of under the English constitution, and the nature of the executive’s removal power under the various state constitutions in existence when the federal Constitution was adopted.”).

118. Gienapp, *supra* note 55.

119. smilebackwards, *Succinct and Persuasive*, ARCHIVE OF OUR OWN (Dec. 23, 2015), <https://archiveofourown.org/works/5501729> [<https://perma.cc/6BKA-FZ8J>].

In *Heller*, Justice Scalia and Justice Stevens focused similar attention on what James Madison was thinking when he “include[d] . . . a conscientious-objector clause in his original draft of the Second Amendment.”¹²⁰

Similar acts of imagination occur in *Bruen* and *Dobbs*. The Court in *Bruen* dismissed “English history and custom before the founding” because, it stated, “the Framers would [not] have thought it applicable in the New World.”¹²¹ Such a statement is delivered with authority. But this firmness should not obscure the obvious fact that the Supreme Court actually had no idea what the Founders were thinking, any more than the author of the above fic knows what Alexander Hamilton was thinking when he read the Federalist Papers not written by him.

In *Dobbs*, when considering a particular historical statute, the Court queries, “Are we to believe that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women?”¹²² Answering this question required the Court to imagine what was in the head of the lawmakers.

Given the status of Catholics and women during the nineteenth century, it seems absurd not to believe that a large number of these lawmakers *were* in fact motivated by prejudice. In the nineteenth century, the influx of Catholic immigrants into the country produced a wave of anti-Catholic backlash.¹²³ Women, meanwhile, would not get the right to vote until 1920.¹²⁴ Given that one of these groups could not vote at all and the other had political parties arrayed against it, there is little reason to believe that laws in the nineteenth century were designed to consider the interests of Catholics or women. The Court, however, read the same history and reached a different conclusion. It told, in effect, a different story about these laws and the thoughts of the people who passed them.

The motivations of the legislators who passed these laws are not necessarily recorded. Likewise, there is no historical record of how “the public” regarded homosexual marriage or abortion in the nineteenth century. This requires the Supreme Court to fill in the gaps in the same way RPF fandom does. This gap-filling is “an important component in [RPF]” and “emphasizes a feeling of connection” to the people being considered.¹²⁵

120. *D.C. v. Heller*, 554 U.S. 570, 589 (2008).

121. *N.Y. State Rifle & Pistol Ass’n, v. Bruen*, 142 S. Ct. 2111, 2139 (2022).

122. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2256 (2022).

123. See Mark Silk & Andrew Walsh, *A Past Without a Future?: Parsing the U.S. Catholic vote*, AM. (Nov. 3, 2008), <https://www.americamagazine.org/issue/674/article/past-without-future> [<https://perma.cc/TAW4-85QD>] (describing the “active hostility of Protestant antagonists clustered in the Whig, Know Nothing and emerging Republican parties”).

124. See U.S. CONST. amend. XIX.

125. Hoad, *supra* note 19, at 12.

B. *Tinhatting*

The problem is not that the Supreme Court engages in the same storytelling techniques as writers of RPF: copiously researching all available textual evidence to extrapolate interpretations.¹²⁶ The problem is that the Supreme Court does so as a tinhatter: the much-maligned and embarrassing version of a RPF fan who steadfastly believes that the fictional conclusions they have derived from the evidence is the truth. When people believe that they know the truth about celebrities, fandom grows alarmed.¹²⁷ That, however, is precisely the point at which originalism *starts*.

The entire premise of originalism should raise suspicions that it cannot be actually discovering the truth. The Supreme Court seeks to ensure that we only allow laws that “our ancestors” would have accepted.¹²⁸ As critics of originalism have noted, this implies a curiously homogeneous understanding of how the public operated in the eighteenth and nineteenth centuries.¹²⁹ Any assertion that *all* people believed in a particular thing seems to suspect *a priori*. For instance, almost every analysis of history and tradition was undertaken during an originalist survey of the relevant past reveals statutes or cases that don’t fit the Court’s understanding of the words.¹³⁰ Those statutes get dismissed as “outliers.”¹³¹ But surely their existence indicates that there was no singular “understanding” to be uncovered.¹³²

Sometimes the Supreme Court acknowledges the inability to accurately enter the minds of the prior inhabitants of the country. Faced

126. See Hagen, *supra* note 15, at 46.

127. *Tinhat*, *supra* note 19 (“[T]inhat is often considered a derogatory term.”).

128. *N.Y. State Rifle & Pistol Ass’n, v. Bruen*, 142 S. Ct. 2111, 2133 (2022).

129. See Merkel, *supra* note 114, at 379 (“[T]he framers did not all share the same understanding of contested text. Debates dragged on over four months at the Constitutional Convention, and the Bill of Rights was on the floor of the House for three months. Had the members been in harmony, they surely would have spared themselves these long weeks of disputation. Search for unified understanding among the drafters will very likely prove futile (or delusional.)”; see also Gienapp, *supra* note 55 (“[O]f the fifty-five delegates who had convened in Philadelphia in the summer of 1787, whose intent was to be privileged? The same question applied to the nearly 1,700 Americans who gathered in the special state ratifying conventions. A careful look at the multitude of voices involved in the Constitution’s creation pointed only to ‘original meanings’ in the plural. And then there was the matter of the Anti-Federalists (the Constitution’s earliest opponents); did their original understanding also merit consideration?”).

130. See *D.C. v. Heller*, 554 U.S. 570, 632 (2008) (“[W]e would not stake our interpretation of the Second Amendment upon a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense of the home.”).

131. *Bruen*, 142 S. Ct. 2111, 2153 (2022).

132. See Gienapp, *supra* note 55 (explaining that the shift to “public understanding” was meant to save originalism from the problem of determining the singular intent of a group of people like “the Framers,” and that “the public” consists of even more people than the Framers.).

with a colonial-era New Jersey regulation, the *Bruen* Court admitted that “the reason behind this singular restriction is not entirely clear.”¹³³ Considering that old regulations drew a consistent distinction between pre- and post-quickening abortions, the Court stated that “[t]he original ground for [doing so] is not entirely clear.”¹³⁴ Sometimes, there is simply too little evidence still existing to turn to.¹³⁵

However, such uncertainties do not deter the fervent belief of the Court, similar to how the existence of girlfriends does not deter those who fervently believe Harry Styles is dating Louis Tomlinson.¹³⁶ The Supreme Court is confident in its announcements about the thoughts and beliefs of early U.S. society. “*No doubt*,” the Supreme Court asserted, the Framers were seeking to prohibit certain activity “when they adopted the First Amendment.”¹³⁷ Likewise, the “public” would “*no doubt*” be “shock[ed]” to learn of abortion rights.¹³⁸

After admitting that the phrase “keep arms” “was not prevalent in the written documents of the founding period,” the Court in *Heller* concluded at the end of the very same paragraph that, in fact, “keep arms” was “a common way of referring to possessing arms.”¹³⁹ This sort of flexible reading, choosing which sources to emphasize and glossing over those which are less attractive, is something at which RPF writers excel, and which originalists also employ. So, for instance, although the Supreme Court is insistent on the historical interpretation of the Second Amendment, it is also willing to expand the definition of “arms” beyond those “in existence in the 18th century.”¹⁴⁰ Likewise, the words of the Magna Carta are assumed to have evolved from their meanings in 1215.¹⁴¹ Words have fixed meanings and evolved meanings, in the same way “management” in RPF fandoms is all-powerful and also incompetent.¹⁴²

133. *Bruen*, 142 S. Ct. 2111, 2144 (2022).

134. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2251 (2022).

135. *See Heller*, 554 U.S. at 582.

136. *See Romano*, *supra* note 46.

137. *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407 (2022) (emphasis added).

138. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2151 (2020) (Thomas, J., dissenting) (slip op., at 17) (emphasis added).

139. *Heller*, 554 U.S. at 582–83.

140. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2132 (2022) (The Court in *Heller* said that restricting the definition of “arms” to those arms existing in the eighteenth-century would “border . . . on the frivolous,” again seemingly without irony in a case focused on how eighteenth-century citizens understood the word and citing statutes regarding “Negroes.”); *see also Heller*, 554 U.S. at 582.

141. *See Bruen*, 142 S. Ct. 2111, 2136 (2022).

142. *See Further thoughts on tinhatting and fannish history*, TUMBLR: FITCHER’S BIRD (Nov. 13, 2013), <https://fitchersvogel.tumblr.com/post/66897417361/further-thoughts-on-tinhatting-and-fannish-history> [<https://perma.cc/2ZSX-AAMP>].

This is tinhatting behavior. Tinhaters—for instance, those who believe that Harry Styles and Louis Tomlinson must be in love with each other—pick and choose their favorite moments from history “to reaffirm” the truth of the secret homosexual relationship between Harry Styles and Louis Tomlinson.¹⁴³ They “read into interviews and social media posts . . ., seeking evidence.”¹⁴⁴ They “chroincl[e] every microgesture and millisecond of the way Styles and Tomlinson interact with each other.”¹⁴⁵ What they do, in effect, is “‘find’ [their] preferred reading in what is, at best an ambiguous text.”¹⁴⁶

“History and tradition points to an understanding of the Constitution as a document of fixed meaning, supplied by those who framed and ratified it. Apart from its own terms, there is no better source for the traditional understanding of the Constitution than that of James Madison,” explained a writer who made a pronouncement based on James Madison’s statements, but was not James Madison himself.¹⁴⁷ But James Madison’s head cannot be inhabited any more accurately than the head of Harry Styles. The non-tinhat portion of RPF fandom understands that this means that the result must be fiction: “The impossibility . . . of truly knowing the [real person in question] . . . frees the fan producer from a certain level of commitment to the real.”¹⁴⁸ Originalists, however, do not see themselves as making interpretive decisions so much as they see themselves uncovering essential truth.

The earnest belief that one can really know what another human being was thinking is concerning. When a person writes that Madison or Hamilton or Jefferson thought x, y, or z, it is nothing more than an educated guess based on evidence.¹⁴⁹ It might be an excellent educated guess, backed up by lots of contextual evidence.¹⁵⁰ But it is always just a guess, as non-tinhat RPF fandom knows. Fans know that “a text of public record is the canon that the fan molds their fiction around,”¹⁵¹ the jumping-off point for the guesses being made. As one fan notes, “[W]e cannot and will never know any star’s ‘real’ self.”¹⁵² The result of the

143. McCann & Southerton, *supra* note 48, at 60.

144. Aja Romano, *What the deepfake controversy about this Chinese actor says about conspiratorial thinking*, VOX (June 6, 2022), <https://www.vox.com/culture/23150487/zhang-zhehan-deepfake-fandom-conspiracy-theory> [<https://perma.cc/WQH9-DAV3>].

145. Romano, *supra* note 46.

146. *D.C. v. Heller*, 554 U.S. 570, 644 (2008).

147. Meese, *supra* note 55, at 6.

148. Hong, *supra* note 15, at 48.

149. *See* Meese, *supra* note 55, at 9 (asserting confidently why the Founding Fathers chose to write the Constitution).

150. *See* Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L. J. 1085, 1089 (1989).

151. Piper, *supra* note 13, ¶ 7.3.

152. Busse, *supra* note 15.

careful historical research conducted by RPF fans is not the truth. They “rely on media footage to create a blueprint of the ‘real’ star in order to create a fictional extrapolation.”¹⁵³ As scholars describe, “[The] Real Person and [the character in the stories] are similar in superficial characteristics, but the Fictional Persona is absolutely a Fictional Character”¹⁵⁴ RPF fans—those who aren’t tinhattars—know that tinhattars take “complex source materials” and make “interpretive decisions.”¹⁵⁵

Originalists also take complex source materials and make interpretive decisions. Just as with RPF fandoms, there is nothing wrong with that, as long as that guesswork is acknowledged. What is concerning about originalism, as in RPF fandom, is the tinhatting aspect: the refusal to admit what we might not know. We might not know that all nineteenth-century people were heterosexual. In fact, we know for a fact they were *not*. Take, for just one example, Alice James, sister of the novelist Henry James, who was twenty years old when the Fourteenth Amendment was ratified and who had a “life partner,” Katharine Loring, with whom she had a “relationship equivalent to a marriage.”¹⁵⁶ Of course, what Alice James thought about marrying her same-sex lover wouldn’t matter, since women weren’t ratifying the Fourteenth Amendment. However, we don’t know *for a fact* that no nineteenth-century man longed for the liberty to marry his male lover or had that thought in mind when he ratified the Fourteenth Amendment. We also don’t know *for a fact* that no eighteenth-century white man, ratifying a Bill of Rights that referenced “a well-regulated militia,” thought that the carrying of guns would be regulated. The danger of originalism—as is the danger with all tinhatting—is that it pretends that we *do* know those things.¹⁵⁷

The Barrett Concurrence to *Bruen* momentarily seemed to raise flags of caution concerning historical reliance: “[T]oday’s decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights.”¹⁵⁸ However, that’s only because Justice Barrett believed the nineteenth century is too recent a reference to use to establish rights,¹⁵⁹ not because he believed that it may be difficult to know the thoughts of the relevant dead people.

153. *Id.*

154. Hong, *supra* note 15, at 48.

155. Busse, *supra* note 15.

156. Margaret Cruikshank, *James, Alice (1848–1892)*, in *ENCYCLOPEDIA OF LESBIAN AND GAY HISTORIES AND CULTURES* 411 (George Haggerty & Bonnie Zimmerman eds., 1999).

157. See Eric Berger, *Originalism’s Pretenses*, 16 U. PA. J. CONST. L. 329, 336 (2013) (quoting U.S. CONST. amend. II).

158. N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2163 (2022) (Barrett, J., concurring).

159. See *id.*

Breyer's dissent in *Bruen* asked what happens if new source text becomes available that changes the interpretation,¹⁶⁰ in much the same way that additional interviews and new social media postings shift how RPF develops. In essence, Breyer is pointing out that history is essentially unknowable and insubstantial and is as subject to change as anything else. However, the example of tinhatting fandom assures us that any new history can be interpreted to fit the facts as they have been decided.¹⁶¹

C. *Wish Fulfillment*

Given all the information they can gather, authors in RPF fandoms do not arrive at the truth; they arrive at what they *want* to arrive at, invent[ing] personalities for celebrities and fill[ing] the celebrity vessel with traits that align with the authors' desires."¹⁶² They start with "'real' details," but then embellish those details in a way "that they see as theirs to invent."¹⁶³

Therefore, engaging in RPF is seen as telling much more about the fan—the person doing the interpreting—than about the real people the fandom is about—the text being interpreted. In the words of one scholar who has studied the phenomenon, "Most stories contain traces of the author's desire and identifications, and [RPF] in particular offers such a complex source material that interpretive decisions about characterization and interpersonal dynamics are paramount to creating interesting characters."¹⁶⁴ There is no such thing as an objective historical fact; rather, knowledge of the celebrity is inevitably affected by the fan's subjective interpretation. The fans take the source text and "construct" it into something further.¹⁶⁵ The real people are mere "objects through which [the fans] are able to explore their own desires and form friendships."¹⁶⁶ The fans are not revealing truths about the real people they're admiring, but rather, are projecting their own ideas onto those real people, shap[ing] and alter[ing] the celebrity to their own specifications, making him more interesting, intelligent, or vulnerable, and thus more desirable, identifiable, and available."¹⁶⁷ RPF permits those who engage in it "to construct the star as she wishes."¹⁶⁸

160. *See Bruen*, 142 S. Ct. at 2177 (Breyer, J., dissenting).

161. *See Romano*, *supra* note 46.

162. Hagen, *supra* note 15, at 47.

163. Hong, *supra* note 15, at 27.

164. Busse, *supra* note 15.

165. Hong, *supra* note 15, at 17.

166. Hoad, *supra* note 19, at 13.

167. Busse, *supra* note 15; *see also Romano*, *supra* note 46 (referring "to the unprecedented agency that fans now have with regard to shaping those narratives").

168. Busse, *supra* note 15.

The same is true for those RPF fans who engage in tinhatting. As scholars describe the activity, “When Larries circulate images, words, videos, and other fan objects, they are not producing an exact reproduction in their resharing of these objects but rather the process of sharing is a creative one in which paratexts take on lives of their own through circulation and quotation.”¹⁶⁹ This act of interpretation is not singular, either, but collaborative: “[W]e make up a Collaborative Fantasy Space where our headcanons interact and build our interpretations of these Real People with personas we happen to love.”¹⁷⁰

Understanding this aspect of RPF provides a keener insight into the type of RPF known as originalism. Part of the dissent’s attack on the majority’s stance in *Dobbs* was that it claimed to be neutral while, in fact, taking a position.¹⁷¹ The understood wish-fulfilling aspect of RPF thus exposes originalism’s lack of neutrality, once originalism is seen as a type of RPF. Justice Amy Coney Barrett, in her confirmation hearings, asserted that originalism means she could not “infuse [her] own policy views” into the Constitution.¹⁷² Likewise, Justice Scalia stated that originalism “establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”¹⁷³ But understanding originalism as RPF helps us see more clearly that it is a practice inherently filled with a person’s own views.

Far from being an objective interpretation of historical facts, originalism’s understanding of the public, the Framers, or the Founding Fathers can be understood as a hollow vessel filled with projections of a judge’s subjective views. In much the same way that RPF fans use celebrities to vindicate their worldviews originalism can be understood as a method for shaping the world that the practitioner desires. “[T]he Court’s own ardent views” are as present in originalism as the writers’ ardent views are present in their RPF.¹⁷⁴ Tinhaters are described as “forming elaborate theories and then fitting news events and occurrences into them.”¹⁷⁵ The Supreme Court might be accused of doing something similar.

169. McCann & Southerton, *supra* note 48, at 60.

170. Hong, *supra* note 15, at 48.

171. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2328 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting) (“[W]hen it comes to rights, the Court does not act ‘neutrally’ when it leaves everything up to the States.”).

172. Brian Naylor, *Barrett, An Originalist, Says Meaning Of Constitution ‘Doesn’t Change Over Time’*, NPR (Oct. 13, 2020, 10:08 AM), <https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time> [<https://perma.cc/64YF-JF96>].

173. Scalia, *supra* note 7, at 864.

174. *Dobbs*, 142 S. Ct. at 2247.

175. Romano, *supra* note 46.

Those engaging in RPF pick and choose bits of the source text that they wish to emphasize.

The result is a variety of interpretations or adaptations of the celebrity as character, where individual fan authors can choose which elements of the star image to include, emphasize, or disregard (for example, playing up certain characteristics that may fit their narrative of the celebrity, or ignoring elements of a celebrity's private life, such as real-life spouses in order to write their preferred RPF pairing).¹⁷⁶

The introduction of messy real-life as source text means that “fans can define for themselves what constitutes” the source text.¹⁷⁷ A similar technique can be seen in the selective reading of the messy real-life history that the dissents accuse the majorities of performing. In *Bruen*, the dissent claimed that the majority has “ignore[ed] an abundance of historical evidence supporting regulations restricting the public carriage of firearms.”¹⁷⁸ In *Dobbs*, the dissent took issue with the majority's historical conclusions, noting that “early law in fact does provide some support for abortion rights.”¹⁷⁹ RPF fandoms are quite used to such debates over historical cherry-picking to support one side's interpretation of the canon text over another's, highlighting one interview or quotation and ignoring any interview or quotation that might contradict the first. Those debates mean very little when RPF is understood as producing fiction. There can be a multitude of stories, after all. The debates mean everything when “truth” is seen to be at issue. But doing so obscures that the debate is riddled with a personal investment in the outcome and that the ultimate conclusion is nothing more than wish fulfillment.

D. *Diverse Voices*

The dissent to *Dobbs* raised the important issue that originalism focuses on an extremely narrow group of people: “‘People did not ratify the Fourteenth Amendment. Men did.’”¹⁸⁰ As the dissent pointed out, these men “did not understand women as full members of the community embraced by the phrase ‘We the People.’”¹⁸¹ Because women were not understood as full members of the community, that colored the understanding of their rights as well. As the dissent notes, “Those responsible for the original Constitution, including the Fourteenth

176. Piper, *supra* note 13, ¶ 2.2.

177. *Id.*

178. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2164 (2022) (Breyer, J., dissenting).

179. *Dobbs*, 142 S. Ct. at 2324 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

180. *Id.*

181. *Id.* at 2324–25.

Amendment, did not perceive women as equals, and did not recognize women's rights."¹⁸² The problem is not just that women were left out of the voices heard in the nineteenth century. Opinions focusing on interpreting the original meaning of the words in question gloss over that the meaning was established by people who were also enslaving Black people.¹⁸³ *Heller* approvingly uses an eighteenth-century legal dictionary as support for its broad definition of "arms," citing "[a]n Act for the trial of Negroes" from 1797, without any acknowledgment that restricting readings to eighteenth-century definitions include citing statutes about enslaved people carrying guns without the permission of the white people who owned them.¹⁸⁴ *Bruen* continued this reliance on statutes concerning enslaved people's ability to carry weapons.¹⁸⁵

Seeing originalism as a form of RPF also highlights how originalism stands in stark contrast to RPF. RPF is a space that has its systemic problems but is often characterized by queer and marginalized voices. When functioning ideally, RPF fandoms, like other fandom spaces, encourage participation in the theories and speculation around real people's thoughts, rejoicing in complex readings that are explicitly and deliberately colored by deeply challenging ideas of identity. RPF interpretations layer on top of more conventional interpretations, providing perspectives on gender and sexuality that expand social acceptance. As one scholar explains, "Even if gendered power relationships and cultural patterns remain largely intact in many works of fan fiction, the participatory and creative nature of [RPF] allows readers and writers to interrogate these power structures."¹⁸⁶ RPF gives its fans the ability to "exercise agency over their own sexual identities [and] seek out representations otherwise denied to them by [the existing media's] staunch sexual politics."¹⁸⁷ While fandom has work to do on full equality, fandom ideally operates to include more voices, giving people the ability to see themselves in societal structures that otherwise exclude them. Even the tinhattes are often seen to challenge existing power structures by presenting new voices.¹⁸⁸

182. *Id.* at 2325.

183. See Waldman, *supra* note 5 ("Dred Scott was the first major originalist ruling, claiming to find its defense of slavery and its assertion that even free Black people could not be citizens in the original intent of the founders.").

184. *D.C. v. Heller*, 554 U.S. 570, 581 (2008); 1797 Del. Laws 104, An Act For the Trial Of Negroes, ch. 43, § 6.

185. See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2144 (2022).

186. Hagen, *supra* note 15, at 56.

187. Hoad, *supra* note 19, at 6; see also Romano, *Larry Stylinson*, *supra* note 46.

188. See McCann & Southerton, *supra* note 48, at 54 ("[W]hether fans really believe that Larry is real or pretend for pleasure is moot: what is at stake is how Larry fan practices work in queer ways.").

Originalism, on the other hand, ideally operates to exclude most voices. Far from the playful imaginativeness of RPF fandoms that recast wealthy white men in different societal roles,¹⁸⁹ originalism insists on enshrining a view of the world that is exclusively written from the perspective of wealthy white men. There were queer people alive in 1868 who definitely questioned whether marriage had to be between a man and a woman, unlike the assertion otherwise in the *Obergefell* dissent. There were women alive in 1868 who definitely sought a right to abortion, unlike the implication otherwise in *Dobbs*. There were people alive in the nineteenth century who thought that the public carry of guns should be limited in various ways, as the *Bruen* opinion itself acknowledged, before dismissing the opinions of those people as unimportant.¹⁹⁰

Originalism's erasure of the complexity of the nation's past in favor of an exclusive primacy of wealthy white male voices entrenches systemic discrimination. Thinking of originalism as an RPF fandom places it in stark contrast to the vibrant, creative, and more diverse spaces that fans have created, and can help reveal how little it's using its creativity to accomplish. Hamilton RPF, for starters, has imagined a Founding Father world that looks very different than the one imagined by the originalists, full of homosexuality and polyamory.¹⁹¹ That fandom's interpretation of the source texts that the Framers left behind would be wildly different from the view the Supreme Court would endorse.

E. *The Differences*

Although this Article has argued that originalism can be understood as a form of RPF, the law and fandom are, of course, quite different. Fans exist in the nebulousness of prismatic source texts that can be read in a multitude of ways. Fans may settle on particular readings of particular scenes and lines of text, but fans as a whole are generally more willing to accept debates over meaning, as the multitude of stories makes clear. Fans are especially fond of the AU for many reasons, but not least because a shifting of setting can also shift how the canon is viewed. Indeed, all fics can be viewed as an endless and relentless questioning of how to interpret the source text: What happened between the scenes to either illuminate or alter the gloss of later events? What happened before the story started

189. See Hagen, *supra* note 15, at 56.

190. See *Bruen*, 142 S. Ct. 2111, 2146 (2022).

191. See ARCHIVE OF OUR OWN (last visited July 22, 2022), https://archiveofourown.org/works?commit=Sort+and+Filter&work_search%5Bsort_column%5D=kudos_count&work_search%5Bother_tag_names%5D=&work_search%5Bexcluded_tag_names%5D=&work_search%5Bcrossover%5D=&work_search%5Bcomplete%5D=&work_search%5Bwords_from%5D=&work_search%5Bwords_to%5D=&work_search%5Bdate_from%5D=&work_search%5Bdate_to%5D=&work_search%5Bquery%5D=&work_search%5Blanguage_id%5D=&tag_id=Hamilton+-+Miranda [https://perma.cc/CWU7-K9X8].

that shifts how you view the characters' motivations? What happened after the story ended that might explain better the repercussions of canon choices? And, if you change something about the canon, how does that affect the rest of the canon's dominos?¹⁹² These questions get asked and answered in countless permutations; each time they are answered, they are asked again and answered differently.

Such fuzziness and uncertainty are no good in the law. The law does not want an infinite supply of new interpretations. The law needs to be clear and understandable.¹⁹³ The vagueness in the source text that fandoms thrive on is such anathema to lawyers that legal texts that are too vague are discarded entirely.¹⁹⁴ But this aversion to vagueness can lead to dangerous concealment of the essential fact of it. RPF recognizes that all the information it knows about a person is merely the public representation of that person and cannot be trusted to be true in and of itself.¹⁹⁵ What a person is thinking while setting forth words is always unknowable (sometimes even to the person originating the words). Therefore, members of RPF fandoms have a healthy skepticism toward "knowing" anything at all: "The thing about RPF is: there is no way for you to know whether the 'source text' is genuine."¹⁹⁶

What a person thought while setting forth words hundreds of years ago is even more unknowable than what people think today.¹⁹⁷ What a committee of people thought while working on multiple drafts of a document is even more impossible to ascertain.¹⁹⁸ Finally, what an entire public unanimously thought about any given issue must be nothing but a fabrication. But rather than admit this fundamental weakness underlying the heart of all legal interpretation, originalism pretends that it does not exist.¹⁹⁹ RPF acknowledges that the source text is "very choppy, very

192. See Piper, *supra* note 13, ¶ 2.1 ("[A] common understanding of the motivations of fans to write fan fiction is because they either want 'more of' their source material or 'more from it.'").

193. See Berger, *supra* note 157, at 366–67 (2013) ("[T]he judge often does not have the luxury of concluding that the law is unclear. To the extent that judges must decide a constitutional case one way or another (at least when they do not dispose of it on other grounds), they gain little from illustrating the maddening historical and linguistic complexities of a question.").

194. See, e.g., Guyora Binder & Brenner Fissell, *A Political Interpretation of Vagueness Doctrine*, 2019 U. ILL. L. REV. 1527, 1529 (2019).

195. See Hagen, *supra* note 15, at 48 ("RPF is built around the assumption that a celebrity's public identity is in some sense fabricated.").

196. Hong, *supra* note 15, at 47–48.

197. See Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 33–34 (1986) (noting that Madison's notes during the Constitutional Convention recorded only about ten percent of each day's debate); see also Farber, *supra* note 150, at 1088.

198. See Farber, *supra* note 150, at 1089.

199. See Berger, *supra* note 157, at 347 ("[F]or many provisions most likely to arise in litigation, the notion of a 'right answer' is a legal fiction that fails to appreciate both the practical difficulties of historical inquiry and the relevant history itself.").

unreliable.”²⁰⁰ Unlike fictional fandoms, RPF fandoms concern real people, which means that they have “no single definitive” source text.²⁰¹ They “use the available material while inventing what is not and cannot be known.”²⁰² Originalism, on the other hand, treats the source text as unassailable and does not acknowledge that it is making choices in how it reads that source text. Originalism pretends that the unknowable is a fact. That might help set certainty, which is more desirable in law than in fiction (although, in the name of certainty, it has overruled many longstanding ideas). However, seeing originalism as RPF helps to reveal that it doesn’t necessarily help with neutrality, nor does it leave space for other voices.

CONCLUSION

“The past is a foreign country,” L. P. Hartley once proclaimed; “They do things differently there.”²⁰³ Originalism, looking to the past’s foreign country to define the present’s domestic country, has been criticized by many as “a philosophical fig leaf for a conservative political agenda.”²⁰⁴ This Article seeks to introduce a new lens through which to consider and evaluate this possibility: through fandom.

The Supreme Court’s RPF about the Founders is excellent RPF: thoroughly researched and exhaustively supported. In an RPF fandom, the Supreme Court would doubtlessly emerge as a BNF (Big Name in Fandom),²⁰⁵ respected for its knowledge of the source text.

However, eventually, the Supreme Court will be ostracized to a corner as a tinnhatter, committing the cardinal sin of RPF fandom. For, no matter how intensely and single-mindedly one might research the object of one’s dedication, one should not lose sight of the fact that one does not know that person and cannot accurately speak about the inner workings of that person’s mind. “I write the way I write,” one RPF writer stated, “because it produces a story that I like and not because I think it mimics reality exactly.”²⁰⁶ That is the aspect of RPF fandom that the Supreme Court is missing. In fact, the Supreme Court’s repeated assertions that it knows how the (entire) eighteenth-century public understood the Bill of Rights, or how the (entire) nineteenth-century public understood the Fourteenth Amendment, is tinnhating behavior at its finest.

200. Hong, *supra* note 15, at 47–48.

201. Piper, *supra* note 13, ¶ 2.2.

202. Busse, *supra* note 15, at 6.

203. L. P. Hartley, *THE GO-BETWEEN* 17 (2002).

204. McCarthy, *supra* note 6.

205. See Olivia Coy, *Fifty Shades of Yellow*, *THE NEW INQUIRY* (June 22, 2015), <https://thenewinquiry.com/fifty-shades-of-yellow/> [<https://perma.cc/69RB-AGWW>].

206. Busse, *supra* note 15.

When tinhatters are people who believe Harry Styles and Louis Tomlinson are involved in a secret relationship, it's easy to see them as a target of mockery. It's all too easy to criticize them for thinking they know the truth about people they have never met, for believing the fictions they have created inside their heads. When the Supreme Court thinks it knows the truth about people it has never met, believing the fictions it has created inside its head, we call it precedent.

This Article has viewed the originalism of the Supreme Court's recent decisions through a fandom lens, illustrating how the Supreme Court's pronouncements about the Framers and Founding Fathers resemble Real Person Fiction. This Article wishes to make clear that there is nothing wrong with RPF as a practice. Telling creative stories about celebrities requires acts of imagination that are important and valuable. It reveals things about the storyteller and our greater society, and it supports communities that nurture and nourish important relationships and connections.²⁰⁷

However, when RPF tips into tinhatting, it rightly raises concerns about the blurred line between fiction and reality. RPF is controversial because of this danger, and the people in RPF fandoms police it fiercely to avoid this pitfall. This Article has sought to expose how the Supreme Court's recent originalist jurisprudence is, in fact, tinhatting, and should raise the same grave concerns. In RPF, the writers' particular attitudes toward the real people "ultimately . . . shape the fiction more than any particular star quote or media clip does."²⁰⁸ Originalism contains little recognition of this.

Interpretation is an act of imagination. The law might like to pretend otherwise, but every fan knows the truth. Imagination is not a bad thing. The only problem with imagination is if it is obscured and set forth as reality. It takes imagination to think about what Alexander Hamilton might have meant by a particular writing. RPF writers know that; originalists pretend they do not.

The Breyer, Sotomayor, and Kagan dissent in *Dobbs* concluded, "[a]s a matter of constitutional method, the majority's commitment to replicate in 2022 every view about the meaning of liberty held in 1868 has precious little to recommend it."²⁰⁹ However, originalism, like RPF, is a perfectly respectable interpretive tool that can shed light on important subjects—as long as the guesswork of the process is acknowledged. There is nothing wrong with originalism as an interpretive approach. There is everything wrong with believing the absolute truth of what results from that interpretation. We understand that when it comes to believing that Harry

207. *See id.*

208. *Id.*

209. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2333 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting).

Styles is in a secret relationship with Louis Tomlinson. We should understand it in our legal jurisprudence as well.