THE SECOND AMENDMENT'S FIXED MEANING AND MULTIPLE PURPOSES

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I. INTRODUCTION

Although enacted by the First Congress in 1789, the Second Amendment of the U.S. Constitution had never, until 2008, been carefully scrutinized by the Supreme Court, despite the vivid debates that gun regulation has provoked throughout American history.[1] During the nineteenth century, there was not a significant debate over the nature of the right to keep and bear arms. The right protected by the Second Amendment was generally discussed in the context of the racial conflicts and the granting of constitutional rights to the newly freed African American population.[2] It was only in the beginning of the twentieth century that the first claims that the Second Amendment's right to keep and bear arms extended only to militia use appeared.[3] This view was strengthened after the 1960s, with the rise of gun violence and the emergence of a more articulate gun control movement that sought a serious limitation in gun ownership.[4] The argument that the Second Amendment should be viewed as dependent on the militia use of arms was part of the debate over gun control that the movement advocated.[5]

Notwithstanding the intensity of the debates over the right to keep and bear arms, the Supreme Court had never carefully examined the Second Amendment. The two first cases regarding the Second Amendment—*United States v. Cruikshank*[6] and *Presser v. Illinois*[7]—did not require such an examination. In the first, the Court had to decide if the Bill of Rights, and hence the Second Amendment, imposed restrictions on

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1. *See* Robert J. Cottrol & Raymond T. Diamond, *Public Safety and the Right to Bear Arms*, *in* THE BILL OF RIGHTS IN MODERN AMERICA 88, 88-89 (David J. Bodenhamer & James W. Ely, Jr., eds., 2008).
2. *See id.* at 95-97.
3. *See id.* at 99.
4. *See id.* at 101-03.
5. *See id.* at 103.
6. 92 U.S. 542 (1875).
7. 116 U.S. 252 (1886).

private action in addition to the limitation it imposed in the government.[8] The Court answered that question in the negative.[9] The second case dealt with the incorporation of the Second Amendment as a right enforceable against state action through the Fourteenth Amendment.[10] The Court held that the Second Amendment had not been incorporated.[11]

A third case, *United States v. Miller*,[12] resulted from a 1930s regulation on guns, a response to the increase of gang related crimes.[13] In this case, the Court only heard the government's argument.[14] It remanded the case to the lower courts to decide if the type of gun at issue, a sawed-off shotgun, was suitable for use in a militia.[15] This case is an object of great debate. Advocates of the collective right to keep and bear arms argue that the Court supported their view.[16] On the other hand, the Court's view of the militia was one that included all individuals, which would strengthen the individual right understanding of the Second Amendment.[17]

The Second Amendment was finally carefully interpreted by the Supreme Court in *District of Columbia v. Heller*[18] in 2008 and *McDonald v. City of Chicago*[19] in 2010. In the first case, a District of Columbia handgun ban was challenged.[20] The central issue of the case was whether the Second Amendment protected an individual right to keep and bear arms or if its exercise depended on participation in a state militia.[21] In *McDonald*, a similar law was challenged, and the Court was to determine if the Second Amendment had been incorporated as a protection against state and local action by the Fourteenth Amendment.[22]

The Second Amendment is one of the best instruments to observe the complex debates that can occur in the field of constitutional theory and interpretation.[23] It is the only constitutional provision in which the framers stated its practical purpose in the constitutional text. The Amendment also challenges the conventional expectations regarding the country's political opinions and their respective constitutional claims. The liberal approach

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8. *See Cruikshank*, 92 U.S. at 553.
9. *Id.*
10. *See Presser*, 116 U.S. at 264.
11. *Id.* at 265.
12. 307 U.S. 174 (1939).
13. *See* Cottrol & Diamond, *supra* note 1, at 100.
14. *Id.*
15. *Id.* at 101.
16. *Id.*
17. *See id.* at 18-20.
18. 554 U.S. 570 (2008).
19. 130 S.Ct. 3020 (2010).
20. *Heller*, 554 U.S. at 575-76.
21. *Id.* at 636-37 (Stevens, J., dissenting).
22. *McDonald*, 130 S. Ct. at 3026.
23. *See* Eugene Voloch et al., *The Second Amendment as Teaching Tool in Constitutional Law Classes*, 48 J. LEGAL EDUC. 591, 591-92 (1998).

that usually emphasizes individual liberties against government intervention tends to understate the individual content of the Second Amendment, and the reverse is equally true.[24]

This Article is focused on the theories of constitutional interpretation. It intends to explore the uses of history in constitutional adjudication. The Second Amendment is the vehicle to understand the practical implications of such discussion. The objective of this Article is to demonstrate that, when the Supreme Court interpreted the Second Amendment, the use of textualism as a model of constitutional interpretation enabled the Court to adapt the application of the constitutional provision to different social and political contexts throughout American history.

Currently, history is a vital component of constitutional adjudication. This development is partly due to the emergence of the originalist theory of interpretation. This theory has had considerable influence in the Supreme Court, which is easily perceived when reading *Heller*. It is possible to say that *Heller* was a case as much about originalism as it was about the Second Amendment.[25] To explore the uses of history in constitutional adjudication, and specifically in the Court's interpretation of the Second Amendment, it is necessary to examine originalism.

The structure of this Article reflects its purpose. Part II is dedicated to analyzing the theoretical background that has led to the importance that history currently has in constitutional interpretation, culminating in the examination of originalism. To understand originalism, however, it is necessary to observe some critical issues that are related to it.

On the one hand, originalism is profoundly related to what is known as the "counter-majoritarian difficulty," a term that represents the problematic position of judicial review in a democratic society.[26] This idea is the subject of Part II.A. Originalism presents itself as a solution to such difficulty by offering a democratic basis for judicial review: the democratic legitimacy that derives from the events that led to the enactment of the constitutional text.

On the other hand, originalism enhances the relevance of history to constitutional adjudication. Part II.B investigates the uneasy relationship that history and law have had during the twentieth century, which is done by examining the path that both legal and historical scholarship has been through. This path is the history of the decline of the ideal of law as an autonomous discipline and of the ideal of objectivity in historical research.

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24. *Id.* at 592.

25. An illustration of this assertion is the placement of *Heller* in the topic dedicated to "Methods of Interpreting the Constitution" in GREGORY E. MAGGS & PETER J. SMITH, CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH (2011).

26. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334-35 (1998).

Lastly, Part II.B seeks to identify the relevance of history to constitutional adjudication and what it can provide to the legal field.

Part II.C examines originalism. Its focus is on its evolvement and the shift from the initial original intent theory—the proposal that the force of a constitutional provision is defined by the original intent of the framers and ratifiers of the Constitution[27]—to the original textual meaning model, based on the idea that the force of a constitutional provision is defined by the original meaning of the constitutional text.[28] Finally, this Part observes how the debate over originalism has revived a long-going thread over textualism and intentionalism in legal interpretation. This discussion is the theoretical locus of this Article, as it intends to observe how each of these paradigms of legal interpretation deals with history.

Part III examines the cases in which the Supreme Court interpreted the Second Amendment. Its focus is essentially on the historical research carried out by the opinions. Part III.A briefly exposes the processes that led to the Supreme Court decisions and their main opinions. Part III.B is the central point of the examination of the historical inquiries made by the Supreme Court Justices. It analyzes the sources on which the Justices relied and the results they reached. It argues that the sources used depended on jurisprudential choices, and thus, the results obtained, albeit grounded on historical research, were essentially the result of legal reasoning.

From the opinions in *Heller* and *McDonald*, it is possible to observe the history of the right to possess arms in the United States from its English background to the present day. Part III.C intends to tell this story, as it may be captured from the Supreme Court opinions. Finally, Part III.D supports the idea that, from the perspective of the Supreme Court's opinions in *Heller* and *McDonald*, the Second Amendment has a fixed textual meaning that has served multiple practical purposes throughout American history. This statement is based on the idea that textualist originalism has enabled the Court to see the Second Amendment in a form which is adaptable to different social and political contexts.

II. BACKGROUND

A. The Counter-Majoritarian Difficulty

Before originalism emerged as a theory of constitutional interpretation, the main concern of constitutional scholarship had been the legitimacy of judicial review in the American democratic scheme.[29] This

27. *See* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM 8 (2011).
28. *See id.* at 2-3.
29. *See* Friedman, *supra* note 26, at 334-35.

concern has been referred to as the "counter-majoritarian difficulty."[30] Originalism is profoundly related to this debate. It is presented as a solution to the counter-majoritarian difficulty, a statement that will be examined in Part II.C. The purpose of this Part is to present an overview of the main issues of the debate over the counter-majoritarian difficulty. This discussion is essential to allow for a better comprehension of the theoretical context in which originalism developed.

The placement of judicial review in the institutional design of American democracy is a permanent concern in the country's political debate.[31] Currently, this issue is perceived under the name "counter-majoritarian difficulty."[32] Although it does not have a fixed concept, there is no doubt about its meaning, which is set out by Barry Friedman as "the problem of justifying the exercise of judicial review by unelected . . . judges in what we . . . deem as a political democracy."[33]

The problem of placing judicial review in a political democracy was already expressed in the Anti-Federalist papers, which stated:

> [Judges] will give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or controul their adjudications. From this court there is no appeal. And I conceive the legislature themselves, cannot set aside a judgment of this court, because they are authorised by the constitution to decide in the last resort. The legislature must be controuled by the constitution, and not the constitution by them.[34]

Examining the issue, Alexander Bickel, in 1962, states that "[t]he root difficulty is that judicial review is a counter-majoritarian force in our system."[35] This idea gave birth to the term "counter-majoritarian difficulty," which has become one of the most turbulent issues in the constitutional debate in the United States in the last fifty years.[36]

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30. *Id*. at 334.
31. Jesse H. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 810 (1974), *cited in* Friedman, *supra* note 26, at 340.
32. *See* Friedman, *supra* note 26, at 334.
33. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002).
34. RALPH KETCHAM, THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 295-296 (1986).
35. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1986).
36. *See* Friedman, *supra* note 33, at 155.

The main premise of the counter-majoritarian difficulty thesis rests on the account that democracy responds to the public will.[37] Because democracy is defined by popular will, the power given to the courts to strike down legislation (or to uphold rights) in alleged conflict with the majority opinion undermines the democratic system.[38] Thus, the counter-majoritarian difficulty argument rests on ideas about the American democratic system and the role of the judiciary in its institutional design. The issues at stake in the discussion about the counter-majoritarian difficulty are whether democracy is truly a system laid upon majority will; whether the courts' behavior demonstrates a disregard of popular will and; finally, what are the consequences of the countermajoritarian difficulty theory in constitutional scholarship.

Barry Friedman claims that the counter-majoritarian difficulty is not grounded on eternal and universal truths. Rather, he states, "[I]t is the product of a historically contingent set of circumstances. It is true that courts have been criticized throughout American history when they acted contrary to the will of people."[39] However, he argues that the majority of legal scholarship is not concerned with a profound democratic theory and the insertion of the judiciary into that theory.[40]

The preoccupation with majoritarianism and judicial review, Friedman argues, is nothing more than a smoke screen to hide truly normative theories.[41] Authors have been supporting ideas on how courts should address specific problems and present those ideas as solutions to the counter-majoritarian difficulty.[42] The problem, Friedman claims, "represents . . . a need to justify present-day political preferences in light of an inherited intellectual tradition."[43]

One notable work to help one understand the debate over democratic theory and the judicial role is John Hart Ely's *Democracy and Distrust*,[44] in which an idea of the judicial role in a democratic system is set forth. Ely dismisses both interpretivism (an approach on interpretation strongly attached to the text of the Constitution) and noninterpretivisim (a more open-ended approach that takes into account extra-constitutional values).[45] In his opinion, both approaches share, in different ways, the problem of indeterminacy. Interpretivism's problem is based on the lack of

37. *See* Friedman, *supra* note 26, at 335.
38. *See id.* at 334-35.
39. Friedman, s*upra* note 33, at 256.
40. *Id.*
41. *See id.* at 164-67.
42. *Id*. at 156-57.
43. *Id*.
44. JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).
45. *Id*. at 1.

determinacy of the constitutional text, while the idea that noninterpretivism is grounded on a concept of fundamental rights is certainly unclear.[46]

Indeterminacy presents an obstacle to the majoritarian democracy, and this obstacle is the starting point of Ely's theory.[47] In his opinion, "The central problem . . . of judicial review [is that] a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like."[48]

The democratic system Ely visualizes is mostly grounded on the fourth footnote from United States v. Carolene Products Co.[49] This fact means that his idea of democracy is a procedural one. His focus is on the representative system, and he claims that courts' most fundamental task is to maintain a fair political process.[50] The courts' role in the democratic system, thus, would be to enhance the majoritarian principle.[51]

Nevertheless, a different conception of the democratic system has also had influence in the United States. This conception is one of substantive democracy, not merely procedural democracy. Jane S. Schacter sees in Tocqueville one of the origins of this idea of democracy, one that "is not only an electoral system, but a community of citizens whose collective interactions with one another are in many ways as important as the precise institutional arrangements by which the state itself is constituted."[52] This democratic culture is grounded not only on the process by which political decisions are made, but by the commitment made to substantive principles,

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46. *Id*. at 4-5.
47. *See* Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 739 (2004).
48. ELY, s*upra* note 44, at 4-5.
49. 304 U.S. 144 (1938). In footnote four, the Court stated:

> There may be narrower scope for operation of the presumption of constitutionality when *legislation appears on its face to be within a specific prohibition of the Constitution*, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . ; whether prejudice against *discrete and insular minorities* may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 152 n.4 (emphasis added) (citations omitted).
50. *See* Schacter, *supra* note 47, at 740-41.
51. *Id.* at 741.
52. *Id.* at 747.

"commitments defining the values that we as a society, acting politically, must respect."[53]

Accordingly, the counter-majoritarian difficulty rests on an idea that democracy is majoritarian decision-making. This idea, however, is not a unanimous one. On the contrary, it is subject to criticism for being narrow and for not taking into account the broader and substantive values inherent in the constitutional order.[54] Furthermore, the concept on which the counter-majoritarian difficulty theory rests upon is challenged, in a certain extent, by the ideas championed by what has come to be called the "social choice theory."[55] Based on the work of the economist Kenneth Arrow, studies on the characteristics of processes of collective decision-making have called attention to its incapacity to be fair or rational.[56]

The consequences of social choice theory to the legal field have been profound. Elizabeth S. Anderson and Richard H. Pildes offer a brief overview of the range of reactions the theory has provoked:

> From across the political spectrum of the current constitutional law academy, scholars have proposed such reassessments. In his recent Supreme Court Foreword in the Harvard Law Review, Erwin Chemerinsky makes Arrow's Theorem a centerpiece in his argument that democratic legislatures cannot "reflect the views of a majority in society." From the radically skeptical left, Mark Tushnet takes Arrow's Theorem to have proven "that constitutional theory must fail in the task" of reconciling judicial review with democracy. Representing the liberal wing, Laurence Tribe suggests the Theorem might establish that representative processes cannot reflect majority will meaningfully; at the least, he argues, the Theorem "puts the burden of persuasion on those who assert that legislatures (or executives) deserve judicial deference." And from the libertarian right, Judges Easterbrook and Posner between them have asserted at various times that the Theorem suggests that legislatures are incapable of formulating intelligible policy, that courts should no longer seek to harmonize the policies in distinct statutes, that statutory interpretation has been dealt a "mortal blow," and that courts should no longer be criticized for issuing inconsistent decisions.[57]

Erwin Chemerinsky believes that the executive and legislative branches—which are deemed as the democratic branches of government, as opposed to the judicial branch, according to the counter-majoritarian

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53. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1065 (1980).
54. *Id.* at 1064 (quoting ELY, *supra* note 44, at 87).
55. Elizabeth S. Anderson & Richard H. Pildes, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2124 (1990).
56. *Id.*
57. *Id.* at 2124-25.

difficulty theory—do not necessarily act in a way that reflect the majority's views.[58] The ideas championed by the social choice theory have shaken the stable arena in which the debate over democracy has been made. It is as if it had taken the one idea that sustained the democratic system: the majority's rule.[59]

Adding to this shift in democratic theory are studies which focus on the relationship between the courts, politics, and public opinion. These studies have called attention to the overall convergence between courts' decisions and the public opinion.[60] The whole institutional design of the American democratic process ensures that the courts, at most, "ha[ve] the power to impose delay on majoritarian policy preferences."[61]

It is possible to see, at this point, the three different debates in which the counter-majoritarian difficulty theory falls: the debate over procedural versus substantive democracy; the thread about the effectiveness of collective decision-making; and discussions between the judiciary, politics and the public opinion. From all of these discussions arises Barry Friedman's assertion that the counter-majoritarian difficulty theory is an academic obsession that serves as a disguise for normative claims.[62] This practice, he argues, "serves only to obscure that what is on offer is the author's own view, as opposed to a theoretical solution . . . . More explicit normativity might liberate scholars and improve the quality of the arguments."[63]

Steven G. Calabresi, on the other hand, argues that the counter-majoritarian difficulty is a real problem for two main reasons. The first rests on the possibility of a true inconsistency between the majorities represented by the political branches and the judiciary, due to the different timings that govern their actions. This inconsistency can be summed up by examining the power of agenda-making held by the federal courts and the difficulty of policy-making throughout the lengthy legislative process.[64]

The second reason for the real existence of the counter-majoritarian difficulty is the prevalence the federal government (and therefore national majorities) gains against local minorities.[65]

> Federations like the United States are typically characterized by a high degree of cultural, religious, racial, and even linguistic heterogeneity.

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58. Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 77 (1989).
59. Anderson & Pildes, *supra* note 55, at 2124-25.
60. *See* Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373, 1385-86 (1998); Friedman, *supra* note 26, at 337-39.
61. Calabresi, *supra* note 60, at 1386.
62. Friedman, *supra* note 33, at 257.
63. *Id.*
64. Calabresi, *supra* note 60, at 1386-88.
65. *Id.* at 1387.

> Federal structures are thus ideally suited for liberal, tolerant societies that value and respect cultural pluralism. The National Supreme Court of such a federation must thus be something more than the agent of a national majority coalition.[66]

It seems that the debate over the existence of a difficulty in placing judicial review in a democratic system is not going to be over in the near future. The divergence in views about democracy—if based on the will of the majority or on the protection of substantive rights—may be observed since the founding era.[67] The movements within this conflict are reflected in a series of other theories and ideas on constitutional interpretation. Part II.C will examine originalism. The counter-majoritarian difficulty is the focus of one of the theoretical debates that surrounds the emergence of originalism and a thorough comprehension of the latter requires an overview of the former.

Before analyzing originalism, however, it is necessary to examine another set of theoretical problems that are equally relevant in framing the development of the originalist theory: the relationship between law and history.

B. Back to History

During the end of the nineteenth century, the arrival of John Austin's analytical positivism to the American legal field resulted in the isolation of law from other fields of knowledge.[68] One of the most salient elements in Austin's legal thought is the autonomy of law, the separation of law as it is and as it ought to be.[69] The study of law, in Austin's theory, must concentrate on what law is (to be explained through the assessment of its internal elements: command, duty and sanction), and not on the relations law might have with other fields of human experience, such as politics and morality.[70]

The isolation of law was motivated by the necessity to understand the law in scientific terms and thus to provide it with academic recognition.[71] This isolation served the legal community as a means to the rise of a trained technical profession.[72] This movement was part of comprehensive

66. Calabresi, *supra* note 60, at 1389.
67. Friedman, *supra* note 26, at 340.
68. *See* Christopher Tomlins, *History in the American Juridical Field: Narrative, Justification, and Explanation*, 16 YALE J.L. & HUMAN. 323, 336-47 (2004).
69. *See* John Austin, *Lectures on Jurisprudence*, *in* GEORGE C. CHRISTIE & PATRICK H. MARTIN, JURISPRUDENCE 673 (2008).
70. *Id.*
71. Tomlins, *supra* note 68, at 330-36.
72. *Id.* at 339-43.

scientific paradigms and academic arrangement.[73] This objective was shared among the entire academic world of the period.[74] As Christopher Tomlins puts it:

> [W]hen the Langdellian law school was establishing the terms of its own, and law's professional and methodological differentiation from other subject areas and modes of inquiry, it was doing little that was different from other sectors of the university, or of society at large. Langdell's law was no more obsessively differentiated or technically formalistic than other modes of contemporary thought. . . . [I]nquiry in general had fragmented under the impact of academic reorganization; this differentiation would continue through the following century.[75]

In effect, the isolation of academic fields had serious consequences for the relationship between law and history throughout the entire twentieth century. The use of history in legal debate has been subject to essentially two different types of criticism. The first one focuses on the history made by lawyers who are not trained as historians.[76] The second one criticizes history made with the intention to promote legal claims.[77]

Both criticisms are based on the idea of a fundamental distinction between the methodologies and the goals of the fields. "Critics key in on the perceived difference in the underlying purposes of the respective professions: objectivity versus advocacy."[78] One notable representative of this critique is Alfred Kelly's article *Clio and the Court: An Illicit Love Affair*.[79] Kelly claims that the use of history by the Warren Court is appalling and that the poor quality reveals the underlying political intentions of the Court.[80] The Warren Court's actions, "[i]n part, . . . would appear to derive from the radical difference in theory and process between the traditional Anglo-American system of advocacy and equally time-honored techniques of the scholar-historian."[81]

One way to look at the history of legal scholarship during the twentieth century is by analyzing the crisis of its isolation and the way law came to interact with other fields of knowledge. The criticism on the idea of law as independent began in the beginning of the century; the products of that criticism are still far from ending.

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73. *Id*. at 346-47.
74. *Id*.
75. *Id*.
76. Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479, 482-83 (2008).
77. *Id*. at 481-84.
78. *Id*. at 486.
79. Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (1965).
80. *Id*. at 155.
81. *Id*.

1. The Turn to History from the Law's Perspective

The realist movement criticized what they called legal formalism for being unattached to the real world and thus unable to provide sound answers to real-life legal problems. Realism was initially promoted mainly by the writings of Oliver Wendell Holmes, Jr. and Roscoe Pound. Holmes, in *The Path of the Law*, sets up the idea of law as prediction of what the public force, through the courts, would determine.[82] He makes clear that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[83] This conception had powerful consequences, as it defined law in terms of the reality of practice, not theory.

Roscoe Pound introduced the concept of mechanical jurisprudence.[84] For Pound, the danger of the adoption of a scientific system of law is its petrification.[85] By this term, he means the risk that the legal system would degenerate into technicalities.[86] From his point of view, law should be evaluated by the results it achieves, not by the internal coherence of its system.[87] He supports a movement "for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument."[88]

If the law is an instrument for the achievement of social ends, law alone cannot determine the outcome of legal (and thus social) disputes.[89] This idea is the basis for an initial dialogue between law and the social sciences.[90] The key to understand the law, however, was still the study of law.[91] The difference from formalism was that, for realists, the law was a tool for social progress, and to be able to ensure that this goal would be achieved, it was necessary "to know something about society."[92] Mark Tushnet points out that, from the perspective of the realist jurisprudence:

> [T]he indeterminacy of formalistic legal rules should be replaced by a form of policy science that drew informally upon the wisdom of the social sciences to inform legal judgment. Social science would be called upon to

82. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).
83. *Id*. at 461.
84. *See* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).
85. *Id.* at 606.
86. *See id.* at 606-07.
87. *Id.* at 605.
88. *Id.* at 609.
89. Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 762 (1987).
90. *Id*. at 763.
91. *Id.*
92. *Id.*

> answer questions that lawyers found interesting as they attempted to resolve conflicts that formalism left unresolved.[93]

The dialogue of law and the social sciences, at this point, rested on the idea that these disciplines had the power to promote social progress. "[L]egal 'science' became associated with inquiries that focused upon the current policy consequences of legal decisions, as illuminated by the techniques of modern social scientists."[94] This idea increased the distance between historical and legal scholarship. The legal scholarship claimed by the realist and the post-realist periods was present-minded, policy-oriented, and ahistorical.[95]

Richard Posner enumerates some reasons for the decline of the autonomy of law.[96] Two of them are worth mentioning at this point. The first is the broadening of the country's political spectrum, which influenced the legal academy and increased the political debate within it.[97] This phenomenon might be better understood by examining what the Critical Legal Studies movement called the indeterminacy argument, which held that "within standard resources of legal argument were the materials for reaching sharply contrasting results in particular instances."[98]

Another important reason for Posner is the expansion of other disciplines,[99] which generated another type of relationship between law and other disciplines, a relationship in which law came to be understood through the concepts offered by those disciplines.[100] "Now, social science would not be merely instrumental to policymaking; rather, it would be a true science of law as a social phenomenon."[101] The same idea seems to be underneath the Law and Economics movement. As Posner puts it, "The economic analysis of nonmarket legal regulation can be viewed as part of the larger movement in economics towards application of the economic model to an ever greater range of human behavior and social institution."[102] The underlying idea in both perspectives is that law came to be viewed as being part of a broader system of explaining reality.

.At this point, scholars began to look at history. It was a moment of a profound crisis in legal scholarship, one in which law was deemed as

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93. Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1532 (1991).
94. G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA L. REV. 485, 495-96 (2002).
95. *Id*. at 497.
96. Posner, *supra* note 89, at 766-74.
97. *Id.* at 766.
98. Tushnet, *supra* note 93, at 1524.
99. Posner, *supra* note 89, at 767.
100. *Id.* at 768-69.
101. Tushnet, *supra* note 93, at 1533.
102. Richard Posner, *Some Uses and Abuses of Law and Economics*, 46 U. CHI. L. REV. 281, 284 (1979).

dead.[103] In the words of Morton Horwitz, "[H]istory usually becomes the arbiter of constitutional theory only as a last resort in moments of intellectual crisis."[104]

The problem resides on what history has to offer to legal—and specifically to constitutional—scholarship. History opens the possibility of the discussion of purposes and meaning of constitutional clauses. But it seems that history has more to offer; it is able to give a meaning to the present. It provides information so that one can understand how social needs and feelings came to be or vanished. Through historical analysis, American constitutional tradition can be better understood. More than providing answers to legal problems, history enlightens these problems.[105] In the words of Justice Harlan in his dissenting opinion in *Poe v. Ullman*, "[W]hat history teaches are the traditions from which [this country] developed as well as the traditions from which it broke."[106]

Perhaps what this new dialogue with history may show is that historical consciousness might ground better legal decisions. Regardless of the controversy over the existence of the counter-majoritarian difficulty, the problem of the legitimacy of law and of standards of interpretation seems to be a very real one.[107] Historic consciousness can provide an understanding of the rights debated, the way they have been invaluable to society, and the way they have been interpreted throughout history.

2. The Usefulness of History

Another way to look at the confluence of law and history at the end of the twentieth century is to look at it from the perspective of the theory of history. In fact, the subject cannot be fully understood from one perspective alone. Because this idea is a merge of two disciplines, it is imperative to observe what was happening to each one of them at the time they met.

The twentieth century witnessed the emergence and crisis of historicism as the main theory of historical inquiry and the way through which society perceived time and history.[108] Historicism was laid upon the legacy of modernity and its belief in secularization, science, objectivity and

103. *See* Barry Friedman, *The Turn to History*, 72 N.Y.U. L. REV. 928, 942 (1997).
104. Morton J. Horwitz, *Foreword: The Constitution of Change—Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV., 30, 40 (1993), *cited in* Friedman, *supra* note 103, at 959.
105. Friedman, *supra* note 103, at 962-64.
106. 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).
107. Friedman, *supra* note 103, at 963.
108. White, *supra* note 94, at 498-513.

social progress.[109] History would be viewed as a continuum of human progress through rational human activity.[110]

This ideal of rational human progress sets the basis for an understanding of history as having precise period frames. The past is essentially different from the present, and men of rational action constructed the fundamental differences. This fact enables men to understand history objectively.[111] Edward White puts it clearly:

> The discernible differences moderns observed between their contemporary existence and their recollected past were taken as evidence of qualitative change. And not only was the present different from the past, it was different because humans had helped make it so. Humans were harnessing the forces of modernity to shape the course of history. With the aid of scientific knowledge, they could make change synonymous with progress.[112]

After the experience of the totalitarian regimes of mid-century, however, a crisis arose in this concept. Rationality was not only the engine of human progress, but could be also used to annihilate freedom and humanity. Rational social engineering could utilize the canons of modernity in the service of terror and villainy, and "scientific training . . . did not inevitably breed objectivity, nor did it constrain its practitioners in any meaningful sense."[113] At this time, no external cause could be the ultimate motor of human enterprise.[114]

The historian Lynn Hunt, addressing the changes in historical methodology during the twentieth century, observes that at a certain point of the century, linguistic theory and culture became the chief theoretical grounds for historical scholarship.[115] Any historical subject, then, came to be deemed a "discursive subject", and "since [discursive subjects] are historically grounded and by implication always changing, they cannot provide a transcendent or universal foundation for historical method."[116]

From this decline of the modern essence of historicism arose a perception of history in which time periods are not clearly distinguishable.[117] At the end of the twentieth-century, the boundaries of present and past are not so clear anymore. The past endures in the present.

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109. *Id*. at 614-15.
110. *Id*.
111. *See id*. at 493.
112. *Id*. at 615.
113. *Id*. at 616.
114. *See id*. at 614-15.
115. Lynn Hunt, *Introduction: History, Culture and Text*, *in* THE NEW CULTURAL HISTORY 1, 6-7 (Lynn Hunt ed., 1989).
116. *Id*. at 7.
117. *See* White, *supra* note 94, at 491-92.

One reason for this result is the deterioration of the idea of objectivity in history. Christopher Tomlins, citing Hayden White, asserts that "the past as such has no accessible reality, no rhyme or rhythm of its own. . . . [It] leaves only fragments or remnants that are already historicized in the very act of their preservation."[118] It is the task of contemporary historians to access such fragmented sources and organize them into texts that are laid upon contemporary "theories, hypothesis, literary forms, or simply common sense."[119]

The result is that "history cannot be confined to what's done with it, as if 'the past' could be neatly boxed."[120] The German historian Reinhart Koselleck developed the fundamental concepts of "space of experience" and "horizon of expectation" supporting this perception of time.[121] He claims that a historical time is not fixed; instead it reflects the relationship between past and future.[122] In short, "[I]t is the tension between experience and expectation which, in ever-changing patterns, brings about new resolutions and through this generates historical time."[123]

Once more, Edward White's explanation is clear:

> Every time contemporary humans make a decision they do so against the backdrop of their immediate past. They themselves are creations of actors and events in that past. Their contemporary institutions were forged in that past. When they seek to make changes in their external world or in their attitudes to it, their frame of reference is composed of the external landmarks and attitudes they inherit, regardless of their perspective on that inheritance.[124]

The transformation witnessed in the theory of history was essential to understand the late twentieth-century convergence of law and history. One question that remains open, however, is how this new perception of history may contribute to legal debate and constitutional adjudication. History can help make sense of the present, provide the contemporary legal community with information about rights and their meaning and purposes throughout history, and explain the value and significance of those rights to society.

To think about the world—and thus about rights, their meaning, and their purposes—is to think historically.[125] As has been suggested

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118. Tomlins, *supra* note 68, at 393.
119. *Id*.
120. *Id*. at 394.
121. REINHART KOSELLECK, FUTURES PAST: ON THE SEMANTICS OF HISTORICAL TIME 256 (2004).
122. *Id.*
123. *Id*. at 262.
124. White, *supra* note 94, at 621.
125. *See* Friedman, *supra* note 103, at 957 (citing ARTHUR DANTO, NARRATION AND KNOWLEDGE 94 (1985)).

previously, the "experience of [the] contemporary world suggests that few other potentially stabilizing forces can readily be identified."[126] The stabilizing force of history resides in the fact that "[h]istory roots us";[127] the pursuit of historical knowledge reflects the pursuit of knowledge about oneself.[128]

Originalism is deeply related to the turn to history described here. Much discussion has been devoted to the causal connection between originalism and the emergence of history in constitutional debate.[129] Regardless of the merit of such discussion, the fact is that "[t]he use of history has seemingly won the day,"[130] as authors that do not comply with originalist claims equally understand that history has a significant importance in contemporary constitutional scholarship.[131]

C. Originalism

It is helpful to start with the basic claim of originalism and then begin to unfold its elements and controversies. However, it is difficult to present in a few words the thesis supported by all originalist scholars. The risk is that this basic description might be so vague that it does not expose the theory. Nevertheless, this difficulty should not prevent the attempt. The basic claim of the originalist theory may be presented as this: the scope of a constitutional provision becomes fixed when it is framed and ratified.[132]

Originalism arises from the same unease that gave birth to the counter-majoritarian difficulty: the search for a limitation on the power of the judiciary.[133] Nevertheless, originalism presents itself as a solution to the counter-majoritarian difficulty.[134] The claim is that, if restrained to the original meaning or purpose of the Constitution, courts will be acting according to the will of the people. The will of the people of the time the Constitution was enacted outweighs any current circumstantial majority.[135]

Originalism, on the other hand, enhanced the importance of historical analysis on constitutional adjudication. Because courts are to be bound to original purposes or meaning, discovering what those purposes and meaning were is a fundamental part of legal activity.[136] Some of the

126. White, *supra* note 94, at 622.
127. Friedman, *supra* note 103, at 959.
128. *Id*. at 957.
129. *See* Festa, *supra* note 76, at 490-92.
130. *Id.* at 501.
131. *Id.* at 499-500.
132. *See* BENNETT &. SOLUM, *supra* note 27, at 1-4.
133. *Id*. at 5-7.
134. *Id*. at 7.
135. Horwitz, *supra* note 104, at 42-44; *see also* Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1444-46 (2007).
136. BENNETT & SOLUM, *supra* note 27, at 54.

problems that arise from this proximity of studies derive from what has been described *supra*: the belief that historical inquiry has an essentially different purpose and methodology than legal adjudication, which results in an incompatibility between both fields. Other problems derive from what will receive some attention further: the difficulties of defining the intentions and meaning of a text. Although this problem is essentially a linguistic one,[137] it arose from the joinder of history and law because, as has been mentioned *supra*, historians have already faced such a problem. An efficient way to unfold the elements and controversies of the originalist theory is by examining its evolvement.

1. "Old Originalism"

The seminal works on what is now known as originalism are the ones of Robert H. Bork,[138] Chief Justice William H. Renquist,[139] Raoul Berger,[140] and Edwin Meese III.[141] The characteristic that distinguishes "old originalism" is the reliance on the original intent of the framers and ratifiers of the Constitution.[142] Indeed, for "old originalists," the "basic idea shared by the precursors of contemporary originalism is that the meaning of the text of the Constitution is a function of the intentions of those who wrote it."[143] The innovation proposed, however, was not taking into account the intention of the framers, but the idea that these intentions were themselves the constitutional rule.[144]

This concept is one of the essential elements of the originalist theory, which has been called the fixation thesis.[145] It claims that the meaning of the constitutional text became fixed when it was framed and ratified.[146] The intention of the framers and ratifiers is the key to ascertain that fixed meaning.[147] Courts, when interpreting the constitutional text, should ask what the framers and ratifiers thought about the specific case.[148]

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137. *Id*. at 56.
138. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. REV. 1 (1971).
139. *See* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).
140. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977).
141. *See* Edwin Meese III, *Speech Before the American Bar Association*, *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION (Paul G. Cassel ed., 1986).
142. BENNETT & SOLUM, *supra* note 27, at 8.
143. *Id.*
144. *Id.* at 2.
145. *Id.*
146. *Id*.
147. *Id.*
148. *Id*. at 8.

The second element of "old originalism" is the idea that the fixed meaning of the constitutional text imposes a constraint on the courts.[149] In other words, the rule of the Constitution is within the meaning of the constitutional text, which can be found through the inquiry about the original purposes of the ones who framed and ratified it.[150]

Originalism, thus, intended to harmonize judicial review and the democratic scheme of government.[151] Judicial review is compatible with the will of people if it is bound by the intention of those who enacted the Constitution, which is a paramount law.[152] Supporting this view, Justice Scalia writes, "The principal theoretical defect of nonoriginalism, in my view, is its incompatibility with the very principle that legitimizes judicial review of constitutionality."[153] Scalia also argued that "[n]othing in the text of the Constitution confers upon the courts the power to inquire into, rather than passively assume, the constitutionality of federal statutes."[154]

Originalism, as proposed initially, was subject to harsh criticism.[155] One of them was the methodological difficulties of discovering one original purpose for any given constitutional provision.[156] This criticism is true in the case of seeking the psychological intention of any written document made by a multimember body.[157] In the case of the Constitution, the difficulties in discovering the purpose of any provision are enormous, due to the quantity and variety of people who were part of the constitutional convention and the states' ratifying conventions.[158] The only thing historians are able to grasp is fragmentary evidence of multiple interests that frustrate the effort to find one true purpose for the constitutional text.[159] A second criticism was made by H. Jefferson Powell, who argues that there is evidence that the framers of the Constitution did not want the document to be interpreted by their intentions, but by its textual meaning.[160] A third critique on the first originalist approach focuses on the fact that only the Constitution has the force of law; the other documents in which the framers and ratifiers exposed their intentions do not have such power.[161]

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149. *Id.* at 3.
150. *Id*. at 3-4.
151. *See id.* at 9.
152. *See id.*
153. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989).
154. *Id*.
155. *Id.* at 856.
156. *Id.*
157. Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 707-08 (2009).
158. *Id.*
159. BENNETT & SOLUM, *supra* note 27, at 9.
160. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888 (1985).
161. Kay, *supra* note 157, at 705-06.

The set of criticisms led originalism to change one of its elements. From the original purpose, the focus of originalism came to be the original public meaning of the constitutional text.[162] It was only the text of the Constitution that was subject to the ratification process; thus it is only the text that has the democratic authority necessary to the law.[163]

2. "New Originalism"

The so-called "new originalism" is a newer version of the same claim made by the "old originalism" theory. The innovation was in the method used to discover the original meaning of the Constitution. For "old originalism," the method equated the meaning with the intent of the people who enacted it, while for "new originalism," the meaning of the text would be its original linguistic meaning.[164]

This view is the stream of originalism championed by Justice Scalia. It is founded on the same idea of democracy that grounds the counter-majoritarian difficulty argument.[165] In *A Matter of Interpretation*, Justice Scalia argued that "it is simply incompatible with democratic government . . . to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated."[166]

There is a fundamental shift of perspective carried out by the "new originalism." The focus of the constitutional inquiry should be placed at the audience of the constitutional text, not on its authors. More specifically, the focus is the linguistic context in which the text was written.[167] This shift is well explained by Lawrence Solum:

> Writing a Constitution is like putting a message in a bottle. To communicate successfully, you must rely on the public meaning of the words and phrases you employ and the standard rules of grammar and syntax. To understand what a constitution means, the reader must understand the circumstances of constitutional communication. If both the framers and the interpreters of a constitution share this understanding, then communication is possible.[168]

Therefore, besides the two main elements of the "original intent" version of originalism—the fixation and the textual constraint theses—one more was added by the "new originalism": the public meaning thesis, which

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162. *Id.* at 704.
163. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1998).
164. BENNETT & SOLUM, *supra* note 27, at 11.
165. *Id.* at 6.
166. SCALIA, *supra* note 163, at 17.
167. *See* BENNETT & SOLUM, *supra* note 27, at 13-14.
168. *Id*. at 15.

states that the meaning of the constitutional text must be understood according to the linguistic practices of the time the text was framed and ratified.[169]

There is one more idea that some representatives of "new originalism" support, which is a distinction between constitutional interpretation and constitutional construction.[170] Constitutional interpretation is solely the act of determining the meaning of the constitutional text; the way it is to be applied in a real situation depends on constitutional construction, which takes into account more than just the definition of the text.[171] This distinction is necessary due to the generality and vagueness of constitutional language.[172] The topic will be better understood after considerations on the debate between textualism and intentionalism in legal interpretation.

Several criticisms have been made towards this new version of originalism. They can be gathered into three main different lines of attack. The first of these lines argues that the focus on the semantic meaning detaches the constitutional text from the normative force that arose from the events that generated the Constitution.[173] The normative force of the Constitution derives, primarily, from the authority given to those who enacted it.[174] Framing and ratifying the Constitution was a deliberate act and that intention cannot be disregarded when interpreting its text.[175]

The second criticism to which "new originalism" is subject deals with the methodological difficulties in defining the sole meaning of a text.[176] If the interpretive focus is on the reader of the Constitution at the time it was framed and ratified, one should construe a hypothetical reader that represents such a category.[177] Guy Seidman characterizes this hypothetical reader as follows:

> This person is highly intelligent and educated and capable of making and recognizing subtle connections and inferences. This person is committed to the enterprise of reason, which can provide a common framework for

169. *Id*. at 4.
170. *See id.* at 3 (citing KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION (1994)).
171. *See id.*
172. *See id.* at 3-4.
173. Kay, *supra* note 157, at 715.
174. *Id.*
175. *Id*. at 706.
176. *See* Keith Whittington, *The New Originalism*, 2 GEO. J.L & PUB. POL'Y 599, 611 (2004) (admitting that new originalism "cannot eliminate disagreement and controversy in resolving hard questions of constitutional meaning").
177. Kay, *supra* note 157, at 722.

> discussion and argumentation. This person is familiar with the peculiar language and conceptual structure of the law.[178]

Richard Kay observed that these defined persons were quite like the real enactors of the Constitution.[179] Thus, the shift would not have any significant utility, as the interpretive method would still be looking at the linguistic practices and the ideas of the framers and ratifiers of the Constitution, although now under the mask of a hypothetical reader.[180]

A third set of criticism has significant importance to this Article. It argues that the "original public meaning" originalism offers a wide range of interpretation possibilities, which would move originalism away from its initial aspiration.[181] Richard Kay affirms that this form of originalism allows "for interpretations that may deviate from any plausible estimate of the original intentions."[182]

Jack Balkin affirms that "original [public] meaning originalism . . . is actually a form of living constitutionalism."[183] Focusing on the distinction between the original intended application of a constitutional provision and its original textual meaning, Balkin argues that the latter allows the interpreter to perceive the connection between the Constitution and the abstract principles of justice that ground its text.[184] In his opinion, because original meaning theory advocates faith to the text, not to the intended application of the framers, interpreters have more leeway in applying the constitutional principles to concrete cases.[185]

Lawrence Solum perceives the possibility of compatibility of originalism and living constitutionalism.[186] He affirms that the two sets of ideas belong to distinct domains and that "if living constitutionalism accepts the fixation thesis, some theory of linguistic meaning, and some version of the textual-constraint thesis, it is committed to the idea that the Constitution provides constitutional law a hard core."[187]

The idea of an interpretational hard core imposed by the text of the law and the possibilities of interpretation provided by the intentions it conveys was not a result of the debate over originalism. In fact, originalism

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178. Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 73 (2006), *cited in* Kay, *supra* note 157, at 722.
179. Kay, *supra* note 157, at 722.
180. *Id.* at 722-23.
181. *Id.* at 721-22.
182. *Id*. at 723.
183. Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 449 (2007).
184. *Id.* at 494.
185. *Id*. at 433.
186. *See* BENNETT & SOLUM, *supra* note 27, at 67.
187. *Id.*

revived a discussion already present, one over textualism and intentionalism on legal interpretation.

3. Textualism and Intentionalism

The most significant reference on the debate over textualism and intentionalism in legal interpretation is the exchange of ideas between H.L.A. Hart and Lon Fuller in two law review articles.[188] The vital issues that make up part of the debate are exposed with excellence by both scholars.

H.L.A. Hart presents the idea that the textual meaning of a law has a core and a penumbra.[189] Some cases deal with the text's core and thus do not generate many difficulties of interpretation.[190] Hart calls the penumbral cases those whose discussions are located outside the law's meaning core.[191] In these cases, the application of the legal language cannot be made by deductive reasoning.[192] A sound decision, in such cases, must take into account what the law ought to be; it must contemplate the aims, purposes and the questions of policy that are related to the law.[193] The distinction between the core and the penumbra of a law's textual meaning is necessary, according to Hart, because of the generality and vagueness of legal language.[194]

Hart's purpose was to defend Austin's analytical positivism against the criticism made by the legal realists. In Hart's opinion, the attack made against formalism derived from a complete misunderstanding of Austin's thought; the fact that some cases demand the analysis of matters others than the text of the law does not imply that the distinction between law and morality is a false one.[195] He emphasizes that there is a core meaning and that, if there are borderline cases, "there must first be lines."[196]

Fuller's reply to Hart points out that the act of interpreting legal language deals not with single words, but with sentences, paragraphs, and even the whole content of statutes.[197] Fuller stated, "Surely a paragraph does not have a 'standard instance' that remains constant whatever the

188. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).
189. Hart, *supra* note 188, at 607.
190. Fuller, *supra* note 188, at 664.
191. Hart, *supra* note 188, at 604.
192. *Id.* at 607.
193. *Id.* at 596.
194. *Id.* at 606-10.
195. *Id.* at 624; Fuller, *supra* note 188, at 631.
196. Hart, *supra* note 188, at 614.
197. Fuller, *supra* note 188, at 663.

context in which it appears."[198] In Fuller's opinion, the context of the enactment and application of the law are part of its meaning and cannot be ignored by judges.[199]

Fuller's main criticism, however, is directed to the linguistic assumptions made by Hart. Fuller's words are instructive:

> Professor Hart seems to subscribe to what may be called "the pointer theory of meaning," a theory which ignores or minimizes the effect on the meaning of words of the speaker's purpose and the structure of the language. Characteristically, this school of thought embraces the notion of "common usage." The reason is, of course, that it is only with the aid of this notion that it can seem to attain the innate datum of meaning it seeks, a meaning isolated from the effects of purpose and structure.[200]

The influence of this debate on originalism is so clear that it makes it hard to add any valuable comment. A large part of the arguments that were made in the debate over the different types of originalism were already made by Hart and Fuller. Regarding two aspects of this thread, however, it is crucial to ensure that the influence is clearly seen.

The first aspect involves Hart's core and penumbra concepts. As already mentioned, some originalists claim a distinction between interpretation and construction.[201] They assert that one step in legal reasoning is to define the textual meaning of a constitutional provision; a second step is to determine its application in a specific case.[202] This second step is what some originalists call "constitutional construction."[203] While limited to the definition given by interpretation, constitutional construction is not an issue fully addressed by originalism.[204] This idea is fully grounded on Hart's distinction of core and penumbra.[205] Constitutional construction will have broader implications whenever the case does not fall within the core of the meaning of the constitutional text.[206]

The second aspect regards Fuller's critique on the linguistic theory that grounds Hart's view. Lawrence Solum thought that the "new originalist" is subject to a criticism from historians who claim that the meaning of a text is not definable without reference to its context and purposes.[207] This critique is the same one Fuller made on Hart's article.[208]

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198. *Id.*
199. *Id*.
200. *Id.* at 668-69 (footnote omitted).
201. *See supra* note 176 and accompanying text.
202. *See* BENNETT & SOLUM, *supra* note 27, at 22-23.
203. *Id.* at 23.
204. *Id.* at 26.
205. *See id.* at 23.
206. *Id.*
207. *Id*. at 57.

This point, however, is one which, in Solum's opinion, still waits for more attention from legal scholarship.[209]

One last point must be observed on the issue over textualism and intentionalism. The standard distinction between textualism and intentionalism in the context of originalism affirms the existence of a fundamentally different method of interpretation taken by judges who are advocates of each theory. Textualist originalist judges avoid grounding their decisions on legislative history and manifestations of the intentions of the legislators, which would be the focus of "old originalism" supporters.[210] Nevertheless, Jane Schacter states that the distinction is based purely on theoretical analysis and developed an empirical survey on the Supreme Court's statutory interpretation method.[211]

The judges' practice, Schacter argues, is not as radically different as the literature usually describes it.[212] Caleb Nelson believes that, in reality, "no 'textualist' favors isolating statutory language from its surrounding context, and no critic of textualism believes that statutory text is unimportant."[213] The most significant difference between the two interpretive approaches, Caleb Nelson argues, is of another kind.[214] He points out that both theories of interpretation are based on the assessment of types of intention.[215] The intention that textualists seek is related to the rule that legislators wanted to implement, rather than the social aims that might have motivated the law.[216]

Such a perspective is supported by the ideas set forth by the mentioned social choice theory. As Caleb Nelson puts it, for textualists, "the point of most statutes is to effectuate a compromise between competing goals, and courts that extend one or another of those goals to some new area risk 'upsetting the balance of the package' that the enacting legislature approved."[217]

Textualism and intentionalism, then, would be concerned with different types of intentions. Textualism would concentrate on the text intended by legislators, while intentionalism would be concerned with real-life consequences of law. This approach enables Caleb Nelson to conclude that the real difference between textualism and intentionalism, in practical

208. *See* Fuller, *supra* note 188, at 663.
209. BENNETT & SOLUM, *supra* note 27, at 58.
210. Jane Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 3-4 (1998).
211. *Id.*
212. *Id.* at 5.
213. Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 348 (2005).
214. *Id.* at 348-49.
215. *Id.* at 354.
216. *Id.* at 356.
217. *Id.* at 371.

terms, is the different decision results they ground.[218] Decisions based on textualist theory establish rules, while decisions built upon intentionalism seek to accomplish the social results aimed at by the legislator.[219]

It may be observed that originalism has recuperated from a long-going debate over textualism and intentionalism as standards for interpreting legal texts. Intentionalists emphasize the idea that textual meaning is only fully comprehended if the intentions and the context of the speaker are taken into account.[220] In the textualist view, law's authority derives from the process which enacted it, and a legal text should not be confounded with the non-legal ideas that have inspired it.[221] These and other arguments that are part of such thread may be found in originalist literature.

Understanding the opinions in *District of Columbia v. Heller* and *McDonald v. City of Chicago* requires understanding the main arguments of the originalist discussion. Much of the debate that occured in those cases was, in effect, about originalism and its different streams. With these arguments in mind, Part III will carefully examine the most important opinions in *Heller* and *McDonald*.

III. ANALYSIS

A. *Heller* and *McDonald*

Part II of this Article provided an overview of the main theoretical discussions that originate from, and are provoked by, originalism. This theory of constitutional interpretation is supported by the idea known as the counter-majoritarian difficulty, which examines the problematic insertion of judicial review in a democratic system of government. On the other hand, originalism has fostered debate over the uses of history in constitutional adjudication and its utility and convenience when used in such a way.

Part III is dedicated to the examination of the two recent cases where the Supreme Court interpreted the Second Amendment of the U.S. Constitution, in which originalism has been an essential element. Before and analysis of the relevant opinions in those cases, it is necessary to examine the processes that led to these opinions. The idea is to present a background of the procedural history and the arguments made.

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218. *Id.* at 349
219. *Id.*
220. *Id.* at 358.
221. *Id.*

1. District of Columbia v. Heller

The District of Columbia's Firearms Control Regulations Act of 1975, actually enacted in 1976, banned the possession of certain types of handguns in the District.[222] This ban was accomplished by prohibiting the issuance of a registration certificate for such guns, which was necessary for the legal possession of any gun.[223] The law also required that any licensed gun should be kept unloaded and disassembled or locked by a trigger lock or other safety device.[224] Furthermore, the law prohibited a person from carrying his or her gun within the District of Columbia, regardless of whether he or she carried it openly or in a concealed manner.[225] These legal provisions were challenged by six District of Columbia residents who claimed that their individual right to keep and bear arms in their homes, for the purpose of self-defense, was protected by the Second Amendment to the Constitution.[226]

The district court relied largely on *United States v. Miller* in holding that the right to keep and bear arms protected by the Second Amendment was related to service in state militias only and therefore did not protect an individual right to keep and bear arms.[227] Because the plaintiffs were not part of a state militia, the district court dismissed the case.[228]

The D.C. Circuit reversed the district court's opinion.[229] It stated that the Second Amendment protected an individual right to possess and carry guns and noted that right's importance in preserving state militias.[230] The opinion focused on the language of the constitutional provision, specifically "of the people," to draw its conclusion.[231] It added that the Second Amendment was one of the many fundamental individual rights with which the Bill of Rights dealt.[232] Furthermore, the court argued that the militias were composed of all able adult men.[233] In sum, the court concluded:

> [T]he Second Amendment protects an individual right to keep and bear arms. That right existed prior to the formation of the new government under the Constitution and was premised on the private use of arms for activities such as hunting and self-defense, the latter being understood as

222. *See* D.C. CODE §§ 7-2501.01(9), 7-2502.01(a) (2012).
223. D.C. CODE § 7-2502.01.
224. D.C. CODE § 7-2507.02 (2012).
225. D.C. CODE § 22-4504 (2012).
226. Parker v. District of Columbia, 311 F. Supp. 2d 103, 103-04 (D.D.C. 2008).
227. *Id.* at 105.
228. *Id.* at 110.
229. Parker v. District of Columbia, 478 F.3d 370, 402 (D.C. Cir. 2007).
230. *Id.* at 395
231. *See id.* at 381-82.
232. *Id.* at 383.
233. *Id.* at 389.

> resistance to either private lawlessness or the depredations of a tyrannical government (or a threat from abroad). In addition, the right to keep and bear arms had the important and salutary civic purpose of helping to preserve the citizen militia. The civic purpose was also a political expedient for the Federalists in the First Congress as it served, in part, to placate their Antifederalist opponents. The individual right facilitated militia service by ensuring that citizens would not be barred from keeping the arms they would need when called forth for militia duty. Despite the importance of the Second Amendment's civic purpose, however, the activities it protects are not limited to militia service, nor is an individual's enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia.[234]

The Supreme Court granted certiorari.[235] The brief presented to the Court by the District of Columbia contained two separate arguments. The first focused on the meaning and purpose of the constitutional provision.[236] The second was policy-oriented and stated the reasonableness of the District's gun control measures.[237]

The District of Columbia emphasized the prefatory clause[238] of the Second Amendment in stating that the protection of the right to keep and bear arms was limited to participation in state militias.[239] When examining the operative clause,[240] it argued that the expression "keep and bear arms" had a predominantly military connotation.[241] It contended that there was nothing in the constitutional language that led to an "individual right" interpretation of the Second Amendment.[242]

The District also claimed that the Second Amendment derived from the fear that certain provisions of the Constitution,[243] including the Militia

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234. *Id.* at 395.

235. District of Columbia v. Heller, 552 U.S. 1035, 1035 (2007).

236. *See* Brief for Petitioners, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 102223 at *11-40.

237. *See id.* at *40-58.

238. "A well regulated Militia, being necessary to the security of a free State . . . ." U.S. CONST. amend. II.

239. *See* Brief for Petitioners, *supra* note 236, at *12-15.

240. "[T]he right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

241. *See* Brief for Petitioners, *supra* note 236, at *15-17.

242. *See id.* at *11-12 ("The text and history of the Second Amendment confirm that the right it protects is the right to keep and bear arms as part of a well-regulated militia, not to possess guns for private purposes.").

243. U.S. CONST., art. I, § 8, cls. 11-16 which grant Congress the powers:

> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in

Clauses, would give the federal government the power to disarm the state militias and that the states and their citizens would have to rely on a national armed force, which would enhance the potentiality of an oppressor federal government.[244] Therefore, the Second Amendment, according to the District of Columbia, had an exclusive federative purpose.

The District of Columbia's second argument claimed that the gun control policy it adopted was a reasonable one.[245] It first stated that the Constitution admitted a reasonable restriction on guns and that traditionally many states and the federal government had different kinds of gun regulation.[246] It then argued that gun regulation should be subject to a reasonableness test that should be made according to practical considerations of gun uses, not according to a categorization of guns based on their historical uses.[247]

It concluded that the District of Columbia's law was reasonable because it banned only handguns while maintaining permission for owning shotguns and rifles, which was enough for the law to be consistent with the Second Amendment.[248] The District also addressed the fact that the law was limited to a purely urban environment in which handguns had no legitimate use.[249] It finally considered the relationship between handguns and crimes, suicides, and accidental injuries and killings, finding that banning handguns was effective in diminishing the number of each and did not present an unconstitutional limit on the right to keep and bear arms.[250] These were, in sum, the arguments made by the District of Columbia when the Supreme Court received the case.

Justice Scalia delivered the opinion of the Court. At first, Scalia made a defense of textualist originalism, arguing that constitutional language should be read as the society to which it was directed understood it.[251] This theory gave Scalia the method he would use in interpreting the Second Amendment to establish a consistent reading of that Amendment.

Justice Scalia split the text of the Second Amendment in different parts. The principal division was between the prefatory clause and the

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> the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

244. Brief for Petitioners, *supra* note 236, at *22.
245. *See id.* at *48-58.
246. *Id.* at *41-44.
247. *See id.* at *45-46 (arguing that "[t]he [government's] interest [in public safety] should allow the government to bar particularly dangerous arms, whether or not they are 'lineal descendants' of far less powerful 'Arms' from 1791").
248. *See id.* at *54-55.
249. *Id.* at *49.
250. *See id.* at *52-54.
251. District of Columbia v. Heller, 554 U.S. 570, 576-77 (2008).

operative clause.[252] His analysis, however, focused on specific terms in the Amendment—"well regulated Militia," "free state," "right of the people," and "keep and bear Arms."[253] He claimed that the prefatory clause announced a purpose and should be used to resolve ambiguities arising from the constitutional language, but that it did not limit or expand the scope of the right granted.[254] For this reason, Scalia primarily analyzed the operative clause of the Second Amendment, after which he sought a consistent reading of the prefatory clause.[255]

The first part of the textual interpretation of the operative clause of the Second Amendment addressed the use of the expression "right of the people."[256] Scalia's opinion argued that the Constitution's use of "the people" was meant to protect individual, as opposed to collective, rights.[257] While the opinion agreed that there were times when the Constitution used "the people" to stand for society as a whole, it stated that, in all of those instances, the Constitution was dealing with the allocation of power, not recognizing rights.[258] Thus, the expression "right of the people" in the constitutional text meant "the right of the individuals."

As to the expression "keep and bear Arms," the majority opinion interpreted it to be the right to possess and to carry weapons in case of confrontation.[259] The textual meaning of the whole operative clause of the Second Amendment, thus, was read by the Court to mean the right of individuals to possess and carry weapons in case of confrontation.[260]

The Court argued that this meaning was supported by the background of the right recognized by the amendment. The abuses of King James II against his political enemies and the subsequent abuses of King George III against the colonists gave rise to the idea of an individual right to keep and bear arms for the purpose of self-defense.[261] The importance of this background is derived from the fact that the constitutional provision recognized a pre-existing right, as opposed to establishing a new one.[262] To understand the public meaning of the text, the Court considered it crucial to know "the history that the founding generation knew."[263]

According to the Court, the meaning of the prefatory clause of the Second Amendment should be consistent with the meaning and history of

252. *Id.*
253. *See id.* at 579-91, 595-98.
254. *Id*. at 577-78.
255. *Id*. at 578.
256. *See id.* at 579-81.
257. *Id.* at 579.
258. *Id.* at 579-80.
259. *Id.* at 581.
260. *Id*. at 592.
261. *See id.* at 592-94.
262. *See id.* at 592.
263. *Id*. at 598.

the operative one.[264] First, the opinion called attention to the fact that the Constitution referred to the pre-existing militias and not to ones that would later come to be.[265] "Well regulated" meant nothing more than a properly disciplined and trained militia,[266] which would be crucial to the security of a free state.[267] As to the phrase "security of a free state," the Court interpreted the word "state" as any political entity and stated that the Constitution could be read as addressing a free country.[268] Accordingly, the Court claimed that the constitutional text did no more than affirm that the existing trained militias were essential to the security of a free country.[269]

This meaning of both clauses of the Second Amendment permitted the Court to observe that the prefatory clause described the purpose for the codification of the right to keep and bear arms, but not the entire purpose of the right itself.[270] The Court pointed out that the history of governmental abuses from which the right derived was related to the banning of guns themselves, not from the banning of militias.[271] Therefore, there was no reason to believe that the right was not directed to individuals.[272]

After considering the textual meaning and the background of the Second Amendment, the Court examined the history of the debate over the right to keep and bear arms, both before and after the ratification of the Second Amendment.[273] The opinion mentioned that after the enactment of the Bill of Rights, nine states protected the right to keep and bear arms, seven of which expressly mentioned it as an individual right.[274] In addition, four states protected that right before ratification, two of which expressly stated it as an individual right.[275]

Regarding the drafting history of the Amendment, the Court stated that the debate occurred over the place of the militias in the newly established governmental design, not over the individual right to keep and bear arms.[276] However, the militia issue was the reason for the codification

264. *Id.* at 595 ("Before turning to limitations upon the individual right, however, we must determine whether the prefatory clause of the Second Amendment comports with our interpretation of the operative clause.").
265. *See id.* at 596 (noting that the Constitution gave Congress the power to *create* an Army and a Navy, while also giving Congress the power to *organize* the militia).
266. *Id.* at 597.
267. *See id.* at 597-98 (noting that militias were useful in repelling invasions, suppressing insurrections, rendering large armies unnecessary, and resisting tyranny).
268. *Id.* at 597.
269. *See id.* at 595-98.
270. *Id.* at 599.
271. *Id.* at 598.
272. *Id.* at 599.
273. *See id.* at 600-03.
274. *Id.* at 602-03.
275. *Id.* at 601-02.
276. *See id.* at 603-04.

of such right, not for the right's existence, which was not disputed.[277] In the Court's opinion, the post-ratification commentary and case law also showed that the Second Amendment was meant to protect an individual right.[278] The post-Civil War commentaries and legislation pointed in the same interpretive direction.[279]

The Court dedicated the last part of its opinion to confirming the interpretation of the individual right content of the Second Amendment, examining the precedents of the Court, and asking if those precedents foreclosed that interpretation.[280] The answer to that question was in the negative.[281] The *Heller* Court stated that, in *United States v. Cruikshank*, the Court held only that the Amendment applied exclusively to the federal government.[282] In *Presser v. Illinois*, the Court upheld a law that forbade private military associations, but did not say that the Amendment was limited to the use of weapons in militias.[283] Finally, the *Heller* Court argued that the decision in *United States v. Miller* did no more than state that the protection of the Second Amendment extended only to certain types of weapons.[284] In its conclusion, the Court made a defense of a majoritarian view of democracy, stating that the Second Amendment was the result of an interest-balancing by the people, which excludeed the possibility of the Court engaging in an interest-balancing interpretation of the constitutional provision.[285]

For the purpose of this Article, Justice Stevens's dissenting opinion is the one worth mentioning. It interpreted the right protected by the Second Amendment as limited to the reason for its adoption: a fear that the power of the federal government over the militias would violate the states' sovereignty.[286] As a result, the Second Amendment protected the right to keep and bear arms for the exclusive purpose of service in militias.[287] The opinion, furthermore, read *Miller* in this same sense, giving it authority, under the doctrine of stare decisis, over the matter.[288]

In interpreting the constitutional language, Stevens emphasized the prefatory clause, arguing that the framers' sole focus was on the military use of weapons.[289] Consequently, the "right of the people" that the

277. *Id*. at 599.
278. *See id.* at 605-14.
279. *Id*. at 614-19.
280. *See id.* at 619-26.
281. *Id.* at 625.
282. *Id*. at 619-20.
283. *Id*. at 620-21.
284. *Id*. at 625.
285. *Id*. at 634-35.
286. *Id.* at 637 (Stevens, J., dissenting).
287. *See id.* at 637-38.
288. *Id*.
289. *See id.* at 640-44.

Constitution referred to was one that, while directed to individuals, could only be exercised collectively.[290] Justice Stevens thus agreed that the Second Amendment protected an individual right.[291] His divergence was related to the scope and extent of the exercise of that right.[292] He claimed that the right to keep and bear arms was only protected by the Constitution if it was related to militia use.[293]

The text of the Amendment, in Justice Stevens's opinion, should be interpreted according to the purposes for its adoption.[294] For Justice Stevens, history showed that the enactment of the Second Amendment was a response to the threat that the Militia Clauses of Article I of the Constitution would impose on the states' sovereignty.[295] The purpose of the Amendment was thus the protection of the militias as a means to protect the states' autonomy.[296] The right it recognized had its exercise limited to that purpose.[297]

Justice Stevens criticized the Court's analysis of the debate over the right to keep and bear arms.[298] He argued that the English Bill of Rights and, consequently, Blackstone were concerned with totally different issues, so it was incorrect to analyze the Second Amendment as if it shared those concerns.[299] Furthermore, he claimed that the post-enactment commentaries on the Second Amendment referred to the English Bill of Rights and were unfamiliar with the legislative history of that Amendment.[300] The nineteenth-century legislation and case law also had little weight to support the majority's interpretation of the Second Amendment, according to Justice Stevens, because the Amendment played only a small role in the debate at that time about civilian use of weapons.[301]

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290. *Id.* at 645.
291. *Id.*
292. *See id.*
293. *Id.* at 651 ("[T]he Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia. So far as appears, no more than that was contemplated by its drafters or is encompassed within its terms.").
294. *See id.* at 637-38. Justice Stevens argued:

> The view of the [Second] Amendment we took in *Miller*—that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons—is . . . the interpretation most faithful to the history of its adoption.

Id.
295. *See id.* at 653-56.
296. *See id.* at 655 ("The proposed amendments sent by the States of Virginia, North Carolina, and New York focused on the importance of preserving the state militias and reiterated the dangers posed by standing armies.").
297. *See id.* at 637.
298. *Id.* at 662.
299. *Id.* at 663-65.
300. *Id.* at 666-67.
301. *Id.* at 672.

Justice Breyer's opinion was one that dismissed the originalist theory of interpretation, focusing on the policy arguments over gun-control legislation.[302] Therefore, it is of little use to this Article.

2. McDonald v. City of Chicago

The city of Chicago and the village of Oak Park, a Chicago suburb, had laws that limited the right of their citizens to keep handguns in their homes.[303] Four Chicago residents who wished to keep handguns in their homes for the purpose of self-defense brought a suit challenging the constitutionality of that city's handgun law.[304]

The district court upheld the local laws, relying on Seventh Circuit precedent which, relying on *Presser v. Illinois* and *United States v. Cruikshank*, held that the Second Amendment did not protect the individual right to keep and bear arms and was not incorporated in the Fourteenth Amendment to limit the authority of the states.[305] The district court delivered its decision based on the premise that it should not anticipate the overruling of a Supreme Court decision and that it should consider itself bound to it until the Supreme Court overruled its own precedent.[306]

The Court of Appeals for the Seventh Circuit affirmed the district court's decision.[307] The court claimed that, while *Presser*'s, *Cruikshank*'s and *Miller*'s reasoning was abandoned by the Supreme Court in *Heller*, those cases were not overruled to the effect of considering the Second Amendment applicable against state authority.[308]

The petitioners' brief to the Supreme Court carried three lines of arguments.[309] First, it argued that the Privileges or Immunities Clause of the Fourteenth Amendment protects individual rights, including those contained in the Bill of Rights.[310] Presenting an analysis of the history of the Fourteenth Amendment, the petitioners argued that it was a way to constitutionalize the Reconstruction after the Civil War.[311] Furthermore, it was the framers' intention and the public understanding that the Privileges

302. *See id.* at 696-99 (Breyer, J., dissenting) (discussing the numbers of gun crimes, injuries, and deaths).
303. McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010).
304. *Id.*
305. Nat'l Rifle Ass'n of Am., Inc. v. Village of Oak Park, 617 F. Supp. 2d 752, 754 (N.D. Ill. 2008); McDonald v. City of Chicago, No. 08 C 3645, 2008 WL 5111112, at *1 (N.D. Ill. Dec. 4, 2008).
306. *Oak Park*, 617 F. Supp. 2d at 753 (quoting Saban v. U.S. Dep't of Labor, 509 F.3d 376, 378 (7th Cir. 2007)).
307. *McDonald*, 130 S. Ct. at 3027.
308. *See id.*
309. Petitioners' Brief, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521), 2009 WL 4378912 at *5-7.
310. *Id.* at *9-10.
311. *Id.* at *13.

or Immunities Clause encompassed pre-existing rights, including the ones protected by the Bill of Rights.[312]

As a consequence of this first argument, the petitioners' claimed that the *Slaughterhouse Cases*,[313] as well as *Cruikshank* and *Presser*, should be overruled.[314] They argued that the privileges or immunities doctrine conveyed in those cases was deeply erroneous and denied the fundamental changes the Privileges or Immunities Clause carried.[315] Moreover, the decision was illogical, as the type of rights that the Court said the Clause would protect was not being violated by the states; there was no reason, therefore, to enact the clause.[316] Stare decisis, according to the petitioners, should not protect the *Slaughterhouse Cases* doctrine; its preservation was not practical, given that the Court developed the incorporation doctrine under the Due Process Clause, and there would be no upset of legitimate expectations.[317]

Finally, the petitioners argued that the Second Amendment individual right to keep and bear arms should be incorporated against the states under the Due Process Clause of the Fourteenth Amendment.[318] They claimed that the Supreme Court's doctrine on incorporation of the Bill of Rights through the Due Process Clause was based on the concept of an American system of ordered justice.[319] To know if a right is part of such system, the Court must look at the historical recognition, the states' acceptance, and the nature of the right in dispute.[320] The right to keep and bear arms had been recognized throughout American history and by the majority of the states.[321] Furthermore, it was deeply related to the right of self-defense and self-preservation, which was one of the most significant values of the common law tradition.[322]

The opinion of the Court was written by Justice Alito. First, the Court rejected the claim that the question be analyzed under the Privileges or Immunities Clause, arguing that it would not be necessary because the precedents on the Second Amendment did not prevent the Court from examining its incorporation under the Due Process Clause.[323] Because the incorporation of the Bill of Rights against the states had been developed

312. *Id.* at *15.
313. 83 U.S. 36 (1872).
314. Petitioners' Brief, *supra* note 309, at *42.
315. *Id.* at *43.
316. *Id.* at *55-56.
317. *Id.* at *57-60.
318. *Id.* at *66.
319. *Id.* at *67.
320. *Id.*
321. *Id.* at *68-69.
322. *Id.* at *69-70.
323. McDonald v. City of Chicago, 130 S. Ct. 3020, 3031 (2010).

under the Due Process Clause, there was no need to decide the case under a different prism.[324]

The Court then noted that the standard through which a Bill of Rights protection was incorporated against state action was to ask if the right was fundamental to the American scheme of ordered liberty, deeply rooted in the nation's history and tradition.[325] Moreover, the Court affirmed that the Bill of Rights protections incorporated under the Fourteenth Amendment were enforced against the states according to the same standard that protected those personal rights against federal violation.[326] In relation to the Second Amendment, the Court understood that *Heller* gave an affirmative answer to the question of incorporation.[327]

Justice Alito argued that the right of self-defense was almost universally recognized.[328] He then referred to the history of the right to keep and bear arms to confirm its incorporation, first addressing its importance in the revolutionary period as a response to King George III's disarmament of the colonists.[329] Prior to the ratification of the Amendment, both Federalists and Anti-Federalists saw the right to keep and bear arms as fundamental to the new system of government.[330]

As the nineteenth century went by, the federalist concern that previously grounded the framing of the Second Amendment, the disarmament of the universal militia, faded.[331] However, the Amendment's relevance as a means of self-defense persisted.[332] After the Civil War, the Fourteenth Amendment was enacted as the constitutional basis for the protection of the Bill of Rights—including the right to keep and bear arms—at the state level.[333] The Court believed that the right to keep and bear arms was considered a fundamental right of the American system of justice by the generation that framed the Fourteenth Amendment.[334]

After the historical exposition, the Court contemplated some of the assertions that the municipal respondents made. First, the Court reconfirmed that the standard for incorporation was that the right be considered fundamental to the American scheme of ordered liberty and that the existence of other civilized countries that did not recognize a given right

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324. *Id.*
325. *See id.* at 3036.
326. *Id*. at 3035.
327. *See id*. at 3036 (noting that *Heller* established that the right to keep and bear arms was "deeply rooted in [American] history and tradition").
328. *See id.*
329. *Id.* at 3037.
330. *Id*. at 3037.
331. *See id.* at 3038.
332. *See id.*
333. *See id.* at 3041.
334. *Id*. at 3042.

did not jeopardize its incorporation.[335] Second, the Court disputed the existence of any distinction between substantive and procedural protections in the debate over the incorporation of the Bill of Rights.[336] Third, regarding the arguments that the Second Amendment protection had implications for public safety and could lead to costly litigation, the Court argued that they could equally be made against the incorporation of the criminal procedure clauses of the Bill of Rights.[337] Finally, the Court addressed *Heller* by saying that there was space for state experimentation in gun control measures as long as the core of the right to keep and bear arms was not violated.[338] It also argued that *Heller* admitted the initial federative purpose of the enactment of the Second Amendment, stating, nevertheless, that this initial purpose did not limit the scope of the right it protected.[339]

The last two sections of the majority opinion were dedicated to responding to some of the arguments that grounded the dissenting opinions of Justices Stevens and Breyer.[340] First, replying to Justice Stevens, the majority restated that the Bill of Rights should be applied to the states according to a "single, neutral principle," not one that applied it differently as between the states and the federal government.[341]

In response to Justice Breyer, Justice Alito made three main arguments. First, the Court said that there was popular consensus over the fundamentality of the right to keep and bear arms, as thirty-eight states and a majority of both the House of Representatives and the Senate subscribed to the petitioners' claim.[342] Second, Alito's plurality opinion maintained that the right to keep and bear arms especially protects minorities exposed to the violence of poor communities.[343] Finally, the Court argued that the incorporation of *every* individual protection of the Bill of Rights imposed a restriction in policy experimentation and local variation.[344]

Justice Thomas's opinion is worth mentioning for the innovation it conveyed. Notwithstanding his concurrence with the result, Justice Thomas agreed with the petitioners that the Privileges or Immunities Clause protected an individual right to keep and bear arms.[345] He also argued that the Fourteenth Amendment radically changed the country's original system of government.[346]

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335. *See id.* at 3044 (plurality opinion).
336. *See id.* at 3045.
337. *See id.* at 3045, 3047.
338. *See id.* at 3046.
339. *See id.* at 3048.
340. *See id.* at 3048-50.
341. *Id*. at 3048.
342. *Id.* at 3049.
343. *See id.*
344. *Id*. at 3049-50.
345. *Id*. at 3059 (Thomas, J., concurring).
346. *Id*. at 3060.

In his point of view, the *Slaughterhouse Cases* and subsequent Supreme Court cases marginalized the Privileges or Immunities Clause.[347] The resulting development of the substantive due process doctrine was a legal fiction.[348] The peril of that legal fiction was that it lacked a guiding principle consistent with the text and history of the Due Process Clause.[349] The protection of individual rights under the Privileges or Immunities Clause would also give rise to hard questions, but, as Justice Thomas put it, "[T]hey would have the advantage of being the questions the Constitution asks us to answer."[350]

Justice Stevens's dissenting opinion is also relevant. He dismissed the Privileges or Immunities Clause argument and stated that the case dealt with substantive due process.[351] He contended that the existence of a fundamental right to keep and bear arms under the liberty concept of the Due Process Clause was distinct from the question about the incorporation of the Second Amendment against state action through the Fourteenth Amendment.[352] Justice Stevens understood this last question to have already been solved by the Court in *Cruikshank* and *Presser*.[353]

The basic question, in determining if a right fell within the scope of the Due Process Clause, according to Justice Stevens, was whether it carried values "implicit in the concept of ordered liberty," adding that such a concept had a "universal character."[354] In Stevens's opinion, to answer that question, the Court should look to "judicial precedents, the English common law, legislative and social facts, scientific and professional developments, practices of other civilized societies, and, above all else, the 'traditions and conscience of [the American] people.'"[355] Justice Stevens then added that history must be the starting point, but not the ending point, of such an inquiry.[356]

These were the methodological ideas that underlay Justice Stevens's opinion that the Constitution did not protect an individual right to keep and bear arms against State and local authority, an idea grounded in several practical reasons. He argued that "firearms ha[d] a fundamentally ambivalent relation to liberty," given that they could be used to defend

347. *See id.* at 3060-61.
348. *See id.* at 3061-62.
349. *Id.* at 3062.
350. *Id*. at 3086.
351. *See id.* at 3088-90 (Stevens, J., dissenting).
352. *Id.* at 3088.
353. *Id*. at 3088 & n.1.
354. *Id*. at 3096.
355. *Id.* (footnote omitted).
356. *Id*. at 3097 (quoting Lawrence v. Texas, 539 U.S. 558, 572 (2003)).

one's life or property or to commit violent crimes.[357] Therefore, the right did not necessarily lead, in his opinion, to a life of autonomy and dignity.[358]

The final argument Justice Stevens made dealt with the federative character of the Second Amendment. Because the *Heller* Court recognized that the preservation of the sovereignty of the states was the reason for the Amendment's codification, Justice Stevens argued that the Amendment could not be interpreted as a restraint on state power.[359] He added that federalism and deference to the states' power to experiment and regulate firearms were just as old and just as rooted in American tradition as the right to keep and bear arms.[360]

B. Methodological Differences and Their Results

The objective of this Part is to observe some methodological differences made by the most important opinions just briefed and try to see what distinctions in the results reached come from those methodologies. The focus is not on the constitutional interpretive doctrines, but on the historical inquiry performed by the Justices.

Differences in the historical research methodology derive from choices made in the field of constitutional interpretation theory. The interpretational theory someone chooses to follow will determine the questions to be answered by the historical research. This effect is perceptible in the cases just examined. Justice Stevens, in criticizing an exaggerated reliance on historical inquiry in his dissenting opinion in *McDonald*, asserted that "Justice Scalia preferred to rely on sources created much earlier and later in time than the Second Amendment itself; I focused more closely on sources contemporaneous with the Amendment's drafting and ratification."[361] The analysis was precise, and the reason for such a difference was the fact that both Justices were seeking answers to different questions. The problem was not the lack of a yardstick to measure which Justice is correct, but the fact that there were as many yardsticks as there were methodologies.

The concurring opinion written by Justice Scalia in *Heller* had a sole question. He sought to understand what the original public textual understanding of the language of the Second Amendment was. The textual analysis is relatively straightforward. But it did not seem to be enough.

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357. *Id.* at 3107.
358. *Id*. at 3109.
359. *See id.* at 3111 (noting that applying the Tenth Amendment to the states would produce an equally absurd result).
360. *Id*. at 3112-13.
361. *Id.* at 3117 (citation omitted).

Two objects of analysis broadened the scope and result of the inquiry. The first was the background of the right protected by the Second Amendment. Justice Scalia claimed that it was indispensable to investigate that background because the Amendment was meant to protect a pre-existing right, so it was necessary to understand its content.[362] The second object of analysis was the history of the debate over the right to keep and bear arms. The inquiry over this object sought to see if anything in that debate could refute the conclusion obtained in the initial textual analysis.

The historical inquiry in *Heller* lessened the work to be done in *McDonald*. The purpose of the backward perspective in *McDonald* was to find the traditional principle underneath the Second Amendment protection, as the traditional treatment of a right is a key element for its characterization as fundamental. The historical research had already been done in *Heller*. The task of the *McDonald* Court was to examine this history in the perspective of the substantive due process doctrine.

1. Sources

The sources on which the Justices relied in their historical research should be viewed in light of their role in the judicial reasoning. It is important to notice that both the majority and dissenting opinions in *Heller* analyzed the original public meaning and the original intent of the framers of the Second Amendment.

While discussing the Second Amendment's original public understanding, Justice Scalia relied predominantly on the constitutional text itself, comparing the language of the Second Amendment with other provisions that used expressions such as "the right of the people" and "the people."[363] He also relied heavily on contemporaneous dictionaries.[364] The method of examining other constitutional provisions that used some of the expressions in the Second Amendment was also used by Justice Stevens, who concentrated on the use of "the people" in the First Amendment right to petition to the government and to assemble, saying that it described an individual right exercised more effectively by collective action.[365] Contemporaneous dictionaries were also used by Justice Stevens in the examination of the expression "to keep and bear arms."[366]

362. *See* District of Columbia v. Heller, 554 U.S. 570, 592 (2008) ("We look to [the historical background of the Second Amendment] because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.").
363. *Id.* at 579.
364. *See id.* at 581, 584.
365. *Id.* at 645 (Stevens, J., dissenting).
366. *Id.* at 646-47.

The sources used by the majority opinion in *Heller*'s examination of the textual meaning of the Second Amendment's operative clause encompassed contemporaneous treatises, cases, congressional debates, state constitutions, news articles, the Federalist Papers, and the Anti-Federalist Papers.[367] English sources were also examined, such as the Bill of Rights of 1689 and a parliament debate from the eighteenth century over the right to keep and bear arms.[368] Justice Stevens, in his dissenting opinion, cited to contemporaneous state constitutions and laws, treatises, cases, congressional debates, and writings.[369]

When studying the meaning of the prefatory clause exclusively, however, the opinions adopted a perceptibly different universe of sources. Justice Scalia's opinion cited to dictionaries, the Federalist Papers, the Anti-Federalist Papers, the Blackstone Commentaries, and other constitutional provisions (essentially the Article I Militia Clauses, arguing that the militias already existed when the Amendment was drafted).[370] Justice Stevens's dissent, however, had a much narrower universe of sources. It cited only to state constitutions, laws, and treatises to understand that the framers' sole focus was the military exercise of the right to keep and bear arms.[371]

The breadth of each opinion's historical analysis was also significant in the investigation of the Second Amendment's history. Just as he did in his *McDonald* dissent, Justice Stevens concentrated on the legislative history of the Second Amendment in his *Heller* dissent, as he wished to demonstrate that the sole purpose for the enactment of the provision was the fear that a national standing army would impose an intolerable threat to the sovereignty of the states.[372] The sources he used reflect such a choice. Most attention was given to the proposals made by the states (Virginia, North Carolina, New York, New Hampshire, Maryland, and Pennsylvania).[373] Justice Stevens also relied on state ratifying debates and on writings by George Washington and Thomas Jefferson.[374]

The latitude of Justice Scalia's concurring opinion in *Heller* contrasts with the narrow focus of Justice Stevens. It is possible to distinguish three periods of the history of the right to keep and bear arms in Scalia's opinion. The first one dealt with the origins of the right both in England and in the American revolutionary periods.[375] To tell this story, Justice Scalia relied

367. *See, e.g.*, *id.* at 592-95 (majority opinion).
368. *See id.* at 591-92, 595.
369. *See, e.g.*, *id.* at 644-50 (Stevens, J., dissenting).
370. *See id.* at 595-97 (majority opinion).
371. *See id.* at 642-44 (Stevens, J., dissenting).
372. *See id.* at 653-62.
373. *See id.* at 655-61.
374. *See id.* at 653, 659.
375. *See id.* at 592-95 (majority opinion).

on the English Bill of Rights, Blackstone, contemporaneous treatises, and a news article.[376]

The second period reported by Justice Scalia was the enactment of the Amendment.[377] Notwithstanding the inexistence of a significant time lapse between this event and the revolutionary periods, the legislative history of the Second Amendment was an object of specific attention in the majority opinion.[378] For this purpose, it cited to the Anti-Federalist papers, contemporaneous writings and letters, legislative reports, state constitutions and case law, State proposals for the adoption of the Second Amendment, and news articles.[379]

The third period was the post-enactment period.[380] Justice Scalia analyzed post-enactment commentary, case law, and legislation regarding the right to keep and bear arms.[381] The focus was first on the treatises of William Rawle and Joseph Story and George Tucker's version of the Blackstone commentaries.[382] After that, the opinion examined the state and federal case law of the pre-Civil War period.[383] The last part of the historical section of the opinion examined the Reconstruction period, relying on documents of the Freedmen Bureau and its Act, congressional debates, and news articles.[384]

A separate section of the opinion examined the precedents of the Supreme Court over the Second Amendment, and stated that they did not foreclose the conclusion obtained in the textualist analysis—that the Second Amendment protected an individual right to keep and bear arms for purposes of self-defense.[385]

Although there was a significant difference in the scope of the historical inquiry performed by each opinion, it must be noticed that some sources were essential for both. The text of the Constitution itself was one of them. Both opinions began their historical research by examining other provisions of the Constitution which used similar language.[386] This choice made intratextualism[387] a vital method of interpretation, for it was the

376. *See id.*
377. *See id.* at 598-99, 603-05.
378. *See id.*
379. *See id.*
380. *See id.* at 605 ("We now address how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century.").
381. *See id.* at 605-19.
382. *See id.* at 605-09.
383. *See id.* at 610-14.
384. *See id.* at 614-19.
385. *See id.* at 619-26.
386. *See id.* at 579; McDonald v. City of Chicago, 130 S. Ct. 3020, 3028-36 (2010).
387. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) ("In deploying [intratextualism], the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase.").

starting point of both opinions. Justice Stevens concentrated on the First and Fourth Amendments' use of the expression "right of the people," just as the majority opinion did.[388] However, the majority opinion went further and examined the use of the term "the people" in other parts of the constitutional text, specifically the Preamble and Article I, Section 2.[389] Documents relating to the legislative history were also examined by both opinions. Congressional debates, state constitutions, state ratifying conventions, the aforementioned state proposals, and contemporaneous writings and letters were examples of sources used by both Justices when they examined the legislative history of the Amendment.

Justice Alito's opinion in *McDonald* relied most significantly on the sources already pointed to by *Heller*'s majority opinion.[390] It did not present any new source relating to the matter, although it gave more attention to some sources not emphasized in *Heller*, such as the congressional debates over the adoption of the Fourteenth Amendment and congressional Freedman Bureau documentation.[391]

2. Results

While considering the results that each opinion in *Heller* and *McDonald* achieved, one could imagine that those results derived from the breadth of the sources used. It should not be ignored, however, that the degree of breadth was determined by the different theoretical choices on interpretation made by each side of the Court, which contributed to the difference in their results.

The first thing to be considered when analyzing Justice Stevens's opinion is the critique he made on the plurality opinion in *McDonald*, arguing that it was too backward looking and that history was an uncertain ground for constitutional decision-making.[392] To be clear, Justice Stevens did not claim that history was useless for judicial argumentation, but he saw limitations on the benefits the Court could extract from historical inquiries, claiming that, while it could enrich debates over substantive due process, it did not provide objective answers.[393]

This criticism of Justice Stevens over the use of history on constitutional adjudication should be viewed in the context of his understanding that the debate in *McDonald* was not about the Second Amendment—which would not have been incorporated against the states.

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388. *See Heller*, 554 U.S. at 644 (Stevens, J., dissenting).
389. *See id.* at 579-80.
390. *See McDonald*, 130 S. Ct. at 3036-38.
391. *See id.* at 3040-42.
392. *See id.* at 3116-17 (Stevens, J., dissenting).
393. *See id.* at 3102.

His argument was instead limited to the analysis of substantive due process.[394] This limitation is pertinent to note because of the significant historical research that supports the original intent theory adopted by Justice Stevens's opinion in *Heller*. Even if history does not provide sufficiently objective answers when the debate concerns the substantive due process doctrine, it does offer solid ground for determining the scope and extent of the right protected by the Second Amendment.

The adoption of the original intent theory determined the breadth of the historical inquiry and, consequently, its result. The question Justice Stevens sought to answer in his historical research dealt with the social, practical consequences the framers wanted the Second Amendment to achieve, the balance of military power between the federal government and the states.[395]

As seen in Part II.C *supra*, the original intent version of originalism places the constitutional rule on the social consequences desired by the framers and ratifiers.[396] This assumption provides an interesting result. The constitutionality of any law should be tested based on its ability to lead to or foreclose that social, practical goal. The original intent theory in Justice Stevens's opinion, thus provided not a rule, but a standard to test the constitutionality of gun control laws: the government cannot ban guns used by a state militia.[397] The constitutional rule was placed on the practical consequences of the right: its use in a militia. The original intent, thus, served as a way to support *Miller* as precedent. Justice Stevens saw the Court's decision on *Miller* as consistent with the original intent of the framers of the Second Amendment.[398]

In sum, the more narrow historical research performed by Justice Stevens resulted in the answer to what were the social, practical goals intended by the framers and ratifiers of the Second Amendment. Because this social achievement is the constitutional rule itself, the constitutionality of gun-control laws should be analyzed according to their ability to foster the purposes of those who enacted the constitutional provision. In Justice Stevens's view, the Court's decision in *Miller* should have been followed under the doctrine of stare decisis because it was consistent with the standard that derived from the original intent.[399]

Justice Scalia's opinion took a different path. Based on the theory of original public meaning, his decision could also have performed a very narrow historical research, limited to what was done in the textualist

394. *See id.* at 3090 ("This is a substantive due process case.").
395. *See* District of Columbia v. Heller, 554 U.S. 570, 637 (2008).
396. *See supra* note 150 and accompanying text.
397. *Heller*, 554 U.S. at 637 (Stevens, J., dissenting).
398. *See id.* at 637-38.
399. *See id.*

analysis in the opening section of the opinion. This section concluded that the original meaning of the text of the Second Amendment protects an individual's right to keep and bear arms for different purposes, among which is self-defense.[400] This finding would be enough, according to the original public meaning stream of originalism, to state the rule enacted by the Second Amendment.[401]

Justice Scalia's opinion, however, went further, linking the constitutional provision to a principle: the right to self-defense.[402] For Justice Scalia, if the right to keep and bear arms was not based solely on the militia issue and on the federative system, there must be other sets of ideals that justify it. Researching the background of the right to keep and bear arms, the opinion found such justification on the right of self-preservation and self-defense, an issue raised in the context of the English and American revolutionary periods.[403]

After asserting the original public meaning of the Second Amendment's text and its link to the right of self-defense, the decision tested such findings—the meaning and the link. This test was conducted through a broad historical research, which asked if those findings were consistent with the uses and meanings of the right to keep and bear arms throughout American history.[404] This test established the connection between the right to keep and bear arms and the right of self-defense, which was reinforced by the Court's opinion in *McDonald*.[405] Once again, it was the constitutional theory that prepared the field in which the historical inquiry was made. The historical inquiry in *McDonald* sought to evaluate if the right to keep and bear arms was fundamental to the American system of ordered liberty.[406] The plurality opinion in *McDonald* strengthened the connection between the right protected by the Second Amendment and the right of self-defense.[407]

The claim that the federalist issues related to the militias faded during the eighteenth century as the self-defense issue persisted is a significant one. The *McDonald* historical inquiry emphasized the post-Civil War period and the role of the right to keep and bear arms in the enactment of the Fourteenth Amendment.[408] This issue was also well explored by Justice

400. *See id.* at 582-86 (majority opinion).
401. *See supra* Part II.C.1.
402. *See Heller*, 554 U.S. at 599 ("The prefatory clause [of the Second Amendment] does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.").
403. *See id.* at 598-99.
404. District of Columbia v. Heller, 554 U.S. 570, 605-19 (2008).
405. McDonald v. City of Chicago, 130 S. Ct. 3020, 3036 (2010).
406. *Id.*
407. *Id.* at 3036-37.
408. *Id.* at 3040-42.

Thomas's opinion.[409] The idea that the right to keep and bear arms protects individuals against violence perpetrated by majorities bonds the Second Amendment to the right of self-preservation and fully divorces it from the militia issue.

One consequence of the historical inquiries made by the opinions as a result of the initial question over the original textual meaning of the Second Amendment is that they set rules, not standards. The rule of law resides in the text of the Constitution—and on the authority of those who enacted it—not on the social benefits the text intended to achieve. The constitutionality of a given gun-control law should be evaluated according to its potential violation of the right established by the text, without regards to its ability to foster or foreclose any practical goals intended by the framers. Thus, both the *Heller* and *McDonald* decisions do not set a test through which gun-control laws should be scrutinized, as was the desire of Justice Breyer.[410] What the decisions do is establish and announce the content of the right to keep and bear arms.

Another consequence of the decisions that established the content and history of the right to keep and bear arms was the disconnection between the right and the militia issue. In *Heller*, the Court argued that the debate over the militias was only the political issue that explained the codification of the right[411] and did not limit its scope. In *McDonald*, the plurality opinion paid almost no attention to the militia issue.[412] It only stated that Federalists and Anti-Federalists agreed that the right to keep and bear arms was crucial to the new system of government and that the debate was over the adoption of the Bill of Rights, not the content of the right to keep and bear arms.[413]

The examination of the methodologies of the different historical inquiries performed by the Justices of the Supreme Court and the results obtained leads to the conclusion that, while there is a logical connection between history and legal opinion, jurisprudential commitments formed the breadth and depth of the historical research. Such commitments set the questions that history should answer, which is one of the most decisive steps in any research. The question of what history can offer to legal argumentation, thus, is not one that history can answer; this is a matter for the legal field to determine.

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409. *Id.* at 3071-76 (Thomas, J., concurring and dissenting).
410. *Id.* at 3127-28 (Breyer, J., dissenting).
411. District of Columbia v. Heller, 554 U.S. 570, 583-85 (2008).
412. *McDonald*, 130 S. Ct. at 3038-39.
413. *Id.* at 3037.

C. The Supreme Court's History of the Right To Keep and Bear Arms

The opinions delivered in *Heller* and *McDonald* allow society to envision a history of the right to keep and bear arms from the English Revolution until today. The goal of this Part is to present this history, as it may be captured from the Supreme Court opinions.

1. English Roots and the Revolutionary Period

The story of the American right to keep and bear arms may be traced back to the English political turmoil in the second half of the seventeenth century. During that period, political opponents of the Stuart Kings were overpowered by loyal militias.[414] The use of these loyal militias was followed by the disarmament of the opponent population, which was basically composed of Protestants.[415]

During the regency of William and Mary, Protestants obtained, in the Declaration of Rights, the assurance that they would not be disarmed.[416] Before the protection of that right, Protestants were tremendously cautious about the concentration of military power by the Crown.[417] The Declaration of Rights was meant to pacify that caution.[418] It stated that "the subjects who are Protestants may have arms for their defense suitable to their conditions and as allowed by law."[419] This article was deemed the precursor of the Second Amendment.[420] It was intended to protect an individual's right of self-defense against public or private violence.[421] Blackstone described it as "the natural right of resistance and self-preservation."[422]

During the revolutionary period in the American colonies, King George III used the same instrument his predecessors had used; he tried to disarm the colonists.[423] During the 1760s and 1770s, many rebellious groups were disarmed by the Crown.[424] These disarmaments provoked a reaction throughout the colonies, as people defended their individual right to have arms for self-defense.[425] From the revolutionary period to the

414. *Heller*, 554 U.S. at 592-93 (citing JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS 31-53 (1994)).
415. *Id.* at 593 (citing MALCOLM, *supra* note 414, at 103-06).
416. *Id.*
417. *Id.*
418. *Id.*
419. *Id.*
420. *Id.* at 594-95.
421. *Id.* at 594.
422. *Id.*
423. *Id.*
424. *Id.*
425. *Id.* at 594-95.

enactment of the Bill of Rights, several states protected the right to keep and bear arms through laws or through their declarations of rights.[426]

This period may be seen as the prehistory of the individual right protected by the Second Amendment. It may be observed that the right emerged as a popular reaction in periods of political disorder and oppression. It is an individual right, but the context in which it was conceived was one of political insurgence.

2. The Enactment of the Bill of Rights

The legislative history of the Second Amendment was an issue that the majority opinion in *Heller* and the plurality opinion in *McDonald* did not analyze with significant depth. This lack of depth was due to an interpretive choice, as the original meaning theory holds that legislative history is only relevant if it clarifies textual difficulties.[427] Another reason was that the Amendment was deemed to protect a pre-existing right.[428] Hence, the fact that the legislators were not creating a right diminished the importance of the legislative history.[429] However, the subject was not entirely ignored, and it is possible to present a history of the enactment of the Second Amendment based on those opinions.

The inclusion of the right to keep and bear arms in the Bill of Rights derived from a debate over the military balance of the newly created federative system.[430] The core of the debate was over the necessity of the provision in the Bill of Rights, not over the existence of such right.[431] During the ratifying conventions, Anti-Federalists feared that the federal government had an excessive military power over the states under the Militia Clauses—Article 1, Section 8, Clauses 15 and 16—of the Constitution.[432] They feared that the federal government could disarm the state militias and impose an oppressive power over the people.[433] Anti-Federalists felt the need to protect the citizens' militia to fight an eventual oppressive government.[434] Because the federal government had power over

426. *Id.* at 601.
427. *See* BENNETT & SOLUM, *supra* note 27, at 10 (noting that "the writings of the framers would still be relevant—but now as evidence of the public meaning" under original meaning originalism),
428. *Id.* at 602.
429. *See id.*
430. *See id.* at 598-99.
431. *Id.* at 598.
432. *See id.* (noting that at least one prominent Anti-Federalist "worried not only that Congress's 'command of the militia' could be used to create a 'select militia,' or to have 'no militia at all,' but also, as a separate concern, that '[w]hen a select militia is formed; the people in general may be disarmed'").
433. *See id.*
434. *See id.* ("[T]he fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric.").

the militias, it was necessary to protect the citizens who were part of the militias.[435]

The Federalists did not respond by arguing that the right to keep and bear arms was unimportant to protect individuals against an oppressive government. Instead, they claimed that the individual right to keep and bear arms could not be abridged by the government, which was one of limited powers, and thus there was no need for a constitutional amendment.[436] The conclusion was that both Anti-Federalists and Federalists agreed that protection of the individual right to possess weapons was vital to the newly created system of government.[437] The debate that led to the enactment of the Second Amendment was over the militias and over the right itself.[438] There was no voice claiming that such right did not exist.

Several states proposed provisions to protect the right to keep and bear arms.[439] The Anti-Federalist concern with the power over the militias, although mingled in the proposals, was subject to specific suggestions to modify the structural part of the Constitution.[440] The First Congress rejected all proposals to reform the structural part of the Constitution and decided to adopt solely the "individual-rights amendments."[441] The suggestion to protect the right to keep and bear arms, thus, did not point exclusively to the militia issue.

3. Abolitionism and Reconstruction

As Justice Alito's opinion in *McDonald* indicated:

> By the 1850's, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights—the perceived threat that the National Government would disarm the universal militia—had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense.[442]

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435. *See id.*
436. *Id.* at 599.
437. McDonald v, City of Chicago, 130 S. Ct. 3020, 3037 (2010); *see also Heller*, 557 U.S. at 599 ("It was understood across the political spectrum that the right [to keep and bear arms] helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.").
438. *See id.* ("It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia.").
439. *See id.* at 603-04 (noting that proposals were tendered by Virginia, New York, North Carolina, New Hampshire, Pennsylvania and Massachusetts).
440. *Id.* at 604.
441. *Id.*
442. McDonald v. City of Chicago, 130 S. Ct. 3020, 3038 (2010).

Abolitionism was one of the issues in which the individual right to keep and bear arms was discussed.[443] On the battles over the status of Kansas (if it would enter the Union as a free or a slave state), there were attempts of disarmament, which prompted the debate over the individual right to keep and bear arms.[444] Moreover, there was the issue over the rights that free African Americans would be granted. Some held the idea that free black men would not be vested with all the rights granted by the Constitution.[445] The Second Amendment protection was a central concern in the debate over the granting of constitutional individual rights to free African Americans.[446]

After the Civil War, the new freed black men had their rights as citizens denied in many ways in an attempt to maintain as complete as possible the former regime of inequality.[447] One way to prevent the freedmen from sharing the same rights of the white men was to disarm them, which was done through both state law and private action performed by groups of former Confederate soldiers.[448]

Congress concluded that legislative action was needed to assure that the freedmen would be granted the same rights as the white men. The Freedmen's Bureau Act of 1866 stated:

> [T]he right . . . to have full and equal benefit of all laws and proceedings 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 . . . without respect to race or color, or previous condition of slavery.[449]

Similarly, the Civil Rights Act of that same year assured the "full and equal benefit of all laws and proceedings for the security of person and property, as [was] enjoyed by white citizens."[450] The guarantee of the right to keep and bear arms was part of the assurance of the equal protection of the law to all citizens.

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443. *See id.* (noting that "[a]bolitionist authors wrote in support of the right").
444. *Id*.
445. *See id.* (noting that some post-Civil War state laws "formally prohibited African Americans from possessing firearms").
446. *See Heller*, 554 U.S. at 614 (2008) ("In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves.")
447. *See* Cottrol & Diamond, *supra* note 1, at 96 (discussing statutes passed by Southern states just after the Civil War that, inter alia, prohibited newly freed blacks from serving on juries, testifying in court against whites, and carrying a firearm without a license, a license that whites were not required to have).
448. *McDonald*, 130 S. Ct. at 3038-39.
449. *Id.* at 3040.
450. *Id*.

Due to resistance against those laws, presidential vetoes, and the Court's precedent, Congress understood that a constitutional amendment would be necessary to protect the rights of all citizens.[451] The Fourteenth Amendment, thus, emerged as the constitutional basis for Reconstruction. The right to keep and bear arms had been a central issue on the whole Reconstruction debate.[452] The need for legislative action resulted from the disarmament of the freedmen, and the enactment of the Fourteenth Amendment had as one of its main rationales the necessity to guarantee them their right to possess weapons and defend themselves.[453]

4. Present Day and Urban Violence

The debate over the right to keep and bear arms in the present day occurs within the discussion on urban violence. Gun violence in urban environments is a problem substantially related to poor communities consisting of mostly social and economic minorities.[454] Prohibiting law-abiding citizens from these communities to possess a firearm at home is equal to abridging their right to self-preservation. In Justice Alito's opinion, the Second Amendment nowadays essentially protects the rights of minorities who live in areas with high crime rates, whose rights the government is not able to guarantee.[455]

Considering the specificity of handguns, Justice Scalia's opinion in *Heller* called attention to the benefits they have over long guns in the situations in which one needs to protect her property or herself.[456] He argued that handguns could be more easily accessed in case of emergency, were more easily used by a person without the strength to manage a long gun, and could be pointed at a criminal "with one hand while the other hand dial[ed] the police."[457] Those were some of the practical aspects of handguns that made them immune from state prohibition, as they were the most efficient weapons for self-defense.[458]

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451. *Id.* at 3041.
452. *See id.* at 3042 (stating that several state constitution adopted during Reconstruction "included a right to keep and bear arms").
453. *See id.* at 3041-42.
454. *See id.* at 3049.
455. *See id.* ("[T]he number of Chicago homicide victims during the current year equaled the number of American soldiers killed during that same period in Afghanistan and Iraq and that 80% of the Chicago victims were black.").
456. *See* District of Columbia v. Heller, 554 U.S. 570, 629 (2008).
457. *Id.*
458. *See id.* at 628-29.

D. One Meaning, Many Purposes

The opinions of the Supreme Court in *Heller* and *McDonald* were grounded on one fundamental original meaning of the text of the Second Amendment. This fact, however, did not prevent the Supreme Court from observing the evolution of the right to keep and bear arms in different moments of American history. Instead, in the Court's view, the fixation of one original meaning allowed that right to serve multiple purposes and be relevant in different ways throughout time.

The core meaning of the Second Amendment is that it protects an individual right to possess and use arms in case of confrontation. The right is not limited to participation in militia, regardless of the fact that the militias were the concern that led to the codification of the right.[459] The right protects individuals from being prevented by the government from using a handgun to protect themselves and their property.

The right to keep and bear arms has been deemed a critical one in different contexts and has served different purposes throughout American history. It has been considered as crucial in the context of a political revolution: the colonies' fight for independence.[460] The purpose was to give individuals the right to protect themselves against an oppressive power.[461] Around the time of the Constitution's ratification, that right was perceived as an important element of the balance of military power in the new system of government.[462] The context was one of political settlement. Its purpose was to enable the states to be protected from a tyrannical exercise of military power by the federal government.[463] Protecting the right that individuals had to possess a weapon was a way to keep the states able to defend themselves through militias.[464]

In the period just after the Civil War, a pre-existing debate over what constitutional rights free African Americans would be entitled to reached its apex, and the right to keep and bear arms played a central role.[465] That right was a decisive form of protecting the newly freed slaves from private and public violence perpetrated by white majorities in the south.[466] The

459. *See Heller*, 554 U.S. at 598 ("During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric.").
460. *See* Cottrol & Diamond, *supra* note 1, at 92.
461. *Id.* at 92-93.
462. *See id.* at 93-94.
463. *Id.* at 94.
464. *See id.*
465. *See id.* at 96-97.
466. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3039 ("Throughout the South, armed parties, often consisting of ex-Confederate soldiers serving in the state militias, forcibly took firearms from newly freed slaves.").

significance of the right protected by the Second Amendment arose in a context of struggle for civil rights.

Nowadays, regardless of the high rate of gun violence in urban environments, the government cannot prevent individuals from having a handgun at home for their protection. The incapacity of the government to ensure public safety in certain urban communities reinforces the right of individuals subjected to the risk of violence to possess a firearm at home.

Because the rule of law resides in the textual meaning of the constitutional provision and not in its practical consequences, the right it protects can be relevant in different social contexts. In *Heller*, the adaptability of the Constitution is greater in the majority and plurality opinions than in Justice Stevens's dissenting opinion. In Stevens's opinion, the practical consequences intended by the framers of the Second Amendment would determine its content, limiting the adaptability of the Constitution to different social environments.[467]

From this perspective, in the case of the interpretation of the Second Amendment, the original public meaning theory does look similar to a form of living constitutionalism, as Jack Balkin suggests.[468] In Balkin's words, "What matters is the original meaning of the text and its underlying principles, not how people expected the text would be applied."[469] This idea is perfectly convergent with Justice Scalia's opinion in *Heller*. The consequence of Balkin's suggestion is that constitutional interpretation is not limited to the practical outcomes desired by the founding generation when it adopted a given provision. Today's interpreter should be faithful to the principle that underlies a constitutional provision.

The adoption of the original public meaning had a profound impact on the result reached in the Supreme Court's interpretation of the Second Amendment. The shift from original intent to original meaning seems to have had a more significant weight in constitutional theory than it might have been imagined. It has opened a door in originalism towards living constitutionalism, providing it with a historical basis.

Notwithstanding its adaptability to social change, the Second Amendment, as interpreted in *Heller* and *McDonald*, has a stabilizing element, the principle of law found to be enacted through it: the right to self-defense and self-protection.[470] The understanding of the original

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467. *See Heller*, 554 U.S. at 661 (Stevens, J., dissenting) ("The history of the adoption of the Amendment thus describes an overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States' militias as the means by which to guard against that danger.").

468. Balkin, *supra* note 183, at 432-36 (arguing for the compatibility of living constitutionalism and original meaning).

469. *Id*. at 451.

470. McDonald v. City of Chicago, 130 S. Ct. 3020, 3036 (2010) (quoting *Heller*, 554 U.S. at 599, 628 (2008)).

meaning of the constitutional language was a vehicle to maintain the faith to that abstract principle of law. In this sense, Dworkin argues that "fidelity to the Constitution's text does not exhaust constitutional interpretation."[471] Balkin also sees this deep relation between constitutional text and principles of law, claiming that principles "give unity to the entire Constitution and preserve its logic and stability over time."[472]

Moreover, the *Heller* opinion, in which the examination of the text was a vital piece, the Court tested the consistency of that principle with the constitutional text throughout American history.[473] Balkin supported such an approach, as he claims that "[t]he reason why we look to history—where it is available—is to act as a check on our assumptions about what 'the text can bear.'"[474] The broad analysis of the case law over the right to keep and bear arms is also consistent with Dworkin's perspective, when he argues that "[h]istory matters because that scheme of principles must justify the standings as well as the content of these past decisions."[475]

The use of history in constitutional adjudication was important not merely as means to access the original intent of the framers or the original meaning of the constitutional text. History was a vital element in understanding the principles enacted by the Constitution and the way those principles have been crucial to American life in different contexts. Between the failure of the original intent theory to provide objective answers to current problems and the failure of the living constitution theory to integrate the past and the present of constitutional experience, Barry Friedman claimed that a broad historical perspective makes the interpreter see the life of the constitutional text in American history.[476] In his words, "We are the product of a past recent and distant. To move from 1787 directly to 1997 is not to describe our past nor to root constitutional interpretation in it. Our Constitution is the product of constant reinterpretation since the founding."[477] History was useful in *Heller* and *McDonald* because it enabled the Court to perceive the underlying principle of the Second Amendment's text and the ways in which this principle has been a key issue in some of the most critical moments of American history. It was vital to fully understand the original meaning of the Second Amendment and to see the many purposes it has served.

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471. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1250 (1997).
472. Balkin, *supra* note 183, at 484.
473. *See Heller*, 554 U.S. 605-19.
474. Balkin, *supra* note 183, at 489.
475. RONALD DWORKIN, LAW'S EMPIRE 227 (1986).
476. Friedman, *supra* note 103, at 962.
477. *Id.*

IV. CONCLUSION

The intent of this Article was to observe one of the most complex debates in constitutional theory, the interpretation of the Second Amendment. This debate is the one over textualism and intentionalism in constitutional interpretation. The Second Amendment enables a unique perspective on constitutional theory inquiries. One reason is that it is the only constitutional provision in which the framers stated their purposes for its enactment in the constitutional text. Another reason is that for more than two centuries, it had never been the object of a thorough investigation by the Supreme Court. After all that has been observed in this Article, some conclusions might be drawn.

The problem regarding the placement of judicial review in the American democratic system is one of the most vibrant debates in constitutional law in the past half century. The term used to refer to this debate is the counter-majoritarian difficulty. The existence of this problem is disputed in the academy, as is the theory of democracy on which it is grounded and its effects on the democratic process.[478]

Among the ideas presented to solve the counter-majoritarian difficulty is originalism, the argument that the meaning of a constitutional provision becomes fixed at the time the provision is framed and ratified.[479] While interpreting the Second Amendment, the Supreme Court sought to be faithful to its view of the meaning of that provision, regardless of the impact it could have on current local majorities.[480] In the words of Justice Scalia, local governments have a variety of ways to regulate guns, "[b]ut the enshrinement of constitutional rights necessarily takes certain policy choices off the table."[481] This argument is a strong one for the legitimacy of judicial review and its adequacy to the majoritarian view of the democratic process.

If through one perspective originalism is related to the counter-majoritarian difficulty debate, through another perspective it deals with the utility and the uses of history in constitutional adjudication. In the course of twentieth-century American jurisprudence, the ability of the law to provide sound solutions and justification for social problems has been under attack. If, in the beginning of this process, the law sought the help of other social sciences to rationalize and change society, at the end law was perceived as merely part of broader systems of explanations of reality. In the course of the theory of history, the strict lines that separated past and present became more imprecise. The present came to be seen as the result

478. *See, e.g.*, Friedman, *supra* note 31, at 155.
479. BENNETT & SOLUM, *supra* note 27, at 7.
480. District of Columbia v. Heller, 554 U.S. 570, 636 (2008).
481. *Id.*

of the past as much as the current interpretation of the past was determined by the problems of the present. The courses of jurisprudence and theory of history enabled law and history to come closer to each other at the end of the twentieth century.

Heller and *McDonald* are cases in which the Supreme Court performed broad and deep historical research. The opinions of those cases examined more than three centuries of history, both of England and America. The breadth of the sources that were the objects of the Court's analyses are a way to see the magnitude of the Court's enterprise. A great part of the discussion on those cases was focused on specific issues on the interpretation of distant moments of Anglo-American history. These cases are an excellent example of the convergence of law and history that has begun at the end of the twentieth century. In the end, history might be a valuable benefit in constitutional adjudication because it enables courts to understand the principles that are related to the constitutional text, as well as the importance of constitutional rights in different contexts throughout time.

The coming about of originalism has strengthened the perception of the utility of history in the legal field, and the threads occurring within the originalist theory came to support that utility. The criticism of the early original intent theory made originalism shift to the original textual meaning methodology.[482] This shift revived a long-going discussion on textualism and intentionalism as standards of legal interpretation. This shift has also represented a profound change in constitutional theory, with equally profound consequences. Because the rule of law resides in the constitutional text, the practical uses of the rights prescribed in the Constitution are not limited to those intended by the framers. The constitutional language is related to principles of law, and these principles may be decisive in different contexts and used to support different purposes.

In this theoretical context, history is essential to access the meaning of the language used in the Constitution and the principles to which this language refers. History is also a valuable instrument to examine the ways through which those principles have been experienced in the United States and to check if those experiences provide a unified and consistent interpretation of the Constitution. History gives meaning to the American constitutional experience.

However, history is not able to, independently, control the result of any legal interpretation. Any historical research is limited to the problems the researcher needs to have solved. When historical research is part of legal reasoning, its scope is determined by the jurisprudential commitments

482. BENNETT & SOLUM, *supra* note 27, at 11.

of the law's interpreter. For those commitments set the questions that history should answer. In *Heller* and *McDonald*, it was perceptible that the jurisprudential commitments of the Justices controlled the breadth and depth of the historical research.

Heller and *McDonald* are examples of the usefulness and the possibilities of history in constitutional adjudication. In *Heller*, the Court sought to understand the original meaning of the Second Amendment, which came to be identified with the principle of the right to self-defense.[483] The examination of the history of the right to keep and bear arms intended to test that identification. In *McDonald*, the Court faced the inquiry of whether the Second Amendment was incorporated as a right enforceable against the states through the Fourteenth Amendment.[484] To answer this question, the Court had to determine if the right to keep and bear arms was a fundamental right in the American system of ordered liberty.[485]

The principle of self-defense came to be the viewpoint through which the Court found consistency and unity in the long history of the right to keep and bear arms. This right has served a variety of purposes, such as enabling a political revolution, balancing military power in the federative system of government, protecting minorities during an expansion of civil rights, and protecting individuals today in areas of high crime rates.[486] The turn to history enabled the Court to perceive the multitude of uses and the importance that the right to keep and bear arms has had throughout history. The Second Amendment has one fixed original meaning and has served multiple purposes in the American constitutional experience.

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483. *See Heller*, 554 U.S. at 595-603.
484. *McDonald*, 130 S. Ct. at 3031-42.
485. *See id.*
486. *See supra* Part III.C.4.