ABSTRACT

"To Keep and Bear Arms:"
*Heller* and the Public Understanding of Arms Rights

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During the first two centuries of American jurisprudence, numerous constitutional doctrines were established, yet the Second Amendment doctrine was almost entirely ignored. In *District of Columbia v. Heller,* Justice Antonin Scalia became the first to recognize that "the Right to Keep and Bear Arms" included personal use. From this corner-stone case, a burgeoning Second Amendment doctrine entered the national debate. However, this discourse, relying heavily on textualist principles, often neglected critical historical evidence. This dearth of appropriate historical evidence has produced incomplete decisions that undermine the textualist approach and the coherent Second Amendment doctrine. Borrowing elements from intellectual history's contextualist tradition, this thesis proposes legal and communicative content as a means of resolving the imperfect textual understanding of the Second Amendment. Relying on Lawrence Solum's theory of intellectual history as constitutional interpretation and the concept of public understanding, this thesis offers a path to a more complete Second Amendment doctrine.

"To Keep and Bear Arms:" *Heller* and the Public Understanding of Arms Rights

by

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# DEDICATION

To my wife and family, thank you for keeping faith in me, and enabling and motivating me to pursue my academic dreams

# CHAPTER ONE

## Introduction

When "We the people" ratified the United States Constitution they posited that there were rights that were so intrinsic to freedom that not even the government could disenfranchise them. This action represented a revolutionary moment in both political and social systems. In that brief moment, the founders captured and codified one of the most transcendent social movements in history, reconstructing the notion of government to serve the purpose of greater human happiness. After all, they expressly stated this purpose in the preamble:

> We the people of the United States, in order to form a more *perfect union*, establish justice, *insure domestic tranquility*, provide for the common defense, *promote the general welfare*, and *secure the blessings of liberty to ourselves and our posterity*, do ordain and establish this Constitution for the United States of America.[1]

It seems abundantly clear what the people meant to convey, but the communicated structure and purpose was not sufficient to achieve the lofty goals of the Constitution. The aspiring "perfect union" quickly descended into a fractured state concerned with political perceptions and the cost of the document and a constitutional dialogue ensued.

This early perception of the Constitution is defined by the discourse from the between the federalist and anti-federalist, and later between the federalist and the Jeffersonian Republicans.[2] Today, the defining debate for constitutional doctrine is

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[1] U.S. Const. Preamble. (Emphasis added).

[2] See George W. Casey and James McClellan, *The Federalist Papers: The Gideon Edition* (Indianapolis: Liberty Fund Inc., 2001); Ralph Ketcham, *The Anti-Federalist Papers and the Constitutional Convention Debates.* (New York: Signet Classic, 1986); Max Farrand, *The Records of the Federal*

between two jurisprudential branches: Originalism and Living Constitutionalism. The questions no longer focus on "what is the purpose of the federal government" or "how it should be structured." Now the question asks, "how should we understand this document from a generation long past?" For Originalist, "constitutional adjudication… accords binding authority to the text of the Constitution or the intentions of its adopters."[3] Countering, living constitutionalists argue that the Constitution is a living political document and "living political constitutions must be Darwinian in structure and in practice."[4] Living constitutionalism embodies a dynamic approach that views law as pragmatic and carrying a spirit that changes with the movements of social climates. While the Constitution is a dynamic document that continually updates with each generation, a stable doctrine exist that represents both the text and tradition of how the words have and should be applied. Many of the clauses in the Constitution have rich histories that have all but cemented their doctrines, but there are a few that remain contentious. Recently, the Second Amendment has been given more attention and a doctrine has begun to form. This thesis will contribute to that blossoming doctrine, and

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*Convention* (New Haven: Yale University Press, 1966) (the records Farrand relies on are primarily Madison's notes, see also Madison, James and Adrienne Koch. *Notes of Debates in the Federal Convention of 1787* (New York: W.W. Norton & Company, 1987).

[3] Paul Brest, "The Misconceived Quest for the Original Understanding" 60 *Boston University Law Review* 60, no. 2 (1980), 204. Brest identifies intentionalism as the other form of originalism, with different level of force. Within textualism and intentionalism exists two strands, strict and liberal textualism. These are not the sole branches, as purposivism, strict constructionism, and framework originalism. See Brest, 206, 216; John Manning, "The New Purposivism," *The Supreme Court Review* Vol. 2011 (January 2012): 113-182; Morell E. Mullins Sr., "Coming to Terms with Strict and Liberal Construction," *Albany Law Review,* 64, no. 1 (2000), 9-98; Jack M. Balkin, "Framework Originalism and the Living Constitution," 130 *Nw. U. L. Rev.* 103, no. 549 (Spring 2009): 549-614.

[4] Woodrow Wilson. *Constitutional Government in the United States*. (New York: Columbia University Press, 1917), 57. Contemporary views of living constitutional can be found in the opinions and writings of Supreme Court Justice Stephen Beyer (see *Nat'l Labor Relations Bd. v. Canning,* 573 U.S. __ (2014) (S. Breyer Opinion) and *Active Liberty* (New York: Vintage Books, 2005)).

will seek to identify and propose a path for correcting the most problematic aspect of the new founded doctrine.

The burgeoning Second Amendment discourse is propelled by the 2008 Supreme Court decision *District of Columbia v. Heller*.[5] The court's opinion, penned by Justice Antonin Scalia, has been championed by textualist and originalist as a true example of recapturing the original public meaning of the text and affirming the historical tradition of the amendment. In the 11 years since the decision, the dialogue about guns or arms rights has seen exponential growth. Central to this debate is the idea of individual gun rights, gun regulation, and the limits of the right to keep and bear arms. While organizations like the National Rifle Association and some politicians have pushed an unrestricted view of the right, scholars have begun to recognize a pre-existing tradition of gun-control before *Heller*. Leading Second Amendment scholars, Darrel A. H. Miller and Joseph Blocher provide persuasive evidence showing that history, as far back as the English right, is rife with examples of gun regulations.[6] As they point out, and will be discussed at the end of this study, *Heller* does not prohibit the ability to implement or enforce gun regulations, rather it acknowledges the history leaves the possibility of some restrictions. While the dialogue regarding the Second Amendment doctrine is progressing beyond the basic discussion of meaning, there are three questions about *Heller* and the pre-existing debates.

[5] *District of Columbia v. Heller* 554 U.S. 570 (2008).

[6] Darrel A. H. Miller, Joseph Blocher, *The Positive Second Amendment: Rights, Regulation, and the Future for Heller*, (Cambridge: Cambridge University Press, 2018).

The first, can textualism determine the original public meaning of the Constitution? To answer this question, I examine the textualist doctrines of Justice Scalia and Akhil Reed Amar, and the critical perspectives of Dr. William Michael Treanor and Lawrence B. Solum. The second question asks, how can textualism be modified to produce a more accurate original public meaning? I propose that incorporating two elements from the intellectual history movement, communicated and legal content. This section will also show that shifting the goal from public meaning to public understanding enables textualism to better accommodate the tradition and spirit of the Constitution. The final question turns the present discussion and asks how the original public understanding can help stabilize and cement the Second Amendment doctrine.

While this thesis does present and argue for a specific understanding of the Second Amendment and the post-*Heller* doctrine, it does recognize that there is more to be explored and broadened. In parting, I will highlight some of the innovative and unique paths that the Second Amendment discord can go and where my original public understanding fits in. There is much to look forward to, but before we peer ahead we must have a firm understanding of how we got here. That begins with understanding the underlying principles of *Heller* and how they inform the Second Amendment doctrine.

## CHAPTER TWO

### Textualism Principles and Criticism

The concept of textualism was first introduced in 1980 by Paul Brest as a branch of a new line of thought called "originalism." Brest saw textualism as an interpretative approach where law originated exclusively from the text's language.[1] Brest gives three rationales for this approach:

> (a) because of some definitional or supralegal principle that only a written text can impose constitutional obligations, or (b) because the adopters intended that the Constitution be interpreted according to a textualist canon, or (c) because the text of a provision is the surest guide to the adopter's intentions.[2]

The first rationale assumes, with no evidence from early documentation, that that the deliberation and writing of the Constitution consideration and inclusion a normative principles. The second presumes that the idea of textual fidelity from the 1980s was also present in the 1780s, and formed the basis of purposivism or intent based originalism. This speculative assumption, like the first, relies on a concept or intention that may not have existed at the time of the founding, and also represented a form of originalism that textualist later opposed. These assumptions are hardly supported by a document largely

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[1] Brest, 136. Brest's understanding of textualism showed that it was in a sense a hardline positivist position. While his definition of textualism and its rationales are not necessarily the same as the positivist positions expressed by H.L.A. Hart or Joseph Raz. Hart and Raz did discuss on the nature of law as it relates judicial systems, their perspectives were generally geared towards the nature of law rather than its applicability and interpretation *See* Mark C. Murphy, *Philosophy of Law: The Fundamentals* (Malden: Blackwell Publishing, 2007): 25-42. *See also* H.L.A Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review,* 71 no. 4 (February 1958): 593-629; H.L.A Hart, *Essays on Jurisprudence and Philosophy,* (Oxford: Clarendon Press 1983); H.L.A Hart, *The Concept of Law*, 2nd ed. ed. P. Bulloch and J. Raz (Oxford: Clarendon Press 1994, first edition 1961); Joseph Raz, *The Authority of Law*, (Oxford: Clarendon Press 1979).

[2] Brest, 136.

concerned with institutional and structural framework of the government. Today's textualists subscribe primarily to the third rationale, and can be characterized as "clarity-driven textualist" that adhere to a form of strict literalism that presupposes legislative actions are done with precision.[3] The precise nature required of legislative actions removes the impact of non-textual influences that drove the purposivism and intentionalist readings, and requires the interpreter to cull meaning by closely auditing the text. Deriving meaning and intent from the text can potentially produce credible readings, but "clarity-driven textualism's rejection of legislative history threatens to burden the lawmaking process" and "limit the applicability of statutes."[4] In the case of our textualists, Justice Scalia uses this threat as a means of combating judicial discretion, while Amar reconciles the threat though intratextual assumption.

### *Akhil Reed Amar and Intratextualism*

Prominent Yale Law Professor, Akhil Reed Amar, became a titan of Constitutional dialogue in the late 1990's with his Intratextualist doctrine. Described as "intensely interested in the text and in the historical record," his approach largely searches for the original meaning of disputed terms.[5] Amar first presents a comprehensive description of his approach in a pair of articles from 1999.[6] In these

[3] Paul Killebrew, "Where Are All the Left-Wing Textualists," *New York University Law Review* 82, no. 6 (December 2007), 1900.

[4] Killebrew, 1900.

[5] Cass R Sunstein, "Originalism for Liberals," *The New Republic*¸ Sept. 28, 1998. https://newrepublic.com/article/64084/originalism-liberals (accessed August 18, 2018).

[6] Akhil Reed Amar, "Intratextualism" *Harvard Law Review* 112, no. 4 (February 1999): 747-827; Akhil Reed Amar, "The Document and the Doctrine." *Harvard Law Review* 114, no. 1 (November 2000): 26-134.

articles, his theory builds on the assumption that clauses in legal texts are linked and that meaning should derive from those relationships. In contrast to earlier textualist doctrines, Amar places greater value on cutting deeper in to the text, going beyond the surface to find meaning.[7] Amar places these earlier accounts of textualism into two categories of clause-bound textualism, "plain-meaning textualism" and "original intent textualism."[8] Despite this distinction, he does not believe that Intratextualism is entirely distinct from general textualist doctrine.

Amar views general textualism as an approach focused on the words of the Constitution rather than the "institutional arrangements implied or summoned into existence by the document."[9] Concentrating on the explicit language and word choice enables the interpreter "to understand what the American People meant and did when [w]e ratified and amended" the constitution.[10] Amar justifies his textual principles by concluding "a selective survey of canonical constitutional cases," *Marbury v. Madison, McCulloch v. Maryland, Brown v. Board of Education,* and *Roe v. Wade.* These cases represent universal intratextualist arguments of structure, history, and text fundamental to

[7] For earlier accounts of textualism see Brest, "The Misconceived Quest for the Original Understanding.": William Eskridge "The New Textualism" *UCLA Law Review* 37, no. 4 (April 1990): 621-691; Mark V. Tushnet "A note on the revival of textualism in Constitutional Theory" *Southern California Law Review* 58, no. 2 (January 1985): 683-700; Jeffrey Stout "What is the Meaning of a Text?" *New Literary History* 14, no. 1 (Autumn, 1982): 1-12.

[8] "Clause-bound textualism" is characterized as a method that reads the words of the Constitution in isolation from their other uses in the text. While Amar does not provide greater detail on who or what doctrines might be classified as "clause-bound," it is inferred that they are the doctrines above and may include those of Justice Scalia.

[9] Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction*. (New Haven: Yale University Press 1998), 4

[10] Amar, *Bill of Rights,* 4.

the intratextual and conventional constitutional doctrine. These doctrines constitute claims that are:

> characterized by judicial review of both legislative and executive action (Marbury); broad but theoretically finite federal power (McCulloch) that states may not obstruct (McCulloch, again, along with its cousin, Martin v. Hunter's Lessee ); emphatic norms against governmental efforts to subordinate or stigmatize racial minorities (Brown and its companion Bolling); and broad protection of judicially defined fundamental rights that may or may not be clearly stated in constitutional text (Roe).[11]

Based on these claims, Amar determines judicial review rest on two premises; "[f]irst, the written document is supreme law" and "[s]econd, judges should follow this supreme law even if it conflicts with a congressional statute."[12] These premises establish the credibility of intratextualism by rooting it in conventional doctrine and history. Amar uses these cases to argue constitutional interpretation should rely on certain formalistic rules established by the text and tradition.

The primary characteristic of the intratextualist approach binds textual meaning to the relationship between repetitive phrases and words. Amar proposed three brands of intratextualism that highlight this relationship: (1) Intratextualism as Philology; (2) Intratextualism as Concordance; (3) Intratextualism as Principle-Interpolation.[13] Through

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[11] Amar, "Intratextualism, 749-778. *Marbury v. Madison* 5 U.S. 137 (1803); *McCulloch v. Maryland* 17 U.S. 316 (1819) (also relying on "its cousin," *Martin v. Hunter's Lessee* 14 U.S. 304 (1816)); *Brown v. Board of Education* 347 U.S. 483 (1954) (and companion case *Bolling v. Sharpe* 347 U.S. 497 (1954)); *Roe v. Wade*, 410 U.S. 113 (1973). "By confining this survey to what are generally deemed the most canonical cases… I seek to discover how universal the technique might be, to assess its pervasiveness as well as its power." Amar includes in his study other commentaries, but these are omitted in favor of more specific commentaries utilized in the last part of this section regarding his intratextual interpretation of the Second Amendment.

[12] Amar "The Document and the Doctrine", 4.

[13] Amar, "Intratextualism", 791-795. In addition to these three brands of intratextualism, Amar attempts to argue that the doctrine represents multiple constitutional claims. This goes beyond the purpose of this thesis, but it is important to understand his characterization of intratextualism. Amar believes intratextualism represents a structural claim, a historical argument, and a doctrinal claim. These claims can be summarized as focused on the text, history, and tradition. For these claims, Amar relies on the works of

these three brands of intratextualism, constitutional interpretation goes beyond the textual surface and recognize how the document can inform itself.

*Intratextualism as Philology*

Constitutional philology views the Constitution as its own dictionary. This practice "can be seen as serving a linguistic function," by which the Constitution "illustrates word usage, and thus serves a basic dictionary function."[14] Traditionally, when determining meaning textualists consult contemporaneous dictionaries and grammar books, preserving meaning as it would have been understood at the time of enactment. Like the text, dictionaries provide a stable resource isolated from the influence of society or that facts of the case. Dictionaries represent "accurate guidelines to follow" and "offers an authority seen as objective and general."[15] Amar breaks from this view by enabling the Constitution to provide a more isolated source, thus limiting the scope of meaning to those present in the document.[16] Unlike a traditional dictionary, the

Charles Black, Laurence Tribe, and Bruce Ackerman. (Bruce Ackerman, *We the People: Foundations* (Cambridge: The Belknap Press of Harvard University Press: 1991), Bruce Ackerman, *We the People: Transformations* (Bruce Ackerman, *We the People: Foundations* (Cambridge: The Belknap Press of Harvard University Press: 1993); structural argument, Charles Black, *Structure and Relationship in Constitutional Law* (Baton Rouge: Louisiana State University Press, 1969); doctrinal argument, Laurence H. Tribe, *American Constitutional Law,* 2nd ed. (New York: Foundation Press, 1988)).

[14] Amar, "Intratextualism", 791.

[15] Christopher Hutton, "Literal Meaning, the Dictionary and the Law," *Language, Meaning and the Law*. (Edinburgh: Edinburgh University Press, 2009): 87-101. http://www.jstor.org/stable/10.3366/j.ctt1r206b.10

[16] Amar, "Intratextualism", 791. ("the Constitution itself provides a common reference point for all concerned: drafters composing constitutional language, ratifiers deciding whether to make such language supreme law, judges and other interpreters trying to expound such language thereafter, and subsequent generations of would-be amenders seeking to add postscripts to the prior text.") Amar's does not argue against using dictionaries, but indicates the Constitution provides a better source.

Constitution allows for the opportunity to understand words in context and pull meaning that may reflect "lay usage" of word clusters rather than specific or isolated words.

Amar highlights the ability of the Constitution to define word clusters by examining the use of "right," "citizens," and "vote" in the Twenty-Sixth and Fifteenth Amendment, showing how combined the words can include the right of jury service. "If we viewed these three words in isolation and consulted ordinary dictionary entries, we would be hard-pressed to explain how … these words equaled "civil rights" and excluded political rights like voting. But when we instead turn to the clustered… we see the linguistic light (and link)."[17] When claiming that a word bears a particular meaning, this pattern of repetitive use provides stronger evidence than a traditional dictionary definition.

*Intratextualism as Concordance*

While Philology Intratextualism shows what a word could mean, the second brand "tries to show what the document as a whole is best read as meaning."[18] The Constitution can be used as type of concordance whereby two clauses can be compared and patterns can be identified across clauses, regardless of clausal location. Rather than happenstance, Amar believes that "[o]ftentimes the patterns will be ones that the drafters specifically intended and that the ratifiers consciously considered."[19] This does not preclude the possibility that certain patterns were not specifically intended, as at "times, the pattern

[17] Amar, "Intratextualism", 791-792.

[18] Amar, "Intratextualism", 792.

[19] Amar, "Intratextualism", 793.

that we discern upon reflection may not have been specifically intended, but is still far from random."[20] However Amar views these unintended patterns as "part of the genius of the document, and intratextualism can help… see this genius."[21]

*Intratextualism as Principle-Interlopation*

In light of the genius of the Constitution, Amar characterizes the final type of intratextualism as a requirement that word clusters or phrases identified as part of a pattern must be read *in pari materia*.[22] Unlike in the previous two brands, the third deals "not merely with a recurring word, or even a recurring word-cluster, but a complete, carefully elaborated command."[23] Key to this concept of rulebook intratextualism is interpolation. Amar defines this phenomena as reading "the commands as *if* a metacommand clause existed telling us to construe parallel commands in parallel fashion."[24] When words or word-clusters were posited in the Constitution, they create rules signifying how that particular word-cluster should be understood. When those words or word-clusters are repeated, so it the rule. Recognizing that that these meta-commands are not actual present in the document, Amar allows for them to be ignored if "there are sound constitutional reasons."[25] However, without these reasons, this brand of

[20] Amar, "Intratextualism", 794.

[21] Amar, "Intratextualism", 794.

[22] Amar, "Intratextualism", 794. See also Bryan A. Garner eds., *Black's Law Dictionary* 8th ed. (St. Paul: Thomson Reuters), 911 ("Of the same matter; on the same subject; as, laws pari materia must be construed with reference to each other.")

[23] Amar, "Intratextualism", 795. (emphasis not added)

[24] Amar, "Intratextualism", 795.

[25] Amar, "Intratextualism", 795.

intratextualism offers the most reasonably means for explaining what two similar word-clusters must mean.

Amar summarizes his brands as: "dictionary-like textualism tells us what the Constitution *could* mean; concordance-like intratextualism tells us what it *should* mean; and rulebook-like textualism tells us what it *must* mean."[26] Intratextualism views that the best means of determining the original public meaning of the Constitutional text is the text of the Constitution. While there can be influences beyond the text, there must be good reason and precedent for them to play a greater role than context.

Intratextualism represents a type of "holistic textualism." Holistic textualism calls for the interpreter to read the entirety of the document in light of its individual parts.[27] While each part of the Constitution contains its own individual meaning, that meaning is also informed by similar use elsewhere, as well as the context of the surrounding clauses. This type of textual understanding provides the basis for each of Amar's brands of intratextualism.

### *Antonin Scalia and Reading Law*

There are few examples of textualist principles expressed outside of legal academia, but the most prominent examples, including *Heller,* were penned by Justice Antonin Scalia.[28] As a consequence of his influence, Scalia is often the focal point for

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[26] Amar, "Intratextualism", 795.

[27] Amar recognizes that this may not be possible since "there are so many clauses to consider and an almost infinite number of interclausal comparison that could be performed." Amar, "Intratextualism", 798.

[28] There are other judges that base their jurisprudence on textualist principles. Judge Frank Easterbrook, U.S. Court of Appeals for the Seventh Circuit, is the most explicit in terms of expressing his textualist roots, see Frank Easterbrook, "Statutes' Domains." *The University of Chicago Law Review* 50, no. 2 (Spring 1983): 533-552, and Frank Easterbrook, "Textualism and Democratic Legitimacy: Textualism

critical pieces on textualism.[29] Scalia's adherence to textualism stems from the belief that it "will provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law."[30] Textualism's stability depends on close fidelity to the written text, but he also recognized that the Constitution, as written, is not always entirely clear.[31] He believed textual fidelity more effective in finding clarity than trying "to give effect to 'the intent of the legislature.'"[32]

Scalia's doctrine is built on the "canons of construction."[33] These canons provide objective tools by which interpretation can tap into the certainty and predictability of the text. These canons leads to the "view that the objective indication of the words, rather

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and the Dead Hand" *George Washington Law Review* 66, no. 5 & 6 (June/August 1998): 1119-1126. Dr. William Treanor includes Justice Clarence Thomas in his rebuke of textualism, but that label is incorrect. Justice Thomas subscribes to a more general originalist principle, not explicitly construing and constructing the text through the means laid out by Scalia, Amar, or Easterbrook. While Thomas does believe in fidelity to the text and a formalist approach, his jurisprudence leans heavily towards structural originalism. For greater discussion of his views, see Clarence Thomas, "Toward a 'Plain Reading' of the Constitution -- The Declaration of Independence in Constitutional Interpretation." *Howard Law Journal* 30, no. 4 (1987): 983-996; Catherine M. Sharkey, "Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?" *New York University Journal of Law & Liberty* 5, no. 1 (2010): 63-114; Ralph A. Rossum, *Understanding Clarence Thomas: The Jurisprudence of Constitutional Restoration* (Lawrence: University Press of Kansas, 2014).

[29] See, Catherine L. Langford, *Scalia v. Scalia: Opportunistic Textualism in Constitutional Interpretation* (Tuscaloosa: The University of Alabama Press, 2017); Rachel Kenigsberg, "Convenient Textualism: Justice Scalia's Legacy in Environmental Law" *Vermont Journal of Environmental Law* 17, no. 3 (Spring 2016) 418-442; Enrique Schaerer, "What the Heller?: An Originalist Critique of Justice Scalia's Second Amendment Jurisprudence," *Cincinnati Law Review* 82, no. 3 (2014) 795-796.

[30] Antonin Scalia, Bryan A. Garner, *Reading Law* (St. Paul: Thomson/West, 2012), xxix.

[31] Antonin Scalia, "Is There an Unwritten Constitution" *Harvard Journal of Law and Public Policy* 12, no. 1 (Winter 1989): 1-3.

[32] Scalia, *A Matter of Interpretation*, 16.

[33] Scalia, *A Matter of Interpretation,* 25.

than the intent of the legislature, is what constitutes the law."[34] However, he recognized the existence of an unwritten constitution, noting that it comes from the "history of meaning in the words contained in the Constitution, without which the Constitution itself is meaningless."[35] To Scalia, the historical context of the words are paramount to proper textual interpretation if the goal is to find textual meaning.[36] Context, in the textualist sense, revolves around grasping grammar and syntax norms from the time that the text was adopted. Laurence Tribe properly summarizes this position stating, "when we ask what a *legal text* means… we ought *not* to be inquiring… into the ideas, intentions, or expectations subjectively held by whatever particular persons were, as a historical matter, involved in drafting, promulgating, or ratifying the text in question."[37]

Scalia details his perception of the canons of construction in his 2012 treatise, *Reading Law.*[38] The purpose of his fifty-seven canon treatise is two-fold: first, "to remove a facile excuse for judicial overreaching—the notion that words can have no definite meaning;" second, to resolve the dilemma of the unequipped jurists by providing the necessary interpretative tools to achieve fidelity to the text.[39] Fidelity to the text

[34] Scalia, *A Matter of Interpretation,* 29. Scalia's view that the objective text should drive interpretation consequently requires him to conclude "that legislative history should not be used as an authoritative indication of a statutes meaning."

[35] Scalia, *A Matter of Interpretation,* 6. See also Scalia, "Is There an Unwritten Constitution," 1: "Many, if not most, of the provisions of the Constitution do not make sense except as they are given meaning by the historical background in which they were adopted."

[36] Scalia, *A Matter of Interpretation,* 37.

[37] Laurence H. Tribe, "Comment," in *A Matter of Interpretation,* 65.

[38] Scalia, *Reading Law,* 60-63. Scalia incorporates the concept of canons of construction and interpretation as part of his third fundamental principle of statutory interpretation.

[39] Scalia, *Reading Law*, 6-7

requires constitutional application to give the greatest effect to the text that satisfies its expressed purpose. The canons Scalia presents go beyond theoretical interpretations and represent useful tools that jurists can employ to construct the Constitution without judicial overreach. The duty of the interpreter is to "further rather than obstruct the document's purpose" and allow interpretations that validate laws to outweigh those that invalidate.[40]

Scalia's canons can be summarized into three canonical categories: (1) Semantic canons, (2) Contextual Canons, (3) Syntactic Canons. These categories consist of numerous interrelated canons, and represent the most effective tools for interpretation and construction that adheres to the written document.[41] Underlying each category and canon is the "fair reading" method. This method compels the actor applying the text to view the "given facts on the basis of how a reasonable reader… would have understood the text at the time it was issued."[42] While determining purpose is allowed, it is restricted in scope, source, and applicability.[43] Consequently, meaning and purpose should be construed neither "nonliterally" nor "hyperliterally," instead construction should try to find a "meaning that the words can reasonably bear." [44]

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[40] Scalia, *Reading Law*, 63 & 66.

[41] These categories do not represent the entirety of Scalia's canons of interpretation. There are a few categories and a number of canons that are not explicitly addressed or are omitted for this study. The omitted canons address "special rules applicable to the interpretation of authoritative governmental dispositions," provide less information about his doctrine, and in general the principles can be gleaned from the canons explored. Rather than doctrinal principles these represent rules based on what one would normally expect the statute or constitution to say." See *Reading Law*.

[42] Scalia, 33

[43] Scalia, 33

[44] Scalia, 39-40. See Mullins, "Coming to Terms with Strict and Liberal Construction,"

*Semantic Canons*

Scalia's Semantic Canons offer relatively straightforward methods of understanding textual meaning. His canons begin with "the most fundamental semantic rule of interpretation," the Ordinary-Meaning Canon.[45] Relying on Justice Joseph Story's 1833 constitutional treatise, Scalia's refutes the notion that the Constitution contains some hidden underlying meaning or enlightened principle to be expanded.[46] Rather, the text should bear the ordinary, common sense meaning that it bore at the time of its adoption. Acknowledging that the text may be complex and words may be polysemous, Scalia points out that the canon does not assume that every individual will "always understands words to mean the same thing the speakers intended."[47] This is overcome by combining the idiomatic clues with context, which provides the original ordinary meaning that would have been understood by most individuals.

The ability to find the original ordinary meaning is only possible if the meaning is fixed at the time of adoption. Scalia incorporates this as the Fixed-Meaning Canon. The Fixed-Meaning Canon views the process of drafting text as integrating "the experience of

[45] Scalia uses "ordinary-meaning" and "plain-meaning" synonymously, and it can be assumed that when discussing one he is discussing the other as well. See *Reading Law* at 73.

[46] Joseph Story, *Commentaries on the Constitution of the United States* 157-58. (Boston: Hilliard, Gray and Company,1833) ("every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify or enlarge it. Constitutions are not designed for metaphysical or logical subtleties… for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings")

[47] Linda D. Jellum, *Mastering Statutory Interpretation* (Durham: Carolina Academic Press, 2008), 64; Scalia, *Reading Law,* 70. In addition, Scalia recognizes that at times "context indicates that a technical meaning applies" if the text addresses a specific subject that utilizes a special meaning. Ibid, 74.

those who framed them" and thus must be read that way.[48] Scalia recognizes that "[w]ords change meaning over time, and often in unpredictable ways," as a result the fixed meaning provides a "consistent meaning that will be applied to new and different situations."[49]

The final canons, the Omitted-Case Canon and the Negative-Implication canon, serve the purpose of restraining judicial discretion and activism through textual limitations. The Omitted-Case Canon requires that "[n]othing is to be added to what the text states or reasonably implies," limiting the search and application of any extratextual principles. [50] In the same light, the Negative-Implication Canon requires the expressed inclusion of one class of thing to be viewed as implying the exclusion of the contrasting class of thing.[51] Unlike the Omitted-Case Canon which relies on the plain text, the Negative-Implication Canon is contingent on context to establish "the conditions for applying the canon."[52]

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[48] *United States v. Rabinowitz* 339 U.S. 56, 70 (1950) (Frankfurter, J. dissenting).

[49] Scalia, *Reading Law,* 79. One criticism that stems from all concepts of originalism, is that a fixed meaning would render a law ineffective in the face of new technology not included in the original understanding. While the meaning may be fixed, it does not restrict the application of the text to technologies and circumstances that did not exist originally. To address the criticism of a fixed constraint, Scalia notes, "[d]rafters of every era know that technological advances will proceed apace and that the rules they create will one day apply to all sorts of circumstances that they could not possibly envision. The meaning of rules is constant. Only their application to new situations presents a novelty."

[50] Ibid, 93. Scalia quotes Elihu Root ("of the judge: 'It is not his function or within his power to enlarge or improve or change the law.'") and Justice Blackmun ("[I]f the Congress [had] intended to provided additional exceptions, it would have done so in clear language."). See Elihu Root, "The Importance of an Independent Judiciary," *Independent* 72 (1912): 704-707, https://archive.org/details/independent72newy/page/704; *Pettey v. Butler,* 367 F.2d 528 (8th Cir. 1966) (Blackmun, J. dissenting).

[51] Scalia, *Reading Law*, 107. In an attempt to further explain this principle, Scalia utilizes the concept of a car dealer promising to give low financing rates to people with good credit, which logically requires that the low financing rate would not be included.

[52] Scalia, *Reading Law,* 107.

These four canons, provide guides to better understand and identify meaning without going beyond the constitutionally mandated role of the judicial actor. These canons represent the necessary guides to begin interpretation, and form the basis for the interpretative tools that make up the next two categories of canons.

*Syntactic Canons*

Scalia's Syntactic Canons comprise of numerous grammatical and syntactic technical principles. The focus of these canons remains entirely practical; however, their inclusion highlights the importance Scalia places on the rules that govern these areas. This category of canons boil down to two principal canons, the Grammatical canon and Syntactic Canon.[53] The Grammar Canon requires "[w]ords… be given the meaning that proper grammar and usage would assign them."[54] The canons that make up the Syntactic Canon establish rules of word association and sentence structure.[55] Without adequate understanding of these two principles, the meaning of subtle patterns or inferences in the text could be lost. These canons represent necessary tools that aid the judge in understand what was being communicated.

[53] Scalia presents seven canons in this section. The Grammatical Canon consists of both the Grammar Canon and Punctuation Canon, both of which concern technical grammatical considerations. The Syntactic Canon consists of the Last-Antecedent Canon, Series-Qualifier Canon, Nearest-Reasonable-Referent Canon, Proviso Canon, and the Scope-of-Subparts Canon, all of which involve the relationship of words and phrases with regard to relevant syntax rules. For complete descriptions of these canons see Scalia, *Reading Law,* 140- 166.

[54] Scalia, *Reading Law*, 140.

[55] Scalia, *Reading Law*, 140-166.

*Contextual Canons*

The final category of canons consists of three significant canons, Whole-Text Canon, Presumption of Consistent Usage, and Prefatory-Materials Canon. These canons symbolize his position on the use of historical evidence, as well as addresses the interrelationship of words that define Amar's as intratextualism.

Scalia's Whole-Text Canon endorses holistic textualism as necessary for the structural understanding that enables constitutional interpretation and construction. This canon compels that "the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts."[56] Instead of deriving context from the historical evidence or events that prompted the drafting and enactment of the Constitution, he believes that "[t]he entirety of the document thus provides the context for each of its parts."[57] Underlying this canon is the assumption of consistent and harmonious meaning through the entirety of the text, without which there would be no point to reviewing the document as a whole rather than disjointed parts.

Scalia's Presumption of Consistent Usage canon is presented as a derivative of the Whole-Text Canon. The process of drafting legal texts, the Constitution particularly, is viewed "as a solemn and deliberative act that requires verbal exactitude."[58] For this to be

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[56] Scalia, *Reading Law,* 167.

[57] Scalia, *Reading Law,* 167. Scalia justifies this requirement by alluding to Chief Justice John Marshall and Justice Benjamin Cardozo's expressions of holistic approaches to interpretation and construction. Quoting Justice Marshall in *McCulloch v. Maryland*: "a fair construction of the whole instrument." Quoting Justice Cardoza's dissenting opinion in *Panama Ref. Co. v. Ryan*: "[T]he meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view." See, 293 U.S. 388, 439 (1935) (Cardozo, J. dissenting). He also references his own opinion in *United Savings Association of Texas v. Timbers of Inwood Forest Association, Ltd..,* 484 U.S. 365, 371 (1988), "The Supreme Court of the United States has said that statutory construction is a 'holistic endeavor."

[58] Scalia, *Reading Law,* 170.

the case, Scalia stipulates that the drafters generally gave care to their choice of words, placement of those words, and their meaning. Compared to Amar's theoretical reasoning, Scalia's has more consideration of pragmatic application. He believed words must necessarily share meanings in order to avoid "unreasonably giving the word… two different meanings."[59] Whether applied to words or phrases in the same section or different sections, when the relationship is clear and the question directly involves that relationship, a consistent meaning must be assumed.

Scalia does recognize the inherent imperfection of the theory, noting "more than most canons, this one assumes a perfection of drafting that, as an empirical matter, is not often achieved. Drafters more than rarely use the same word to denote different concepts, and often… use different words to denote the same concept."[60] Despite that weakness, when two similarly worded statutes are compared, "the more connection the cited statute has with the statute under consideration the more plausible the argument becomes."[61] Rather than relying on theoretical justification, Scalia recognizes the theoretical holes in the presumption of consistent, but also the value of it as a persuasive tool for counsel and judges.

The final canon, the Prefatory-Meaning Canon, views prefatory materials as an instrument to "set forth the assumed facts and the purpose that the majority of the enacting legislature or the parties… had in mind, and these can shed light on the meaning

[59] Ibid, 171. (Quoting *Mohasco Corp. v. Silver* 447 U.S. 807 (1980))

[60] Scalia, *Reading Law,* 1XX.

[61] Scalia, *Reading Law,* 173.

of the operative provisions that follow."[62] These materials take the place of historical evidence traditionally used to outline original intent, and provide an authoritative source that remains majoritarian. Scalia limits the permissible prefatory materials to the preceding sections of a statute, the preamble, title and heading, purpose clause, recital, or interpretive directions.[63] In addition, he also presents two limitations on the use of prefatory materials that might significantly change the meaning of a text. "First, an expression of specific purpose in the prologue will not limit a more general disposition that the operative text contains… Second, an expansive purpose in the preamble cannot add to specific dispositions of the operative text."[64] These limitations reflect his understanding that any use of intention or purpose merely informs and suggest "which *permissible* meaning of the enactment should be preferred."[65] Only the operative text is binding, no other related materials should carry the same weight.

As we've seen in both Scalia and Amar's textualist doctrines, the principal source of meaning is the text and intertextual relationship between words. While Scalia's cannons provide deeper cuts into the interpretative and constructive tools of textualism, both understand the document to be holistic and limit the importance or use of extra-textual elements. Does this holistic textualism allow for determining the original public meaning? Amar and Scalia both claim that it is the best means of finding valid original

[62] Scalia, *Reading Law,* 218.

[63] This list is generated from both the subheading for the Prefatory Materials Canon and other relevant canons. See Scalia, *Reading Law* xiv. At times, other sources may be used as prefatory materials so long as they are reflective of the enacted text.

[64] Scalia, *Reading Law,* 219.

[65] Scalia, *Reading Law,* 219. (Emphasis not added)

public meaning; however, meaning determine by looking at dictionaries and repetitive words alone provide little context for how these words were used or actually understood to the public.

### *Dr. William Treanor and Textualism's Flaw*

Scalia and Amar's arguments for their doctrines are provocative, but fail to reach their lofty goals due to the constraints placed on historical evidence. Dr. William Michael Treanor provides the most thorough evaluation of the deficient treatment textualism gives to historical evidence. Treanor focuses his efforts on three central critiques: (1) Textualists overlook equally relevant historical evidence; (2) in light of that historical evidence, location of word's and clauses contribute limited significance; (3) there is no consistent underlying meaning in the Constitution.[66] At the center of these critique are Holistic textualism, interpolation, and textual supremacy.

Throughout both of his critical pieces, Treanor doubts textualism's structural underpinning. In his view, textualism's structuralist claim lack adequate resources for finding the original meaning of text, nor does it fit the original structural position of the Constitution and the judiciary.[67] Treanor begins his critique by refuting the textualist claim that the founders and early constitutional cases expressed textualist concern and used textualist elements, Rather than a textual based approach, the "early case law

[66] William Michael Treanor, "Taking Text too Seriously" *Michigan Law. Review* 106, no. 3 (December 2007): 487-544.

[67] See William Michael Treanor, "The Genius of Hamilton and the Birth of the Modern Theory of the Judiciary," in *Cambridge Companion to the Federalist,* eds, Jack N. Rakove, and Colleen A. Sheehan, (Cambridge: Cambridge University Press, 2019); and William Michael Treanor, "Original Understanding and the Whether, Why, and How of Judicial Review," *Yale Law Journal* 116, Pocket Part (2007) 218-222 http://scholarship.law.georgetown.edu/facpub/1031.

reflects a structural and process-based approach to judicial review rather than a textualist approach," and that the Founders "consistently relied on a range of factors, such as structural concerns, policy, ratifiers' and drafters' intent, and broad principles of government" to determine constitutional meaning.[68] If textualists were "to recapture the original public meaning," as they claim they seek to do, it is their duty to "look beyond text in precisely the same way that the Founding generation did, looking to drafting history, the spirit of the document, and structural and policy concerns."[69]

Despite Scalia's claim that textualism results in accurate original public meanings, Treanor highlights three flaws that injure their precision. First, the notion that the similar use of words and phrasing glosses over each other and convey a common meaning. This belief begins with a narrow set of meanings and limits subsequent inclusions to carry the same meaning, even if at odds with identifiable purpose or history of the text.[70] These textual restrictions prove "highly problematic as a guide to original meaning because it privileges a small subset of contemporaneous usages (those in the constitutional document) over the larger body of relevant contemporaneous usages."[71] While the Constitution can identify certain notions, such as "We the people," restricting possible meanings to only those within the text means that idioms or uses not identifiable in the text are removed. The text of the Constitution may provide a well-intentioned and

[68] Treanor, "Taking Text too Seriously," 501; Treanor, "Against Textualism," 1006. Treanor's argument relies heavily on his understanding that the original role of judicial review was principally structural. See William Michael Treanor, "Original Understanding"; William Michael Treanor, "Judicial Review Before Marbury" *Stanford Law Review* 58, no. 2 (2005): 455-562.

[69] Treanor, "Against Textualism," 986.

[70] Treanor, "Taking the Text too Seriously," 523.

[71] Treanor, "Taking the Text too Seriously," 524.

accurate record of specific word-clusters or phrases, but these instances can also be informed or defined by reviewing other historical data.

The second flaw Treanor identifies concerns whether the placement of clauses in the Constitution signifies any indication of their meaning.[72] When crafting the Constitution "the founding generation did not assign a great deal of significance to placement," noting that "[t]he way the Bill of Rights evolved reflects this fact."[73] Assuming the location of the amendments convey some intent, Amar "assigns great weight to the fact that" certain "Amendments are next to each other."[74] This argument entirely depends on the drafters and ratifiers knowing and intending to place the amendments as they are. Yet even a cursory review of historical evidence shows Madison originally intended to integrate the amendments rather than place them at the end.[75] Attempting to glean insight from the final placement is unreliable and may not properly represent the true intention, purpose, or understanding of the founders or "We the People."

Textualism's final flaw reaches a foundational principle to both Scalia and Amar's doctrines, holistic textualism. Treanor finds the position "that the Constitution is substantively coherent" and that "the Bill of Rights… be about *something*, to have a 'grand idea,'" deeply flawed and leads to either missing or misreading the true meaning

[72] While this critique is levied principally at Amar's use of clausal location to link the Ninth and Tenth Amendment, this critique equally applies to his linking of the Second and Third Amendment.

[73] Treanor, "Taking the Text too Seriously," 529.

[74] Treanor, "Taking the Text too Seriously," 509.

[75] See *Annals of Congress*, 1789, 451-.453. http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=227

of the document.[76] Holistic textualism replaces "author's intent" with a more substantive idea about the uniformity of the Constitution and its message. While there may be elements of the Constitution that are often overlooked, the historical evidence highlights that no coherence exists in the document, and nothing is gained by viewing the document as whole over viewing it by its individual parts.

Each of these critical points reveal problems stemming from textualism's demotion of historical evidence to a secondary role. History's secondary role does not mean that it never provides relevant information, but limits the impact it can have on the meaning of the text. Textualists overcome this limitation by implementing assumptions of coherence, locality, and permissibility. Where the argument is weak, they turn to selective pieces of historical evidence to bolster their specific position. Consequently, there exists a "dramatic gap between a textualist reading of the Constitution and the way in which the document was originally read."[77] Their "account reflects a close reading of the text, but it fails because it reflects" their "perspective, not that of the eighteenth century."[78] Ultimately textualism as proposed by Scalia and Amar cannot work, and that "[t]he textualist search for original public meaning can succeed only if textualists give the

[76] Treanor, "Taking the Text too Seriously," 531 (emphasis not added). This position is reflected more in Amar's Intratextualist doctrine. Scalia often views the concept that there is a "spirit" of a statute with a critical eye. Scalia is critical of judicial use of precedence like *Holy Trinity Church v. United States* (143 U.S. 457 (1892)) to justify some non-textual underlying meaning to achieve an idealized perception of what the text should mean.

[77] Treanor, "Taking the Text too Seriously,", 542

[78] Treanor, "Taking the Text too Seriously," 542

evidence that originalists highlight – drafting history and ratification history – careful attention and great weight."[79]

These three criticisms and his undressing of Textualism's founding roots lead to the question, does textualism offer a means to illustrating original meaning? Treanor's answer is a resounding no. "In other words, recovering the original meaning involves not simply understanding what the words themselves meant."[80] Original meaning is found when one is able to consort the text, understanding the role of the actors involved with the drafting and interpreting the text, as well as their principal concerns. Unless textualism were to fundamentally alter its means and principles, a reliable original meaning of the text remains out of the reach.

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[79] Treanor, "Taking the Text too Seriously," 543

[80] Treanor, "Against Textualism," 988.

## CHAPTER THREE

### Can Textualism be Improved to Find Original Public Meaning?

Knowing that textualism falls short in finding original meaning, the question becomes "are there ways to modify textualism to allow for more accurate readings?" Legal theorist, Lawrence Solum, offers an interesting perspective using historiography.[1] Utilizing elements from intellectual history, as well as linguistic distinction of meaning, Solum hints at the possibility of historical contextualism enhancing the constitutional argument of textualism. His use of the contextualist theory relies on two premises: the distinction between legal content and communicative content, and the "Fixation Thesis."[2]

Before moving on to the main discussion of the different types of content, a brief discussion of his Fixation Thesis is needed. Similar to Scalia's Fixed-Meaning Principle, Solum believes that "[t]he meaning of the constitutional text is fixed when each provision is framed and ratified."[3] Solum's Fixation Thesis accomplishes this fixed meaning by recognizing "[t]he public context of constitutional communication is time-bound."[4] Solum attaches his fixed meaning to the text as publicly known at the time of enactment, and produces the communicative content.

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[1] Lawrence B. Solum, "Intellectual History as Constitutional Theory" *Virginia Law Review* 101, no. 4 (June 2015): 1111-1164.

[2] Solum, "Intellectual History," 1112. See also Lawrence B. Solum, "The Fixation Thesis: The Role of Historical Fact in Original Meaning" *Notre Dame Law Review* 91, no. 1 (November 2015): 1-78.

[3] Solum, "The Fixation Thesis," 1.

[4] Solum, "The Fixation Thesis," 28.

*Communicative Content, Legal Content and the Interpretation-Construction Distinction*

Solum's "Fixation Thesis" and argument for a contextualist approach to legal texts, lies the linguistic distinction between "communicative content" and "legal content."[5] Communicative content refers to "the meaning that the text communicated (or perhaps 'was intended to communicate') to its anticipated or intended readers."[6] The act of interpretation naturally yields this kind of content as opposed to legal content. Legal content refers to the "legal norms the text produces."[7] Created through the application of the understanding derived from the communicative content, legal content implies a different type of meaning that incorporates the communicative content to a particular situation. Solum views this distinct type of content necessary for to an effective originalist approach to interpretation.[8]

The distinction between communicative and legal content raises two questions. The first "How do we discern the meaning communicated by a legal text?"[9] The second, "How does the linguistic meaning of legal text contribute to the content of legal rules (understood broadly to include rules, standards, principles, and mandates) that in turn determine legal effect?"[10]

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[5] Solum, "Intellectual History,"1117, see also Lawrence B. Solum, "Communicative Content and Legal Content, *Notre Dame L. Rev.* 89, no. 2 (December 2013): 479-520.

[6] Solum, "Intellectual History,"1117.

[7] Solum, "Communicative Content and Legal Content," 479.

[8] See Lawrence B. Solum, 'Semantic Originalism" *Illinois Public Law Research Paper* No. 07-24 (November 2008) for a full account on his understanding of the relationship between communicative content and legal content.

[9] Solum, "Communicative Content and Legal Content," 481.

[10] Solum, "Communicative Content and Legal Content," 481.

Focusing on the first question, Solum finds that communicative meaning comes in a variety of forms. Borrowing from linguistics, the communicative content is seen as "a function of the semantic meaning of its component parts."[11] Obviously, the individual component parts alone are not sufficient in conveying meaning. If it were, there would be no need for interpretation. Looking at the Second Amendment, the individual component parts do not convey whether the first congress intended "right to keep and bear arms" to be individual rights or collective rights. The semantic meaning of each component is governed by rules of syntax and grammar, and yields the "semantic content."[12] As the individual component parts are grouped together, grammatical norms establish a standard of use that in turn helps to further define the boundaries of meaning. Solum understands the "semantic meaning" as the literal meaning of the text, and is easily defined with the aid of dictionaries and grammar books.

As with the two textualists, Solum recognizes that the literal meaning does not always provide the complete picture of the texts meaning. "[S]emantic meaning of a legal utterance does not necessarily capture all of the content that is communicated… [b]ecause semantic content is sparse—legal utterances can communicate content that is richer than the literal meaning of words and phrases."[13] The literal meaning of text will often provide vague commands that result in questions to be answered. The answer to these questions can be found or informed through the context that enriches the meaning

[11] Solum, "Communicative Content and Legal Content," 486.

[12] Solum, "Communicative Content and Legal Content," 486-7.

[13] Solum, "Communicative Content and Legal Content," 486-7. Solum does not provide an explicit discussion of literal meaning, however he does provide examples of sources discussing this topic. See Note 27.

of the literal meaning. Communicated content is a product of understanding both the literal, textual, or plain meaning of the text as well as its underlying extra-textual context. Solum calls this phenomenon "contextual enrichment."[14] This phenomenon enables the reader to determine what was communicated at the time, yet the circumstances of the constitution represent a complication for application of this enrichment.

The circumstances around the drafting of the Constitution were widely unknown at the time of its drafting, release, and enactment. Today we have a limited number of sources to obtain insight into the workings and deliberations of the Constitutional Convention. This might lead to the conclusion "that constitutional communication was impossible given the context of constitutional communication."[15] However, Solum notes that the framers and ratifiers were able to rely on semantic meaning of the words and the "contextual enrichment" of linguistic norms known widely to the public. By incorporating these modes of communicative meaning into the text of the Constitution, the framers created a "clausal meaning."

Determining the "clausal meaning" is often the goal of the textualist, as they rely on finding meaning by understanding the text through "the ordinary and conventional meanings." [16] To direct the processes of identifying clausal meaning, Solum offers five

[14] Solum, "Communicative Content and Legal Content," 488. Solum's contextual enrichment concept comes from applying the philosophy of language notion of "pragmatic enrichment" to the legal context. In the legal context "the theory would be misleading because of the association of 'pragmatism' with legal pragmatism," as a result he cannot incorporate the concept as originally proposed. See Lawrence B. Solum, "Originalism and Constitutional Construction," *Fordham Law Review* 82 no. 2 (November 2013): 453-528 (discussing the differences between the use of "pragmatic enrichment" and "contextual enrichment" in the legal context).

[15] Solum, "Communicative Content and Legal Content," 497.

[16] Solum, "Communicative Content and Legal Content," 498.

elements or considerations. (1) semantic meaning, (2) publicly available context, (3) technical meaning where applicable, (4) newly stipulated names, entities, or terms, (5) implied or presupposed content or meaning. These five elements define what Solum calls "clausal meaning" and give a clear picture of the communicated content of the text. However, these five considerations cannot account for the entirety of the Constitution. Where there exists vague, abstract, or hard to define phrases "the legal content… is provided by constitutional construction that goes beyond mere translation of communicative content."[17]

Solum's legal content generally represent the legal norms conveyed in the text.[18] These norms consist of structural rules found in the constitution as well as standards created throughout the adjudication process. The legal content will often refer back to the doctrine established in the text, such as the arms-bearing rights in Second Amendment doctrine, but it goes beyond the communicated content. Solum gives four reason why the legal content differs from the communicative content: (1) "legal texts are vague," (2) "communicative content of a particular legal text is irreducibly ambiguous," (3) "set of legal norms…contains a gap," (4) "communicative content… is contradictory."[19] The first two reasons recognize that vague or intentionally ambiguous text inevitably requires the judiciary to create legal rules. The final two highlight the insufficient communicative content, and requires a new set of rules to either bridge the gap or correct the

[17] Solum, "Communicative Content and Legal Content," 501.

[18] Solum, "Communicative Content and Legal Content," 507.

[19] Solum, "Communicative Content and Legal Content," 509-510.

contradiction. Each of these problems highlight the necessity of legal norms and how they correct, expand, or fill the meaning of the text.

Legal norms are created through the interpretation of the legal text, often through the adjudicative process. It also represents a distinct type of meaning separate from semantic meaning or clausal meaning. When the communicative content asks, "what does right of the freedom of religion mean?" it focuses on the actual meaning of the phrase. Conversely, when asked the same question as a matter of legal issue or case, it becomes "How does the content of this doctrine apply in this particular situation?" This process is often referred to as giving effect to the text by textualists, Solum recognizes it as a means of creating a "legal effect."[20] The legal content of the text informs the legal effect, the law in action, and allows for the practical application of legal norms to cases and situations. The relationship between the communicative content, legal content, and legal effect is a process of enrichment. In order to find the legal content, identifying the communicative content is necessary, and as the communicative content is found it is enriched by every instances of legal effect created in the past.

Solum refers to this relationship as the "interpretation-construction distinction."[21] Basing his distinction on the constitutional theory of Keith Whittington, Solum finds that interpretation refers "to the activity of discovering the communicative content," and construction refers "to the activity of giving the text legal effect."[22] This distinction

[20] Solum, "Communicative Content and Legal Content," 485-86.

[21] Solum, "Intellectual History as Constitutional Theory," 1118.

[22] Solum, "Intellectual History as Constitutional Theory," 1119. Solum offers a guide and discussion of this distinction in note 15. See Keith E. Whittington, *Constitutional Construction: Divided powers and Constitutional Meaning* (Cambridge: Harvard University Press, 1999); Keith E. Whittington,

allows for the recognition of two separate constitutional practices, interpretation and construction. The interpretative process requires a historical approach, seeking and comprehending the historical context, both socially and linguistically, to discover the communicative content but also existing legal content. The construction process represents the legal practice of application and converting the communicative content into actionable legal content and effect. Solum rationalizes the two constitutional practices as a "two-moments model," but notes that "[c]onstittuional practice always involves both interpretation (meaning) and construction (legal effect)."[23]

The distinction and relationship Solum draws between interpretation and construction provides a complete picture of the adjudicatory process. Throughout his discussion of communicative content, legal content, and interpretation, Solum has slowly dropped hints at the role that contextualism and intellectual history may serve in the two-moments model. Solum believes that contextualism best serves as a means of "determining communicative content," as well as the existing legal content, rather than aiding in creating legal content.[24] Solum's proposed role is rooted in the intellectual history methods of historians James Kloppenberg, David Hollinger, and Quentin Skinner.[25]

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*Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*. (Lawrence: University Press of Kansa, 1999).

[23] Solum, "Intellectual History as Constitutional Theory," 1119-1120 ("the two moments model makes it clear that constitutional practice always involves both interpretation and construction (although one step or the other may be tacit or unconscious). Thus, even if the constitutional text is perfectly clear and constitutional doctrine simply mirrors the communicative content of the text the decision to conform doctrine to text is itself constitutional construction.")

[24] Solum, "Intellectual History as Constitutional Theory," 1123.

[25] Solum utilizes Saul Cornell's "investigation of intellectual history as an alternative to originalism as a tentative and provisional guide to" the contextualist method, and relies on that work to identify these three historians. See Solum, at 1139. See Saul Cornell "Meaning and Understanding in the

*James Kloppenberg*

Kloppenberg forms his intellectual history method based on an approach called "pragmatic hermeneutics."[26] Pragmatic hermeneutics focuses on the role of context in intellectual history, placing "a particular text at the center, and arrange around it an ever-widening set of circles that trace the contexts surrounding any text."[27] Using the constitution, the reader begins with the first circle, "the immediate context of framing," moving on to the next, "the larger context" of "the intellectual background of the Framers," and finally the lost circle, "the political context."[28] This method allows for a wider understanding of the motivation of the framers, but lacks instruction about how this information is to be used.

Kloppenberg offers an alternative principle, noting "[e]very text must be studied in relation to its authors or authors… and interpreted as the embodiment of a particular set of practices and purposes."[29] Contextual understanding relies on identifying the intent of the author of a text, but should not be confused with an original-intent argument. Solum clarifies, "he may mean a different sort of intention… [w]hat authors 'do' in a text could be the creation of communicative content, but could also refer to the purpose or

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History of Constitutional Ideas: The Intellectual History Alternative to Originalism," *Fordham Law Review* 82, no. 2 (November 2013): 721-756.

[26] Kloppenberg's pragmatic hermeneutics is not connected to the traditional American pragmatic philosophical movement of Charles Pierce, John Dewey, and William James. Rather as Solum notes, it "may simply be interpretation of historical texts in a useful way." See Solum, "Intellectual History" at 1141, James T. Kloppenberg. "Thinking Historically: A Manifesto of Pragmatic Hermeneutics," M*odern Intellectual History* 9, no. 1 (March 2012), 201-216. https://doi.org/10.1017/S1479244311000564.

[27] Kloppenberg, 202.

[28] Solum, "Intellectual History as Constitutional Theory," 1142.

[29] Kloppenberg, 202.

goals they seek to accomplish by creating the communicative content."[30] Kloppenberg's position requires a significant understanding of the historical context of the text and its author(s), but accomplishes the goal of deciphering of the historical meaning of the text. Ultimately, "Kloppenberg has many interesting things to say, but he does not identify a methodology for determining the communicative content of the constitutional text."[31]

*David Hollinger*

David Hollinger provides an alternative method that discusses the role of discourse in intellectual history.[32] Hollinger's methodology relies on identifying "a community of discourse" from "a common set of questions, and these questions allow us to understand the beliefs, values, and ideas that are shared or contested within the community."[33] This discourse approach aims to determine historical norms and identify meaning based on the context of those standards. While stimulating as historical inquiry, Hollinger's method offers poor guidance for determining constitutional communicative content, as the "public at large may consist of many overlapping discursive communities"

[30] Solum, "Intellectual History as Constitutional Theory," 1143. The "do" he quotes is related to a passage from Kloppenberg's work. "[D]etailed knowledge of the author's life and discursive communities is prerequisite to identifying what she meant to *do* in a particular text." (emphasis added) Kloppenberg, 203.

[31] Solum, "Intellectual History as Constitutional Theory," 1146.

[32] Solum, "Intellectual History as Constitutional Theory," 1146-1147. See David A. Hollinger, *In the American Province: Studies in the History and Historiography of Ideas* (Baltimore: The Johns Hopkins University Press, 1989).

[33] Solum, "Intellectual History as Constitutional Theory," 1146-1147.

and the "public meaning is not the same thing as meaning for a particular discursive community."[34]

*Quentin Skinner and the Cambridge School*

Based on Saul Cornell's summation of Skinner, Solum finds two component ideas Skinners theory. The first, "the idea that the meaning of the constitutional text is the meaning that the text had at the time it was adopted."[35] The second, "the notion that successful communication relies on conventions, both linguistic and social."[36] As Cornell present it, Skinner makes a significant originalist arguments for understanding the original public meaning of the text. The fixed nature of meaning in Skinner's first concept represents a clear originalist argument. The second, while not as obvious, requires an understanding of both semantic and syntactic conventions necessary to identify the fixed public meaning. However, Solum notes, "Cornell's presentation of Skinner is incomplete," and does not provide his complete theory.[37]

Within Skinner's theory "there are two inconsistent strands of thought in Skinner's account of historical meaning… the *Wittgensteinian strand* and the *Gricean strand*."[38] These stands represent contrasting theories of meaning. The Wittgensteinian

[34] Solum, "Intellectual History as Constitutional Theory," 1148.

[35] Solum, "Intellectual History as Constitutional Theory," 1150. See also Saul Cornell, "Meaning and Understanding.".

[36] Solum, "Intellectual History as Constitutional Theory," 1150.

[37] Solum, "Intellectual History as Constitutional Theory," 1151.

[38] Solum, "Intellectual History as Constitutional Theory," 1151. Solum uses Skinners article "Meaning and Understanding in the History of Ideas" to identify the two strands as "the *Wittgensteinian strand* and the *Gricean strand*."

strand borrows Ludwig Wittgenstein's account of meaning, claiming "that the meaning of an expression is the use to which it is put."[39] By viewing meaning as result of use, Wittgenstein and Skinner defines the text's "political purpose," but "not their meaning in the sense of communicative content."[40] Defining the legal content by its use would result in the reader following a purposivist approach to interpretation. Skinner's Gricean strand relies on the works of J.L. Austin, but Solum views "the parallelism between Skinner's theory of text's meaning and Grice's theory of speaker's meaning" as unmistakable. [41] Skinner believed "any attempt to understand the utterances themselves, must be to recover… intention on the part of the author."[42] Viewing meaning as a product of author's intent is the basis of intentionalism, a separate form of originalism. These conflicting theories, while neither completes nor compliments each other, both offer another vital aspect of understanding the role of contextualism in interpretation.

*Contextualism's Role in Constitutional Interpretation*

By reviewing these three intellectual historians, Solum highlights the disconnection in the field for defining a contextual approach to meaning. While it may seem unproductive, Solum's analysis illuminate important assumptions of contextualism and possible connections to textualist principles. Each historian contributes a necessary concept towards a clear understanding of contextualism and the how it can help define

[39] Ibid. "Wittgenstein is associated with the notion that meaning is use, or as he put it, 'Words are deeds.'" Quoting Ludwig Wittingstein, *Culture and Value* (Chicago: The University of Chicago Press, 1980).

[40] Solum, "Intellectual History as Constitutional Theory," 1151.

[41] Solum, "Intellectual History as Constitutional Theory," 1152.

[42] Solum, "Intellectual History as Constitutional Theory," 1152. Quoting Skinner, 37.

communicative content. Kloppenberg contributes, through his theory of "pragmatic hermeneutics," the foundation of understanding meaning by viewing the text through the lens of different levels of perspectives. Kloppenberg and Skinner both stress the importance of seeking out the intention of the author's, gleaning communicative content from those their objectives. Hollinger's discursive communities enables the incorporation of a wider public understanding that can help identify patterns within a collective group. Ultimately, Solum finds the possibility that contextualism can be used as a means to "yield facts about context that may be relevant to the determination of the public meaning of the constitutional text."[43]

Contextualism plays a "supplementary and complementary" role "to the methods employed by originalist and textualists."[44] In determining legal content Solum designates three potential roles for contextualism: (1) as a means of determining semantic content; (2) as a means of enrichment of the intellectual context of the constitution; (3) as a means of enriching constitutional construction. While contextualism may not be able to define the legal content, it does provide an avenue for identifying an accurate communicative content. Coupled with the interpretative and constructive abilities of a sound textualist approach, the method can provide a more enriched and accurate construction of the constitution. [45]

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[43] Solum, "Intellectual History as Constitutional Theory,"1155

[44] Solum, "Intellectual History as Constitutional Theory," 155

[45] Solum does provide other articles in which he explores Originalism and the use of contextualism; however, those are not applicable in this case our discussion focuses on textualism, and does not go into the argument of living originalism. See Lawrence B. Solum, 'Incorporation and Originalist Theory" *Journal of Contemporary Legal Issues* 18, no. 1 (2009): 409-446; Lawrence B. Solum, "Originalism and Constitutional Construction."; Solum, "Semantic Originalism."

*Original Public Meaning v. Original Public Understanding*

Solum's review of contextualism in intellectual history and his two contents as possible ways to enrich the textualist doctrine lead to a question underlying the goal of originalism, textualism, and constitutional practice in general. Amar, Scalia, and Treanor have all expressed ideas regarding how to identify the original public meaning of the text of the Constitution. As Solum shows, particularly with the discussion of Skinner, the concept of meaning is varied and can be contradictory to the purpose of Constitutional adjudication. Should the purpose of textualism be to find the original public meaning? Without straying too far from the course at hand, I offer a brief discussion on the merits of searching for the original public understanding versus original public meaning.

Original public understanding was a concept popular in the late 1980's and represented an argument against the idea of original intent.[46] This debate centered on whether it was possible or appropriate to attempt to reconstruct how the framers intended the Constitution to be understood. This debate provided numerous seminal originalist articles, but represented a pivotal moment in the history of constitutional discord. My proposition, while informed by these early debates, represents a distinct goal in mind. Rather than focusing on identifying how the drafters, ratifiers, or any other group of founders understood the text of the constitution, the goal should focus on how the text was understood by the population at large, how it was used, and how that informed the subsequent legal doctrine.

[46] See "Symposium, 1787 The Constitution in Perspective," William & Mary Law Review 29 , no. 1 (1987) 1-188; Clinton, "Original Understanding, Legal Realism, and the Interpretation of 'This Constitution'," 72 Iowa Law Review (1987): 1177-1280; Jefferson Powell, "The Original Understanding of Original Intent," 98 Harvard Law Review 885 (1985); Meese, "Toward a Jurisprudence of Original Intent," 11 Harvard Journal of Law & Public Policy 5 (1987); Michael Tigar, "Original Understanding and the Constitution," 22 Akron Law Review 1 (1988).

My aim borrows heavily from the intellectual history tradition Solum highlights, and shifts the goalposts from meaning of the communicated content to the understanding of the communicated content. This is possible through consultation of historical documents from state and federal statutes, newspapers, and the judicial process. Meaning is difficult to define, with too many variables or possible options, I simplify the process by enabling all of these different types of meaning to inform the overall understanding that is represented by the communicated and legal content. With our foundation firmly established, we turn to the textualist understanding of the Second Amendment and our final question.

# CHAPTER FOUR

## What is the Original Public Understanding of the Right to Bear Arms?

> A well-regulated Militia, being necessary to the security of a Free State, the right of the people to keep and bear Arms, shall not be infringed.
>
> - The Constitution of the United States, Amendment 2

As a federal matter, the Second Amendment doctrine effectively begins in 2008 with *Heller*. This case represented the first time that the Supreme Court addressed the meaning of the statute and explored the rights contained. The court was tasked with determining the constitutionality of the District's law banning "handgun possession by making it a crime to carry an unregistered firearm and prohibiting the registration of handguns."[1] In a 5-4 decision, Justice Scalia and the Court sided with the petitioner and held that the ban violated the second amendment. Setting out with the textualist goal of finding the "[n]ormal meaning… known to ordinary citizens in the founding generation," Scalia found the "textual elements… guarantee the individual right to possess and carry weapons in case off confrontation."[2] To reach this decision Scalia had to make a

[1] *District of Columbia. v. Heller*, 1. For an overview of the facts of the case and the question before the court see, "District of Columbia v. Heller." Oyez. Accessed November 5, 2018. https://www.oyez.org/cases/2007/07-290. The facts of the case are equally important to understand the holding and analysis of the law. The District enacted provisions to its code regarding restrictions on handguns that effectively banned handguns from the city. The first made it illegal to carry an unregistered firearm, except by one year licenses issued by the police chief. The second provision required that firearms be kept in a non-operative state unless "located in a place of business or being used for legal recreational activities." Respondent Dick Anthony Heller, a special police officer, sued the District on the grounds that the non-operative state provisions violated his Second Amendment rights. In his decision Scalia addresses both issues in determining that the provisions were unconstitutional. See, "District of Columbia v. Heller." Oyez. Accessed November 5, 2018. https://www.oyez.org/cases/2007/07-290.

[2] *Heller*, 3, 19.

conscious decision about the status and application of "A well-regulated Militia, being necessary to the security of a Free State." He finds that the amendment is "naturally divided into two parts: its prefatory clause and its operative clause."[3] Employing his Prefatory-Text Canon, Scalia invokes Joel Bishop and *Rex v. Marks,* quoting, "'It is nothing unusual in acts… for the enacting part to go beyond the preamble."[4] Reducing the role of that clause to a prefatory role, restricts its impact on the original understanding and removes the possibility of a military or state restriction.

The Second Amendment's operative clause, "the right of the people to keep and bear Arms, shall not be infringed," is further broken down into three sections, "the right of the people," "to keep arms," and "to bear arms." Scalia offers an extensive linguistic study of historical use and connotations. To determine whether "the right of the people" concerns "the people" individually or collectively, he links the phrase to similar uses in the First, Fourth and Ninth Amendment. Consequently, "[a]ll three of these instances unambiguously refer to individual rights, not 'collective' rights."[5] Scalia does acknowledge that three other instances that "refer to 'the people' can refer to a collective

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[3] *Heller*, 3. Scalia makes his point by appealing to Joel Tiffany's rephrasing of the amendment, "Because a well-regulated Militia is necessary to the security of a Free State, the right of the people to keep and bear Arms shall not be infringed." See Joel Tiffany, *A Treatise on Government and Constitutional Law*, (Albany: W. C. Little, Law Bookseller, 1867).

[4] *Heller*, 4. See also Joel Prentiss Bishop, *Commentaries on the Written Laws and Their Interpretations*, (Boston: Little, Brown, and Company, 1882) (quoting *Rex v. Marks,* 3 East 157 (K. B. 1802)). Bishops classifies introductory or preamble material, what Scalia deems prefatory, as either showing intent and reason, or reciting facts. Bishop finds that the preamble might "explain an equivocal expression in the enacted clause," but the legislation can go beyond the expression. Additionally, Bishop holds that if the preamble is "broader than the act itself" it would not "enlarge the meaning," instead provide insight into "the reasons which impelled the legislative mind." Alternatively, Bishop contends that the preamble is a collection of facts that "must be accepted as… *prima facaie*." Ibid*,* 48-49. While Scalia does not allude to these specifically, both assertions by Bishop allow for the separation of the operative and prefatory clause, giving most if not all weight to the operative clause.

[5] *Heller*, 5.

body rather than individual members, only if in a context that does not include discussion of "rights." However, those instances are not subject to the Consistent Usage Canon, since those instances do not focus on "rights."[6] When read *in pari materia,* "the people" in Second Amendment undoubtedly must refer to the individual people.

Scalia approaches "to keep and bear arms" through a historical inquiry into past uses of the phrase and individual words, conversing with founding era dictionaries to determine what the term "arms" meant to communicate. Using Samuel Johnson's 1773 dictionary and Timothy Cunningham's 1771 legal dictionary, the terms arms is determined to encompass "weapons of offence, or amour of defence,"[7] and "anything that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another."[8] Used in its most common sense, the word "arms" refers to instruments for offense or defense, conveying a militaristic use or purpose. Founding-era thesauruses limit synonymous words of arms to instruments used in war and confirm the militaristic nature of the term.[9] Scalia finds the common understanding was not that the instruments were used in a militaristic sense, claiming the "term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity."[10] If arms is understood in its most common understanding then "the

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[6] *Heller*, 6.

[7] *Heller*, 6. Quoting Samuel Johnson, *Dictionary of the English Language* 4th Ed. (1773).

[8] *Heller*, quoting Timothy Cunningham, *A New and Complete Law Dictionary* (1771).

[9] *Heller* 8, see John Trusler and Gabriel Girard, *The Difference, Between Words, Esteemed Synonymous, in the English Language* (London: J. Dodsley, 1766).

[10] *Heller*, 8. Scalia here is basing his belief previous state court construction of the word arm (*State v. Duke* 42 Tex. 455 (1874)), and an example provided by Cunningham stating that servants and labourers were allowed to use bows and arrows on Sundays.

Second Amendment extends, prima facie, to all instruments that constitute bearable arms."[11]

Turning to "keep and bear arms," Scalia finds only one natural meaning of "keep arms." Defined by Johnson and Webster's, "keep arms" naturally means to retain or not to lose and "the most natural reading… is to 'have weapons.'"[12] "Bear arms," holds two distinct meanings: the natural meaning, "carrying of weapons outside of an organized militia," and the idiomatic meaning, "'to serve as a soldier, do military service, fight' or 'to wage war.'"[13] Unlike the natural meaning, a product of contemporaneous dictionaries, the idiomatic meaning is a derived from documents like the Declaration of Independence in the context of "bearing arms against."[14] As the amendment does not bookend the

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[11] *Heller*, 8.

[12] *Heller*, 8. Unlike defining "the people" Scalia is unable to point to numerous instances of use in founding era documents, noting "[t]he phrase 'keep arms' was not prevalent in the written documents of the founding period." *Ibid, 9*. The instances where the phrase is present accord with the natural meaning used here. Scalia relies primarily William Blackstone's identifying a penalty for Catholics in England being subject to punitive penalties including the restriction from keeping arms in their houses. *See* Sir William Blackstone, *Commentaries on the Laws of England*, First Edition (Oxford: Printed at the Clarendon Press, 1765-1769). https://avalon.law.yale.edu/18th_century/blackstone_bk1ch1.asp; Johnson, 1095. The Webster definition that Scalia quotes states, "To Hold; to retain in one's power or possession." Noah Webster, *American Dictionary of the English Language* (1828).

[13] *Heller*, 10-12. Quoting Linguists' Brief at 18 and Justice Steven Dissent at 11. Founding-era dictionaries define "bear" as naturally meaning "to carry." Combined with the previously determined meaning of "arms," "bear arms" most naturally and logically conveys the carrying of weapons. (see also, Johnson., 161; Webster; Thomas Sheridan, *A Complete Dictionary of the English Language, Both with Regard to Sound and Meaning,* (London: C. Dilly, 1796). While Scalia relies primarily on those dictionaries to determine the original understanding, he finds further support in Justice Ruth Bader Ginsburg's dissent in *Muscarello v. United States,* 524 U.S. 125 (1998). "[s]urely a most familiar meaning is, as the Constitution's Second Amendment… indicates[s]: 'wear, bear, or carry… upon the person or in the clothing or in a pocket, for the purpose… of being armed and ready for offensive or defensive action in a case of conflict with another person.'"

[14] See *Declaration of Independence* paragraph 28. The idiomatic meaning is introduced and argued in the *amicus* brief for Linguistic and English professors Dennis E. Baron, Richard W. Bailey, Jeffrey P. Kaplan in support of the District. Including the Declaration example, the *amici* refer to a dissent letter written by Secretary of State Thomas Jefferson to President Washington echoing the sentiment from the Declaration, the Maryland ratifying convention ("That no person conscientiously scrupulous of *bearing arms* in any case, shall be compelled personally to serve as a soldier." (Emphasis not added)), and Madison's original draft of the Second Amendment ("That right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: *but no*

phrase with against, the natural meaning is the likely meaning. Pairing the natural readings of "keep and bear arms" with the individual focus of "the rights of the people," the most reasonable and natural reading confirms that the operative clause of the amendment protects the individual right to gun ownership.

As the operative clause clearly focuses on the individual, how then, does the prefatory clause "comport with our interpretation of the operative clause."[15] During the founding the phrase "A well-regulated Militia," most likely conveyed the understanding that the militia was comprised of "all males physically capable of acting in concert for the common defense," with "proper discipline and training."[16] In response to the Justice Breyer's dissenting position on the second phrase, "Security of a Free State," Scalia asserts that it clearly refers to protection of the political state, not the states themselves. "It is true that the term 'State' elsewhere in the Constitution refers to individual States, but the phrase 'security of a free state' and close variations seem to have been terms of art… meaning 'a free country' or free polity."[17] The necessity of a "well-regulated Militia" for the protection of this state three possible reasons: (1) "repelling invasions and suppressing insurrections, (2) rendering standing armies avoidable, (3) enable able-

*person religiously scrupulous of bearing arms, shall be compelled to render military service in person*." (Emphasis not added)). While Jefferson's letter to the President may substantiate Scalia's argument, the two other examples in which the phrase is included principally with regard to the military and service brings into doubt the adherence to the natural meaning. This will be addressed further in Part II and III.

[15] *Heller*, 22.

[16] Ibid, 22-23. Quoting *United States v. Miller,* 307 U.S. 174 (1939). Scalia also confirms this original meaning by conferring with sources from the founding-era, including contemporaneous Webster's dictionary, Federalist No. 46, and a letter from Thomas Jefferson to Destutt de Tracey (January 26, 1811) which states "the militia of the State, that is to say of every man in it able to bear arms."

[17] *Heller*, 24.

bodied men to resist tyranny.[18] As a stand-alone clause the connection between the Militia and the preservation of the state logically follows, yet in connection to the operative clause his interpretation seems unrelated. Yet he maintains, "[i]t fits perfectly, once one knows the history that the founding generation knew."[19]

In order for the prefatory and operative clauses to coexist, Scalia assumes that the founding generation was aware of the history of the Englishman's right to arms. In his view, the right is founded during the reign of the Stuarts as a product of the suppression of Charles II and James II of dissidents "in part by disarming their opponents."[20] The result of these actions "caused Englishmen to be extremely wary of concentrated military forces" and "[t]hey accordingly obtained an assurance from William and Mary, in the Declaration of Right… that Protestants would never be disarmed."[21] The subsequent attempted disarmament of rebellious colonies by George III, during the decade leading up to the revolution, would have turned colonist minds to the Glorious Revolution and the Stuart kings. Remembering this, the founders must have sought to curtail the same threat to liberty. *Heller's* historical review sufficiently supports the understanding that the right to keep and bear arms is most concerned with ensuring the individual colonist are able to independently defend themselves.[22] At the convention, and after, some would feel that a

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[18] *Heller*, 24.

[19] *Heller*, 25.

[20] *Heller*, 19.

[21] *Heller*, 19-20. Also quotes the English Bill of Rights, "That the Subject which are Protestants may have arms for their defense suitable to their conditions and as allowed by law. *Bill of Rights* 1 W. & M., 2d sess., c. 2, (1689).

[22] *Heller*, 21. To establish the connected sentiment between the post Stuart era and the founding era, Scalia quotes a New York Journal article from 1769 ("[[i]t is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence.").

stronger central government would result in a repetition of the actions of the Stuarts and King George III. This is evident in anti-federalist expressions of "the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia."[23] With this in mind, it is apparent that the drafters and ratifying public most likely and reasonably understood the right and prefatory clause to be concerned with the final two of the three reasons listed above.

### *Intratextualism and the Bill of Rights*

Amar, like Scalia, ultimately determines that the Second Amendment inevitably protects "the right to keep and bear arms" on an individual level. However, Amar believes that historically there were two separate understandings of what the amendment conveys, stating, "the right in 1789 and the right in 1866 meant different things."[24] Central to Amar's interpretation of the Bill of Rights, is the theme of creation and reconstruction of the rights. Each amendment was created at a time to serve a specific purpose, and in the aftermath of the Civil War with the Fourteenth Amendment, they were reconstructed. As Amar notes in one section title, the task required "Fitting Creation Pegs into Reconstruction Holes."[25]

Amar's understanding begins with the distinction that the Second Amendment contains a preamble that tells us both what the law does as well as why. "[T]he right to

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[23] *Heller,* 25. See also, "The Federal Farmer III" *The Anti-Federalist*, 43-54.

[24] Amar, *Bill of Rights*, 257.

[25] Amar, *Bill of Rights*, 215. The central issue tackled by the Reconstruction amendment was citizenship for the now freed slaves. Part of tackling this issues involved incorporating all of the rights listed in the Bill of Rights

keep and bear arms exists principally to protect the Constitution's militia structure."[26] This purpose embodied the founding-era view that "arms bearing was collective, exercised in a well-regulated militia embodying a republican right of the people… with the militia muster on the town square."[27] Even though the right was viewed as a republican right of First-Class citizens, it was not viewed as separating the right from the conventional use and purpose of arms. Amar recognizes that in "the Founders' world, individual self-protection and community defense were not wholly separate," but often overlapped through common protective actions like protecting ships from pirates, towns and settlements from Native Americans, and protecting property from thugs and other threats.[28] This original understanding of the right to bear arms was "broad enough to protect rights of private individuals and discrete minorities; but as with the First, the Second's core concerns are populism and federalism."[29]

Amar firmly establishes the link between populism and the right to "keep and bear arms" by distinguishing between the right as a political right versus a civil right. The distinction between political and civil rights rests on who can exercise the rights, with the former a privilege of a "First-Class Citizen." "First-Class Citizens" were citizens belonging to the polity with privileges not available to all members of a society, including the right to own arms.[30] As he explains, "[a]t the Founding, the right of the

[26] Akhil Reed Amar, "Heller, HLR, and Holistic Legal Reasoning," *Harvard Law Review* 122 no. 1 (2008), 163.

[27] Amar, *Bill of Rights,* 259.

[28] Amar, "Heller, HLR, and Holistic Legal Reasoning," 164.

[29] Amar, "Heller, HLR, and Holistic Legal Reasoning," 164.

[30] Amar, "Heller, HLR, and Holistic Legal Reasoning," 164. Amar explains this distinction further by stating, "[a]lien men and single white women circa 1800 typically could speak, print, worship, enter into

people to keep and bear arms stood shoulder to shoulder with the right to vote; arms bearing in militia embodied a paradigmatic *political* right."[31] The notion of the rights as a political right of the first-class citizen raises the question, who did the founders believe were "the people" in the preamble? Amar considers three possible readings: (1) The "Select Militia," "those in active service who regularly muster and train;" (2) The "General Militia," "those in active service plus all those capable of being called upon to serve;" (3) The "Fourth Amendment" Reading, all "rights-holders… protected by the Fourth Amendment."[32] Viewing Scalia and Stevens as staking out the two extreme positions, Amar considers the second set to represent the most accurate answer. His answer relies on the importance of the linkage between arms-bearing in the second amendment, its republican nature, and the militia.

Unlike other political rights, the arms-bearing rights were not viewed as individualistic, but as with the First Amendment, republican in nature. For Amar, "the key linkage between the Amendment's two parts" rests on the understanding that "[i]n eighteenth-century republican ideology, the (general) militia *were* the people."[33] The term "militia" in the late 1800's held a different meaning then than it does now. As Amar

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contracts, hold personal property in their own name, sue and be sued, and exercise sundry other civil rights, but typically could not vote, hold public office, or serve on juries. These last three were political rights, reserved for First-Class Citizens."

[31] Amar, *Bill of Rights,* 258. Emphasis added.

[32] Amar, "Heller, HLR, and Holistic Legal Reasoning," 166.

[33] Amar, "Heller, HLR, and Holistic Legal Reasoning," 166. Amar goes into greater detail stating ""Nowadays, it is quite common to speak loosely of the National Guard as 'the state militia,' but two hundred years ago, any band of paid, semiprofessional, part-time volunteers, like today's Guard, would have been called 'a select corps' or 'select militia'-and viewed in many quarters as a little better than better than a standing army. In 1789, when used without any qualifying adjective, 'the militia' referred to all citizens capable of bearing arms."

distinguishes above, there was a *select* militia and the general militia. S*elect* militias were understood to mean professional soldiers, viewed as individuals who were not citizens but rather mercenaries or men who sold themselves into service. Without the qualifier, the "militia encompassed the same men who voted and who served on juries… all men capable of serving."[34] In answering the question to whom does the Second Amendment apply, Amar views the amendment and right as positively linking the militia to the first-class citizen.

The Second Amendment may not describe the militia as *select*, but it does label the militia as "well-regulated," implying a degree of structure and order. A "well-regulated" militia received training and discipline, but unlike a "disciplined" army, did not increase "their servility to the government."[35] For the militia, any training and "military discipline would be tempered by the many social, economic, and political linkages that predated military service and that would be renewed thereafter."[36] While it was necessary to subject the militia to some degree of military discipline for effectiveness, the members retained and returned pre-existing social bonds. Quoting *Miller* and Adam Smith, Amar finds "In a militia the character of the labourer, artificer, or tradesman, predominates over that of the soldier: in a standing army, that of the soldier predominates over every other character; and in this distinction seems to consist the essential difference between those two difference species of military force."[37] The local

[34] Amar, "Heller, HLR, and Holistic Legal Reasoning," 167

[35] Amar, *Bill of Rights*, 53.

[36] Amar, *Bill of Rights*, 55.

[37] Amar, *Bill of Rights*, 55. *U.S. v. Miller*, quoting Adam Smith *The Wealth of Nations*, (London: W. Strahan and T. Cadell, 1776), 660.

nature of the militia, and the citizens who serve in them, served to ease anxieties regarding standing armies and allow interested parties to protect their liberties.

When they created the Second Amendment, the drafters sought to address "a deep anxiety about a potentially abusive federal military."[38] Relying on the principle of clausal location and concordance Amar believes the framers viewed the Second Amendment as being "closely linked to the textually adjoining First Amendment," based on "the use of the magisterial Preamble phrase 'the people' in both contexts, thereby conjuring up the Constitution's grand principle of popular sovereignty."[39] To this end, Amar claimed "to see the un-Reconstructed amendment as primarily concerned with an individual right to hunt or to protect one's home is like viewing the heart of speech and assembly clause as the right of the persons to meet and play bridge or have sex."[40] While the amendment may be read more broadly, beyond Amar's core, it would not adequately address the inability of individual citizens to confront tyranny or an oppressive professional army. Consequently, even though the amendment does protect political right for those "First-Class Citizens" to own and store arms, it also is a response and serves the purpose of allowing an avenue for men capable of arms to band together in defense of freedom against tyranny.

As Amar shows, originally the purpose and understanding of the Second Amendment was the protection of the ability to arm and serve in a militia for a specific class of men. Yet, the meaning drastically changes over the next 70 years to reflect a

[38] Amar, *Bill of Rights*, 46.

[39] Amar, *Bill of Rights*, 47.

[40] Amar, *Bill of Rights*, 49.

more individual interest. In the 1860's "Reconstruction Republicans recast arms bearing as a core *civil* right, utterly divorced from the militia and other political rights and responsibilities."[41] In this process, specifically in response to the events of the civil war, the Republicans began to recast the amendment more closely aligned with the interpretation of the court in *Heller*, entirely ignoring the prefatory clause. One of the most explicit examples of this rewriting is included in the language of the Freedman's Bureau Act which states, "law… concerning *personal* liberty, *personal* security, and the acquisition, enjoyment, and disposition of estate, real and *personal, including the constitutional right to bear arms,* shall be secured to and enjoyed by all the citizens."[42] The shifting language here and in the writing of Joel Tiffany, reflect a shifting attitude towards the elevation of freed slaves to citizenship.[43] Summing up the change, Amar claims "between 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman."[44] By the time the Fourteenth Amendment was ratified and incorporated the Second Amendment to the states, the right had morphed

[41] Amar, *Bill of Rights*, 258. In shifting his attention to the Republicans of the 1860s, Amar is careful to draw the distinction between the "small-r republicans of the 1780s" and the "capital-R Republicans of the 1860s."

[42] Amar, *Bill of Rights*, 260, quoting 14 Stat. 173, 176 (1866) (emphasis not added).

[43] Amar, *Bill of Rights*, 262. Amar references Joel Tiffany's treatise on the unconstitutional nature of slavery where he states, "Here is another of the immunities of a citizen of the United States, which is guaranteed by the supreme, organic law of the land. This is one of the subordinate rights, mentioned by Blackstone, as belonging to every Englishman. It… is accorded to every subject for the purpose of protecting and defending himself, if need be, in the enjoyment of his absolute rights of life, liberty, and property…. The colored citizen, under our [federal] constitution, has now as full and perfect a right to keep and bear arms as any other; and no State law, or State regulation has authority to deprive him of that right." See Joel Tiffany, *A Treatise on the Unconstitutionality of American Slaver,* (Cleveland: J. Calyer, 1849), 117-118. In addition to this position held by Tiffany, he also reflects on the consequence raised by Tiffany and Roger Taney regarding the proclamations of liberties afforded to citizens by *Dred Scott*. See Amar, *Bill of Rights*, 263, quoting *Dred Scott v. Sanford* 60 U.S. 393 (1857).

[44] Amar, *Bill of Rights*, 266.

from protecting the state of freedom from tyranny, to the individual protecting his personal-self from the tyranny.

Amar leaves open the question of what position should be applied when interpreting the law. To be a good originalist or textualist it would seem the meaning should be confined to the founding generation; however, the meaning would revert back to a political right not intended for contemporary citizens not originally included as "First-Class Citizens." Amar answers this in by utilizing a holistic argument. While not addressing the individual right to "bear arms" personally, he believes "in tandem with later Amendments and other changes in law and fact, the Second Amendment should inspire us to create an Army that truly looks like America." The incorporation of slaves into citizenship, and women with the Nineteenth Amendment, thus changes the Amendment to reflect a new "First-Class Citizen." In interpreting and applying this law, it is impossible to separate the two. Recognizing "the legal and social structure on which the amendment is built no longer exists," Amar acknowledges that post-Reconstruction the "right to keep a gun at home for self-protection was indeed a constitutional right – a true 'privilege' or 'immunity' of citizens."[45]

With the two textualist readings thoroughly explained, we briefly look at areas of commonality and contention. The most obvious area where Scalia and Amar disagree are whether the intention of the founders conform to those of the Reconstructionist.[46] While

[45] Akhil Reed Amar, "Second Thoughts" *The New Republic.* July 12, 1999, at 24. https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1250&context=lcp

[46] Scalia does not neglect to review the pre and post-Reconstruction view of the amendment, but the analysis functions as supplemental to his original assessment. Scalia utilizes his analysis of commentaries and cases in the 19th century to provide concurrence to his interpretation. See *D.C. v. Heller*, 32-47.

Scalia believes that the historical context and contemporaneous documents substantiate the individual right, Amar's evidence and propositions cast more than a shadow of doubt on that argument. Additionally, the two textualists are at odds about the importance of the prefatory clause, although Amar does acknowledge its downgraded standing as a result of the Reconstruction recasting. While they disagree on the original understanding, they agree on multiple fonts. Both agree that the original intention was to enable the people to battle tyranny and ease anxiety about standing armies. Both utilize Holistic Textualism and the repetition of words and phrases to glean underlying meaning otherwise not accessible. While Scalia and Amar disagree on the original understanding, they each find that through historical evidence it is evident that the amendment ultimately does protect and concern itself with a *personal* right to "keep and bear arms" outside of the context of the military and the militia.

### *Heller and the Communicated Content of the Second Amendment*

Years before Solum formulated his concepts of Communicative and Legal Content, he alluded to them in critique of Scalia's *Heller* opinion. Solum viewed the majority in *Heller* as seeking "to recover the linguistic meaning."[47] Solum starts his review of *Heller* by questioning whether the linguistic meaning equates to the normal and ordinary meaning of the Second Amendment. The opinion may argue that it is, but Solum does not find it convincing. He believes Scalia confuses the distinction between norms and facts, stating "*Heller* commits some kind of elementary category mistake: he seems to be attempting to derive an 'ought' from an 'is' – using linguistic facts as the premise

[47] Lawrence B. Solum, "District of Columbia v. Heller and Originalism," *Northwestern University Law Review* 103, no. 2 (2009), 941.

for an argument that yields a normative conclusion."[48] Choosing to rely on linguistic facts does not allow Scalia to properly understand the underlying normative reason for those choices, leaving the meaning discovered incomplete.

Solum proposes two concepts to improve and complete *Heller*, framer's meaning and clause meaning. The framer's meaning of the Constitution is defined as "the content that its authors intended the audience to grasp based on the audience's recognition of the framer's intentions." In order to find this there are a couple of necessary components. The first, the intended audience must be determined. In the case of the Constitution, it is apparent that this audience is the people. The second is a common knowledge regarding the words and phrases used. To illustrate this Solum turns to a thought experiment proposed by Paul Grice, where two cars meet at an intersection, one flashes it's lights and the other realizes that their lights are off.[49] This experiment showcases that to convey meaning the audience has to recognize and understand what the author, or driver, is intending. This not only includes a common understanding of the denotation of the words but also the connotation based on the context of their use. The second requirement is the audience be recognizable. This component is not difficult to determine since "the primary audience… was the collection of citizens and officials who would be governed by" the Constitution. In order to satisfy these components, it's necessary to consult and provide historic evidence that can substantiate the position.

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[48] Solum, "District of Columbia v. Heller and Originalism," 942.

[49] Solum, "District of Columbia v. Heller and Originalism," 948. See also Richard E. Grandy & Richard Warner, Paul Grice, Stanford Encyclopedia of Philosophy, (Edward N. Zatla ed., rev. ed. 2008) http://plato.stanford.edu/entries/gice/. ("[I]magine that you have stopped at night at an intersection. The driver of another car flashes her lights at you, and you make the inference the reason for her doing this is that she wants to cause you to believe that your lights are not on. And based on this inference, you now do, in fact, realize that your lights are not on.").

The "clause meaning" defines "the meaning of the constitutional text" through "the conventional semantic meaning of words and phrases combined" with "the rules of syntax," resulting in the text functioning as operative unites of meaning in the constitutional context."[50] Clausal meaning is the closest thing to what Scalia describes in *Heller*, as he satisfies both of the requirements Solum lists: (1) the text "must employ words and phrases that had conventional semantic meanings at the time of utterance;" (2) the text "must be constructed in conformity with prevailing syntax so that the clauses make grammatical sense."[51] Scalia shows that at the time of the Second Amendment's adoption, the phrase "keep and bear arms" had a conventional semantic meaning that was constructed by the court in accordance to syntactic and grammatical rules. However, Scalia stops at the clausal meaning believing it complete and satisfactory in defining the legal content of the amendment. As viewed by Solum, *"Heller* assumes that the linguistic meaning of the Constitutional text is a function of the 'normal and ordinary as distinguished from technical meaning' of the words and phrases."[52]

*Heller's* insufficient use of meaning leads Solum to ask "[h]ow does the semantic content contribute to legal content?"[53] While *Heller* presumes that semantic meaning

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[50] Solum, "District of Columbia v. Heller and Originalism," 951-52.

[51] Solum, "District of Columbia v. Heller and Originalism," 952.

[52] Solum, "District of Columbia v. Heller and Originalism," 953.

[53] Solum, "District of Columbia v. Heller and Originalism," 937. Solum finds that this problem is closely linked with the "New Originalism" movement, and that the distinction between the two type of content is first identified by Richard Fallon where he states "that what we call constitutional theories or theories of constitutional interpretation are often theories about constitutional meaning that implicitly accept the permissibility of disparity between constitution meaning and implementing doctrine." This implicit distinction means that constitutional theories are not adequately addressing issues of implementation or legal doctrine and often provide incomplete analysis becoming "less practically significant than their proponents suggest." See Richard Fallon, "Judicially Manageable Standards and Constitutional Meaning," *Harvard Law Review* 119, no. 5, (Mar. 2006): 1274-1332.

does contributes the argument for it lies within the function of the court and its relationship with the text. Defining constitutional law, doctrine, and the legal content of provisions, requires institutions develop rules and interpretations for the application of the text of the constitution. To ensure fidelity, "there is a rule of law requiring officials, including judges, to conform the content of constitutional law to the semantic content of the constitutional text."[54] While the courts may develop supplemental test or rules, they are bound by the semantic content. It's not hard to see how this implicit rule became the foundation for the assumption in *Heller*.

Ultimately, Solum is not satisfied with Scalia's interpretation, viewing it as lacking the necessary justification for the court's reasoning and decision. Full support would require three additional premises, (1) a premise about fixation, (2) a premise about clause meaning, (3) a premise about contribution.[55] While Solum is correct that *Heller* is incomplete, the premise that he identified are not necessarily required nor sufficient in completing the justification of the stance taken.

Early in *Heller,* Scalia establish that the court is "guided by the principle '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."[56] While he does not explicitly call this linguistic meaning, it is apparent that the "normal and ordinary" determined from analogous dictionaries and state constitutions firmly fix the meaning at the time of adoption. The third premise, is also sufficiently implied by the extent to which

[54] Solum, "District of Columbia v. Heller and Originalism," 954.

[55] Solum, "District of Columbia v. Heller and Originalism," 954.

[56] *Heller*, 3. Quoting *United States v. Sprague,* 282 U.S. 716 (1931).

Scalia defines each term in the operative clause followed by the connecting of that meaning to the clausal meaning defined by the court. The second premise proves the only one absent and able aid in justifying the decision in *Heller*. Had Scalia sufficiently discussed the reasoning behind tying the linguistic meaning to the original public meaning, the argument might have been more persuasive. The absence of this reasoning represents the central flaw with *Heller*. Heller is incomplete, in neglecting to sufficiently explore the historical context of the right, as well as historical evidence to further define semantic meaning through the communicated content.

*The History of Keeping Arms*

The final question asked at the outset asked, what is the original public understanding of the Second Amendment and how can it inform and advance the current dialogue? This question is of greater importance now. *Heller* sought to determine whether the right to keep and bear arms contained an allowance for individual use, and it found that it not only contained it but could not be divorced from it. Now, the current deliberation focus on the permissibility of regulations and limitations on that right. Rather than searching for the semantic meaning of the text, this I can incorporate from *Heller*, our search begins with the historical foundations of the right. While some continue to argue against the individual right found in *Heller,* the time has come to acknowledge its place at the foundation of Second Amendment doctrine and attempt to better define the scope of the right. *Heller* and Amar's exploration of the amendment provide a roadmap during their respective historical reviews, but they concentrate on possible meaning and not how the right was generally understood. The quest for the public understanding

requires identifying both the communicated and legal content, and must start with establishing the historical context of the right to keep and bear arms.

Most argument about the origins of the right to bear arms start with an exposition of the English history from the Glorious Revolution forward. The English right is generally understood to have developed as a reaction to the treatment of Protestants by the Stuart king James II disarmament of protestant dissidents through commanding a select militia.[57] To condemn James II's actions, and to ensure that future kings would not be able to commit the same infringements, Parliament produced the Bill of Rights, 1689, and the Declaration of Rights, 1689. They claimed that James violated the liberties of Englishmen "[b]y causing several good subjects being Protestants to be disarmed…" and proclaimed "[t]hat the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law."[58] The foundation for the Second Amendment are clear, though less absolute, however the right was never fully understood as an unalienable legal protection until much later.

Parliament's declaration of the Englishman's right to arms contained a built-in stipulation allowing the legislative body perceivably restrict the right as they felt necessary. In his commentaries, Blackstone highlights the right to own arms for defense was "a public allowance, under due restrictions."[59] Saul Cornell highlights "the best illustration of how the scope of this right was understood" in Parliaments rejected

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[57] For a detailed discussion of the English history of arms bearing rights *see* Joyce Lee Malcom, *To Keep and Bear Arms: The Origins of an Anglo-American Right*, (Cambridge: Harvard University Press, 1994). Lois G. Schowerer, "To Hold and Bear Arms: The English Perspective," *Chicago-Kent Law Review* 76, no. 1 (2000): 27-60.

[58] W&M Article 6, 1689. https://avalon.law.yale.edu/17th_century/england.asp.

[59] Blackstone, *Commentaries on the Laws of England*.

revision to the 1671 Game Laws that "would have allowed 'any Protestant to keep a Musquet in his House, notwithstanding this or any other act.'"[60] Despite the proposition merely legitimizing the principles of the Declaration, the House of Lords "quashed the ide as too radical because it tended to "arm the mob."[61] Ultimately, the legislative sentiment revealed that "having arms" was not an inalienable right but rather a privilege granted by and subject to the law.

By the beginning of the eighteenth century, arms had become a necessity in the colonies. Laws concerning the right to bear arms served to ensure that the colonies were sufficiently armed to provide effective security for the colonies against Native Americans. These laws while essentially mandating that men capable of bearing arms be prepared, they limited that to the white colonials. The driving force behind this change was the reliance on the militia. "The colonists were keenly aware of the fact that they could not rely on traditional military formations to secure their vast and undeveloped borders" from raids by Native Americans.[62] By the time the French and Indian War began, the colonies were principally reliant on the militia to secure their borders. "To ensure this security, men had to fulfill their obligations to participate in the militia and

[60] Saul Cornell, "The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace," *Law and Contemporary Problems* 80, No. 2 (2017): 11-54.

[61]Cornell, "The Right to keep and Carry Arms," 15. See note 33, referencing Patrick J. Charles, "Arms for Their Defence - An Historical Legal and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should be Incorporated into *McDonald v. City of Chicago*," *Cleveland State University Law Review* 57, no. 3 (2009): 351-460.

[62] Alexander Gouzoules, "The Diverging Right(s) to Bear Arms: Private Armament and the Second and Fourteenth Amendments in Historical Context," *Alabama Civil Rights & Civil Liberties Law Review* 10, no. 2 (2019): 159-200.

subject their personal firearms to *robust regulation*."[63] For the colonies, by the mid-eighteenth century having and bearing arms was no longer a privilege of the law instead had become a necessity for security.

As the militia reliant colonies were faced with a more traditional war with the French, the necessity for professional troops rose. Whether class bias, racial bias, or displeasure with the armies enforcement of Royal proclamations, the colonist and colonial elites had a distaste for the British soldiers dispatched to the colonies.[64] The colonist's opposition to standing armies is rooted in the English Whig tradition, often citing the threat to individual liberties the armies presented. One of the more influential English Whig political commentators, John Trenchard, believed that "it is absolutely impossible, that any nation which keeps [armies] amongst themselves can long preserve their liberties; nor can any nation perfectly lose their liberties who are without such guests."[65] For Trenchard and the American Whigs, the army represented an existential threat to the liberties afforded them in the English Bill of Rights. In the colonies this

[63] Nathan Kozuskanich, "Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders," *University of Pennsylvania Journal of Constitutional Law* 10, no. 3 (March 2008): 413-446, 417-418.

[64] In the mid 1760's British troops were used to enforce royal proclamation barring colonist from move west of the Appalachian Mountains. For some colonist who insisted on going back to land that they were driven out by Pontiac's Rebellion, Virginians who settled in Kanawha Valley for example, the soldier's enforcement role bred resentment. See Robert Middlekauff, *The Glorious Cause: The American Revolution, 1763-1789,* (Oxford University Press: New York, 2005). Some scholars believe that the founding elite viewed the men who served in standing armies were little more than uncivilized mercenaries. *See* Amar, *Bill of Rights*; Gouzoules, "The Diverging Right(s) to Bear Arms," 169-171.

[65] John Trenchard "No. 95. Saturday. September 22, 2019. The Arts of misleading the People by Sounds," *Cato's Letters, or Essays on Liberty, Civil and Religious, and Other Important Subjects*. Ed. Ronald Hamowy (Indianapolis: Liberty Fund, 1995). https://oll.libertyfund.org/titles/1237#Trenchard_0226-01_326

sentiment was heightened by their traditional reliance on the militia and a growing number of conflicts with British troops.

Over the next decade, the British troops became the face of the yoke of the Crown. Robert Middlekauff notes that in the late 1760's, "[u]nwittingly the army reinforced the resole of all sorts of Americans to resist further encroachments upon colonial rights" in at least three different instances. First, in New York the colonist were at odds with the troops stationed in the city.[66] While the New Yorkers were always uneased by the presence of the troops and the requirements of the Quartering Act of 1765, the conflict came to a head when troops cut down the liberty tree on the commons. The action and response by the troops sparked annual riots and brawls.

The second, an incident in South Carolina in 1769, paled in comparison to the level of conflict involved in the New York City incident and the Boston Massacre to come a year later. British troops, unannounced or solicited, stopped in South Carolina.[67] While there were barracks available, the South Carolina Commons House refused to appropriate for them while Parliament continued to lay revenues on the colonies through the Townshend policies. Despite being requested by General Gage and confronted by the army, the state refused to comply.

The final instance, the Boston Massacre saw the British Army and Bostonians come to armed conflict.[68] For months leading up to the conflict, numerous incidents fermented the hatred between the Bostonians and the troops. First, when the troops

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[66] Middlekauff, *The Glorious Cause*, 198.

[67] Middlekauff.

[68] Middlekauff, 198-213.

arrived in Boston the authorities denied the troops quartering, relaying the availability of barracks on Castle Island or the option to rent quarters throughout town. Throughout the troops stationing in Boston the colonist were at odds with the troop's propensity for drinking, women, theft, and most importantly the ever present reminder of a standing army occupying Boston. The climax of the growing number of conflicts and rising hatred between the groups resulted in five deaths and six wounded colonist. One of the more important catalysts, the Boston Massacre, along with the incidents in New York and South Carolina, cemented the colonial distaste of standing armies and would lead to the founders believing in the necessity of the militia in securing to the freedom of the colonies.

These events and ideas contributed to historical context and basic intellectual thought that yielded the Second Amendment. Most notably the notion of a standing army played a strong role in the constitutional discord. In Federalist No. 8, Alexander Hamilton responds to Anti-Federalist claims that standing armies are a logical byproduct of the new Constitution since they are not provided against by it.[69] In his response Hamilton reasons, "[i]f we are wise enough to preserve the union, we may for ages enjoy and advantage similar to that of an insulated situation… Extensive military establishments cannot, in this position, be necessary to our security."[70] Without the need of the military establishment, the threat of militaristic infringement on the liberties of the people is null. Later in Federalist No. 29, Hamilton again raises the specter of the standing army, noting

[69] For Anti-Federalist claims *see* Brutus, *VII, 10 January 1788*, in *The Anti-Federalist: Writings by the Opponents of the Constitution*, ed. Herbert J. Storing (Chicago: University of Chicago Press, 1985), 150-153; Brutus, *IX, 17 January 1788,* in *The Anti-Federalist,* 153-158; Brutus, *X, 24 January 1788,* in *The Anti-Federalist,* 158-162.

[70] Alexander Hamilton, *The Federalist Papers,* No. 8, in *The Federalist*, 36.

that reliance on the militia to secure the state would "take away the inducement and the pretext, to such unfriendly institutions."[71] For both Hamilton and the Anti-Federalist, the raising and sustaining of an army, especially in times of peace, posed a real and dangerous threat to liberties, yet their approach to how to resolve the issue showed the role that bearing arms would come to play.

In the Anti-Federalist letter, the minority in the Pennsylvania ratifying convention charge that, in part, due to the lack of a bill of rights the proposed government would "not possess the confidence of the people and will have to rely on a standing army… leading to the suppression of individual liberties."[72] Included among the rights is the right to bear arms for their defense and personal use. However, Hamilton finds that to include a bill of rights would do more damage, and would enable the parties to strive for greater limitations on the government than proscribed.[73] While the Federalist would ultimately cede to adding a Bill of Rights, the foreshadowing Hamilton offers in *Federalist* No. 84 plays a large role in the development of the Second Amendment doctrine.[74] The public dialogue between the Federalist and Anti-Federalist provide a great resource for peering into the minds of the founding generation, but as extensive as they are in discussing the nature, structure, and substance of government, they offer little insight into how the right to bear arms was perceived or understood. For that we must turn to our two categories of content.

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[71] Alexander Hamilton, *The Federalist Papers,* No. 29, in *The Federalist*, 140-141.

[72] "The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents," in *The Anti-Federalist*, 201-222.

[73] Alexander Hamilton, *The Federalist Papers*, No. 84, in *The Federalist,* 445-446.

[74] Alexander Hamilton, *The Federalist Papers*, No. 84, 445. "

*Communicated Content*

In order to present the original public understanding of the Second Amendment and the right to bear arms, we have to define our "clausal meaning." *Heller* provides three elements that Solum requires, the semantic meaning, consideration of a technical meaning, and identifying of any new terms. As *Heller* notes, the Second Amendment did not have a technical meaning nor did it present any new terms. The semantic meaning, Scalia's natural meaning, boils down to the people have a right to own and carry weapons, both connected to and unconnected from the militia, so as to resist tyranny. This meaning is consistent with the historical context explained earlier. The final consideration that Solum calls for, the implied content or meaning, is best understood through publicly available content.

In the early republic period, the presumed meaning of constitutional issues is best expressed in the views published in newspapers, pamphlets, letters, or legislative acts. From 1740-1820, there were over 3,000 letters, articles, and communications, where the phrases "bear arms," "keep arms," and "have arms" were mentioned. Of these, the vast majority were used in discussing the military or militia in connection to the protection of the frontier, the American Revolution, or War of 1812. However, there were instances that discussed arms rights seemingly disconnected from the militia, but naturally regarding safety and defense. A letter published in the New-York Mercury in 1757 expressed that the people "should have Arms, upon which we might let our Lives depend."[75] A letter published in the Times and District of Columbia Daily Advertiser in

[75] "To the Printer." New-York Mercury (New York, New York), no. 267, September 26, 1757: [1]. Readex: America's Historical Newspapers. https://infoweb-newsbank-

1800 similarly pressed that fellow Americans have arms ready to defend themselves.[76] The underlying theme running throughout these articles recognized the connection of owning arms and their necessity for personal and national defense.[77]

The people did not inherently come to recognize this underlying premise without the aid of public records of congressional activities. Many newspapers at the time were in the habit of reprinting acts, summaries of activities, and significant propositions. In 1789, the Gazette of the United-States published the original proposed amendments to the constitution, regular updates on their progress through congress and the various states, and the final enacted versions.[78] From these consistent publications, it is evident that not

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com.ezproxy.baylor.edu/apps/readex/doc?p=EANX&docref=image/v2:10DBEB948F3572A8@EANX-10DEF02404EABA60@2363060-10DEF024163B44D8@0-10DEF0248ECA1648@To+the+Printer.

[76] "Translated for the New-York Mercantile Advertiser."Iin the Name of the French Republic." Columbian Advertiser and Commercial, Mechanic, and Agricultural Gazette (Alexandria, Virginia) I, no. 17, September 8, 1802: [2]. Readex: America's Historical Newspapers. https://infoweb-newsbank-com.ezproxy.baylor.edu/apps/readex/doc?p=EANX&docref=image/v2:10CBA8BB2EEF32A0@EANX-10F307876C3EBC88@2379477-10F30787A46C43B8@1-10F307889772BB38@Translated+for+the+New-York+Mercantile+Advertiser.+in+the+Name+of+the+French+Republic.

[77] In 1812 a letter was published in *The War* expressing this, stating "[t]he constitution secures to you the right to bear arms for your own defence, and this certainly implies the right of bearing arms for the defence of your country. [cite] Similar understanding is present in the February 1812 Annals of Congress, "[i]t was believed that by placing the arms in the hands of the citizens themselves they would consider them as their property… and they would become better acquainted with the use of them… Having them in possession, they would be ready for any emergency which might occur." *See Annals of Congress,* 1812, 1024. https://memory.loc.gov/cgi-bin/ampage.

[78] *Gazette of the United-States,* New York City, 13 Jun. 1789, *Chronicling America: Historic American Newspapers,* Library of Congress, 71, https://chroniclingamerica.loc.gov/lccn/sn83030483/1789-06-13/ed-1/seq-3/; *Gazette of the United-States,* 01 Aug. 1789, 126, https://chroniclingamerica.loc.gov/lccn/sn83030483/1789-08-01/ed-1/seq-2/; *Gazette of the United-States,* 22 Aug. 1789, 140, https://chroniclingamerica.loc.gov/lccn/sn83030483/1789-08-22/ed-1/seq-1/; *Gazette of the United-States,* 29 Aug. 1789, 158, https://chroniclingamerica.loc.gov/lccn/sn83030483/1789-08-29/ed-1/seq-2/; *Gazette of the United-States,* 23 Sept. 1789, 185, https://chroniclingamerica.loc.gov/lccn/sn83030483/1789-09-23/ed-1/seq-1/; *Gazette of the United-States,* 03 Oct. 1789, 199, https://chroniclingamerica.loc.gov/lccn/sn83030483/1789-10-03/ed-1/seq-3/.

only would the people recognize themselves as the intended audience, but also that the right expressed followed the traditional thought regarding the arms bearing.

Combining the context, of the rights as described in the various news articles, as well as the context known to the public, it is clear that the right to bear arms was intended to represent the citizens' ability to provide protection for themselves and the state. Yet merely knowing what the right communicated provides only a part of the picture. Was the right limitless? Who constituted the people? How should the right be understood once the militia became obsolete? In presenting the communicated content, the answers these questions were not entirely known. A complete view would need to understand the right as a legal one.

### *Legal Content*

Before *Heller* and *Miller,* the Supreme Court's Second Amendment doctrine rested on the 1876 decision, *United States v. Cruikshank.*[79] The court was asked to review the conviction of members of the White League, under the Enforcement Act of 1870, of violating the Fourteenth Amendment and infringing on the Second Amendment rights of the African Americans slain in the Colfax Massacre. During their review, the Court voiced the opinion that the "second amendment… is one of the amendments that has no other effect than to restrict the powers of the national government."[80] As the Second Amendment is only concerned with the federal government, the Court took a highly deferential position on the regulation of the Second Amendment, but goes even

[79] *United States v. Cruikshank* 92 U.S. 542 (1876).

[80] *Cruikshank*, 591-592.

further to state the "'bearing of arms for a lawful purpose'… is not a right granted by the Constitution."[81] Protection or definition of this right should be found in local legislations. In the following two decades the Court on multiple occasions relied on *Cruikshank*, deferring to the State to decide the scope of laws regulating arms bearing.[82]

As a result of the dearth of federal cases, state law best means of determining how the right to bear arms was understood in the legal sense. Indeed, as seen in *Cruikshank*, the right to bear arms was viewed as the concern of the state. Whether a result of the militia being an institution of the state, or a stronger fidelity to federalist ideals, the general understanding in the pre-Reconstruction era was that the states were in charge of regulating the right to bear arms.

Being a state right, and being that the predominant view was that the Bill of Rights were not applicable to the states, most states adopted equivalent rights clauses. Seven states adopted arms rights amendments contemporaneously to the federal amendment, with each explicating the "right of the people" for the protection of the state or common defence.[83] Noticeably absent from these early provisions are references to the militia. However, the concern underpinning the Second Amendment's prefatory clause, is present in the earliest provisions. North Carolina, the first adopted version of Pennsylvania's, Vermont, Massachusetts, and Ohio all include clauses warning of the dangers of a standing army and the necessity of keeping the military under civil power.

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[81] *Cruikshank.*

[82] See *Presser v. Illinois* 116 U.S. 252, *Miller v. Texas* 153 U.S. 535.

[83] See Eugene Volokh, "State Constitutional Rights to Keep and Bear Arms," *Texas Review of Law & Politics* 11, No. 1 (Fall 2006): 191-218. North Carolina (1776), Pennsylvania (1776, rev. 1790), Vermont (1777), Massachusetts (1780), Kentucky (1792, rev. 1799), and Tennessee (1796).

As more states entered the union and adopted arms rights amendments the individual and republican themes pervade, signifying that the right was understood on to some degree as both recognizing the Blackstonian fundamental right to self-preservation.[84] By the time the Fourteenth Amendment was ratified, nearly two-thirds of the states in the Union had already adopted some form of rights bearing provision. In these states the nature of the right to keep and bear arms had evolved from the militia based right implying an individual right to explicitly endorsing the right of the individual.

To identify the pre-reconstruction legal understanding of the Second Amendment the only avenue is through the state courts. *Heller* offers a brief review, primarily focusing on the understanding established in *Nunn v. State* in 1846.[85] In *Nunn*, "the Georgia Supreme Court construed the Second Amendment as protecting the '*natural* right of self-defense' and therefore struck down a ban on carrying pistols openly."[86] Scalia views the reasoning in the opinion to perfectly describe the relationship between the prefatory and operative clause and the English tradition. While *Nunn* plays an

[84] See Volokh, "State Constitutional Rights to Keep and Bear Arms," and Blackstone, *Commentaries on the Laws of England.*

[85] *Heller,* 37-41. See *Nunn v. State* 1 Ga. 243 (1846). Scalia also discusses the finding of *Houston v. Moore* 5 Wheat. 1 (1820) ("this Court held that States have concurrent power over the militia, at least where not pre-empted by Congress."), the fugitive slave case *Johnson v. Tompkins* 13 F. Cas. 840 (CC Pa. 1833) ("a citizen has 'a right to carry arms in defense of his property or person, and to use them… for the protection or safety of either."), *Aldridge v. Commonwealth* 2 Va. Cas. 447 (1824) (limiting the rights in the Constitutions to whites, especially their right to keep and bear arms), *United States v. Sheldon* 5 Transactions of the Supreme Court of the Territory of Michigan 337 (1829) (one of the few early cases that deals directly with the Constitution state "the constitution… grants to the citizen the right to keep and bear arms. But… this privilege cannot be construed into the right… to destroy his neighbor. No rights are intended to be granted by the constitution for an unlawful or unjustifiable purpose); *State v. Chandler* 5 La. Ann. 489 (1850) (upholding a right to openly carry arms), and *Aymette v. State* 21 Tenn. 154 (1840) (the state constitution guarantees the right to bear arms does not prohibit banning concealed weapons).

[86] *Heller*, 39.

important role in *Heller's* historical argument, its perspective represents the minority at the time.

By the mid-nineteenth century, high courts in Arkansas, Virginia, Alabama, Tennessee, and North Carolina had upheld the right of the state to restrict the right to bear arms. Some of these cases were used in *Heller* to establish a history recognizing the individual right, but in each is also the recognition that the state has the ability to regulate that right. In *Aymette v. State,* while the Supreme Court of Tennessee rejects the notion that the Tennessee Constitution's protection of the right to bear arms was intended to be borne in any manner.[87] Similarly, in Alabama the court found that the state legislature may determine the permissible manner arms can be borne.[88] In *State v. Huntly*, the Supreme Court of North Carolina faced addressing how far the right to bear arms could go.[89] Keeping in line with the notion that public safety constituted a permissible limit on the right to bear arms the court reasoned that the North Carolina bill of rights did not guarantee the right bear arms in any manner. The court explained that if arms are employed "to the annoyance and terror and danger of its citizens, he deserves but the severer condemnation for the abuse of the high privilege."[90] These cases highlight the early understanding of the right to bear arms, yet none offer substantive reasoning beyond answering the question asked.

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[87] See *Aymette.*

[88] *State v. Reid* 1 Ala. 612. ("a law which is intended merely to promote personal security, and to put down lawless aggression and violence, and to that end inhibits the wearing of certain weapons… does not come in collision with the constitution.").

[89] *State v. Huntly* 25 N.C. 418 (1843).

[90] *Huntly*, 422.

In one of the more explicit and descriptive opinions, an 1842 Arkansas case, *State v. Buzzard*, the Arkansas Supreme Court held that Arkansas was within its authority to restrict the right to keep and bear arms to preserve norms and promote the common interest of the community. In the case, an Arkansas statute prohibiting the concealed carrying of deadly weapons is challenged as violating the second amendment. Judge Ringo, in writing his opinion, recognized there were arguments for an unrestricted right, but felt they lacked substantive review. Ringo wrote: "[h]owever captivating such arguments may appear… upon a more mature and careful investigation... their fallacy becomes evident."[91] As he viewed it, an unlimited right would threaten social order and tranquility as well as the administration of the institutions of government. Ringo concludes by stating "the enactment of the Legislature… is in no wise repugnant either to the Constitution of the United States or the Constitution of this State."[92] These opinions underscore the view that a valid interest in limiting the manner in which

*Heller's* argument that historically the right to bear arms was understood as an individual right rest on *Nunn.* Yet the individual right in *Nunn* was a secondary conclusion. The primary conclusion of *Nunn* centered on reasoning at contrast with the general understanding. In concluding their decision, the court found:

[91] *State of Arkansas v. Buzzard* 4 Ark. 18 (1842), 25-26.

[92] *Buzzard*, 28. Judge Dickinson, filing a concurrence opinion, came to the same conclusion but focusing more on the state policing power and the militaristic nature of the language in the Second Amendment and state provision. Judge Lacy files a dissent arguing along the lines of *Nunn* that the right cannot be weakened by the state or federal governments. *See State v. Buzzard,* 28-43.

> "right of the whole people… and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree… Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right,* originally belonging to our forefathers… conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own Magna Charta!"[93]

While this aligns itself with the contemporary argument for an unrestricted right, the Georgia Supreme Court would eventually circumvent its earlier decision to conform to the general understanding.

In 1874, the Georgia Supreme Court revisited the topic of the state's ability to restrict the right to bear arms. In *Hill v. State,* the Georgia Supreme Court addresses whether the right to keep and bear arms is unconstitutionally limited by an 1870 act prohibiting the carrying of certain arms in sensitive public areas.[94] To start his opinion Judge McCay claims that if *Nunn* had not been decided decades prior he would affirm that the state and federal constitutions "guarantees only the right to keep and bear the "arms" necessary for a militiaman."[95] However, unlike *Nunn*, McCay does not see the right to keep and bear arms as an unlimited right, and recognizes the state has both a right and interest in regulating the carrying of deadly weapons in public spaces. This notion is not entirely inconsistent with the message of individual use, as the court in order for the militia men to be effective in their protection they must become familiar with their use. Ultimately, they determine "the right to keep and bear arms is not infringed if the

[93] *Nunn v. State*, 251.

[94] *Hill v. State of Georgia* 53 Ga. 472. The Act in question stated: "No person in said state shall be permitted or allowed to carry about his or her person any dirk, Bowie-knife, pistol or revolver, or any kind of deadly weapon, to any court of justice of any election ground or precinct, or any place of public worship, or any other public gathering in this state, except militia muster grounds."

[95] *Hill*, 474.

exercise of it be by law prohibited at places and times when… a sense of decency and propriety, or the danger of breach of the peace, forbid it"[96]

These early cases go to show that when contemplating the scope of the right to bear arms, the state courts were inclined to recognize reasonable restrictions for the protection and furtherance of public safety and tranquility. Paired with the historical development of the right and communicated content, it's immensely clear that, while the founders anticipated the right to incorporate individual use and the Blackstonian right to self-defense, they never intended the right be without limits. The founders understood that 'the security of the free state" did not solely mean repealing foreign threats, but also included ensuring domestic tranquility and general welfare from those domestic threats.

*The Second Amendment's Communicated and Legal Content*

Looking at the historical foundations of the English right, and its subsequent incorporation and expansion in American law, it is evident that the founders did not intend, nor were they understood, to purely be signifying a single-minded view of the right to keep and bear arms. The Second Amendment, as proposed and adopted, was never understood to be entirely about the individual right, nor solely concerned with the constraining that right to the militia. *Heller* and Amar use textualist guides to present competing views of the original right, and both correctly state what the right concerned. Using the methods of the historians provided by Solum, their readings confirm that the founding generation was primarily concerned with establishing the ability to protect both themselves and the polity. Our review of different levels and discursive communities

[96] Ibid, 479.

show that central to thoughts about arms rights, in both England and America, is an anxiety about the role of the permanent army. However, *Heller* attempts to link this with the idea of personal use, but as our historical review shows this was not in the communicated content. Sure, the right protected the individual to own arms; however, it there is little evidence that the communicated right included the concept of using arms for personal purposes. This concept was a product of a legal content that showed greater concern for understanding the limits of arms rights.

As the Supreme Court gave little attention to the Second Amendment, the only place to turn for pre-reconstruction understanding is the states. Our review of state case law showed that the early legal understanding of the right did not center on whose right it was, but rather on how that right can be carried out. Most of these courts did not view or understand the right to be naturally unlimited, but that certain limitations may be placed on their use. These limitations were not concerned with militia actions, and showed a concern for the manner which arms might be borne or kept. While not federal law, these early cases symbolize the legal content and convey the early legal understanding that personal use of arms was not free from regulation.

We must ask ourselves now, do these two readings accord? The answer is an emphatic yes. History shows us that the English right was not limitless. Parliament established that the crown may never disarm its citizens, but that the law retained that right. The founders would have known this, and would have considered this during the deliberations. These deliberations would have acknowledged the necessity of arms to stave off tyranny, but would have understood that the states security also rested on a peaceable state. There is an argument that can be made claiming the founders would have

drafted the arms right amendment with the intention of removing the restrictive power Parliament maintained to avoid further abuses. While compelling, this intention is neither supported by subsequent cases, but represents the type of constitutional reading that this textualism rejects. As gleaned from the historical and legal context, it is evident that when the people adopted the amendment cementing arms rights they did so with the original public understanding that it limited the necessity of an army, preserving the individual's ability to own arms for defense, but left the states to preserve the peace by restricting the right outside of the militia.

How then does this affect the Second Amendment's doctrine? Scalia's opinion in *Heller*, does not completely ignore the question of regulation and limitation. Yet the embrace that Scalia provides fails to establish the framework for permissible limitations. The public understanding offers a more complete Second Amendment doctrine by contextually enriching with a deeper understanding of history and tradition. If adopted this framework would better equip the court to evenly and accurately apply the Second Amendment, starting with the upcoming case in the term.

*New York State Rifle & Pistol Association, Inc., et al. v. City of New York*

In the coming Supreme Court term, the Court addresses whether local or state governments can place reasonable restrictions using permits and limiting the mobility of legally owned firearms. On December 2, the Supreme Court will hear oral arguments for *New York State Rifle & Pistol Association, Inc., et al. v. City of New York*, a case centered on a New York City law restricting the transport of guns. The central issue in this case is whether the individual rights protection in the Second Amendment extend to traveling with a lawfully owned firearm. Utilizing the communicated and legal content shown

earlier, the court is able to recognize that the states have both an interest and an ability to place limitations on firearms within their locality short of complete banishment.

In their opening brief, the petitioners argue that through the doctrine established in *Heller* and *McDonald v. Chicago* the city of New York violates the individual fundamental rights of the Second Amendment. They allege the "City's regulatory regime is irreconcilable with the text of the Second Amendment... is unprecedented in our history; and it cannot survive any level of scrutiny appropriate for a constitutional right that is both individual (*Heller*) and fundamental (*McDonald*)."[97] However, consulting the original public understanding, the right has never been limitless. Without this understanding, the court might be persuaded to view the restrictive New York law as entirely unconstitutional. Our historical review shows that states have traditionally retained the right to restrict the manner, place, and means arms may be kept or borne, no case has accepted the level of restriction apparent in the New York law.

While the original public understanding that I identify provides beneficial context and enrichment for the courts Second Amendment doctrine, it does not amount to a legal argument that can resolve this case. Equally significant to the case before the court is the question of scrutiny. The petitioners argue for strict scrutiny and lay out the problems of using any other degree. This debate is beyond the scope of this thesis, but does not limit the enrichment from the original public understanding.

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[97] Brief for the Petitioners *New York State Rifle & Pistol Association, Inc., et al., v. City of New York* Docket No. 15-638 (2019), 29.

# CHAPTER FIVE

## Conclusion

At the outset I resolved to answer three questions: Can textualism be used to determine the original public meaning of the Second Amendment? How can textualism be modified to produce the original public meaning? And how can the original public understanding stabilize the current Second Amendment discord? The answer to the first two questions analyzed the doctrinal principles of two prominent textualists, Scalia and Amar. Both proposed methods for finding the original public meaning. Along the way, each commits similar errors, but neither removes the possibility for finding a version of the original public meaning. Without entirely removing the main principles of textualism I proposed the incorporation of Solum's two contents into the textualist doctrine. Through these elements, *Heller's* semantic meaning can be contextually enriched to show "clausal meaning" and ultimately the original public understanding. By the end of the thesis we are presented with an original public understanding that views the right to keep and bear arms as individual but limited.

Our view, while beneficial to the court does not represent a full legal interpretation or construction. However, coupled with the sounder textualist principles from Amar and Scalia, this original public understanding would provide more reliable and accurate applications of the Constitution. As this thesis did not propose to apply those in a legal argument, I was not able to fully argue for a specific reading of the Second Amendment. Instead I present a path forward that textualism can follow in order to establish a more stable doctrine. Utilizing this path, textualism and the Second

Amendment can tackle other issues, such as: the limitations of arms permissible for bearing, addressing new classes of arms, or the amendments applicability to software and cyber-weaponry. As the world progresses in the sophistication of arms, the Second Amendment doctrine must progress without losing its foundation. Textualism and the original public understanding, if used properly would ensure that this foundation is never out of the Courts sight.

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