

THE WAGES OF ORIGINALIST SIN: *DISTRICT OF COLUMBIA v. HELLER*
by Jeffrey M. Shaman*

*A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*¹

I. Introduction

There is much to question in Justice Scalia's majority opinion in *District of Columbia v. Heller*.² To begin, of course, there is his insistence on a rigid originalist interpretation of the Second Amendment. To make matters worse, his lengthy exposition of the Second Amendment is bad history--simplistic "law-office" history that ignores the complexities of historical research. Finally, his refusal to examine any policy considerations regarding the Second Amendment renders its application a desultory matter, haphazard in function and cabined by outmoded notions.

In *Heller*, the Supreme Court ruled by a 5-4 vote³ that the Second Amendment of the Constitution protects an individual right to possess a firearm unconnected with service in a militia, and to use that firearm for traditionally lawful purposes, such as self-

*Vincent de Paul Professor of Law, DePaul University College of Law

¹ U.S. Const., art. II (1791). By today's standards, the Second Amendment contains two commas too many—the first and the third. In all probability, this reflects the extravagant style of punctuation popular at the time the Amendment was adopted. It has been noted that in the 18th to 19th Centuries, "people tended to punctuate heavily, especially in their use of commas." THE OXFORD COMPANION TO THE ENGLISH LANGUAGE, Oxford University Press, p. 824 (1992). "Excessive punctuation was common in the 18th Century: At its worst it used commas with every subordinate clause and separable phrase." THE NEW ENCYCLOPAEDIA BRITANNICA 15th ed., vol. 29, p. 1051 (1997). The Court's opinion in *Heller* states that the Second Amendment could be rephrased to read: "Because a well-regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." *Heller*, 128 S.Ct. at 2789. However, this does nothing to repair the excessive capitalization that also plagues the Second Amendment.

² *District of Columbia v. Heller*, ___ U.S. ___, 128 S.Ct. 2783 (2008).

³ The vote reflected the Court's usual conservative-liberal split, with Justice Kennedy joining the conservative side on this occasion. In addition to Justice Kennedy, Justice Scalia's majority opinion was joined by Chief Justice Roberts, along with Justices Thomas and Alito. Justice Stevens entered a dissenting opinion joined by Justices Souter, Ginsburg, and Breyer; another dissenting opinion entered by Justice Breyer was joined by Justices Stevens, Souter, and Ginsburg.

defense within the home. Accordingly, the Court went on to strike down a District of Columbia law that banned the possession of hand guns and that also required lawfully owned firearms to be kept unloaded and disassembled or bound by a trigger lock unless they are located in a place of business or are being used for lawful recreational activities.

Justice Scalia's opinion engages in a protracted survey of historical materials in an attempt to ascertain the original understanding of the Second Amendment, which was enacted in 1791. After analyzing the historical materials, Justice Scalia concludes that while the purpose of "codifying" the right to bear arms as a constitutional provision was to ensure the preservation a well-regulated militia, this does not suggest that preserving the militia was the only reason Americans valued the right to bear arms; "most undoubtedly thought it even more important for self-defense and hunting."⁴ As Justice Scalia reads history, it is individual self-defense that is the "*central component*" of the Second Amendment right to bear arms.⁵ Although admitting that the right to bear arms is not unlimited, Justice Scalia again turns to history, at this point to determine the permissible limits that may be placed on the right to bear arms.⁶ He explicitly rejects use of a test that would balance the competing interests in the case and flatly refuses to consider any empirical evidence that shows the need to regulate handgun violence.⁷ The Second Amendment, Scalia proclaims, "elevates above all other interests the right of right of law-abiding, responsible citizens to use arms in defense of hearth and home."⁸

⁴ *Heller*, 128 S.Ct. at 2801.

⁵ *Id.* (Emphasis in original.) *See also, id.* at 2797: "Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation."

⁶ *Id.* at 2816-17.

⁷ *Id.* at 2821.

⁸ *Id.*

Justice Stevens entered a dissenting opinion in *Heller* taking strong exception to Justice Scalia's historical analysis. Engaging in his own extensive examination of the historical record concerning the Second Amendment, Justice Stevens concluded, in contradistinction to Justice Scalia, that the Amendment protects the individual right to bear arms only in connection with military service and does not limit the authority of the government to regulate the nonmilitary use or possession of firearms.⁹ As Justice Stevens sees it, the preamble to the Second Amendment clearly states that the purpose of the Amendment is to protect the right of the people of each of the several states to maintain a well-regulated militia.¹⁰ Moreover, Stevens believes that the historical record emphatically confirms that "the Framers' single-minded focus in crafting the constitutional guarantee 'to keep and bear arms' was on military uses of firearms, which they viewed in the context of service in state militias."¹¹

Justice Breyer entered a separate dissenting opinion asserting that even if one assumes that Justice Scalia is correct that the overriding purpose of the Second Amendment is to protect an individual's right of self-defense, that assumption should merely be the *beginning* of the constitutional inquiry, rather than its *end*.¹² In Justice Breyer's view, there are no purely logical or conceptual ways to determine the constitutionality of gun control regulations, such as the D. C. law in question.¹³ He therefore advocates the use of a balancing test that focuses on practicalities to determine what gun control regulations may be permissible under the Second Amendment.¹⁴

⁹ *Id.* at 2822 (Stevens, J., dissenting).

¹⁰ *Id.*

¹¹ *Id.* at 2826.

¹² *Id.* at 2850 (Breyer, J., dissenting).

¹³ *Id.*

¹⁴ *Id.* at 2850-52.

Applying a balancing test that takes into account extensive empirical evidence showing the magnitude of gun-related crime and violence, Justice Breyer concludes that the D.C. law, directed to the presence of handguns in high-crime urban areas, was a constitutionally permissible legislative response to a serious, indeed life-threatening, problem.¹⁵

II. Originalism

Justice Scalia's opinion in *Heller* strictly adheres to his belief that the Constitution should be interpreted by ascertaining its original meaning at the time it was adopted.¹⁶ Much of his opinion is devoted to an historical exposition of the Second Amendment to show that it originally secured an individual right to possess firearms unconnected with service in a militia and that it proscribed laws that prohibit the possession of firearms commonly used for lawful purposes. The opinion surveys 17th Century English history, 18th Century American dictionaries, Blackstone's Commentaries, the Journals of the Continental Congress, the Federalist and Anti-Federalist papers, early American political essays and treatises, state constitutional enactments adopted both before and shortly after the Second Amendment, and other sources from around the time of the American Revolution.¹⁷ The opinion is thoroughly originalist; it looks exclusively to the original understanding of the Second Amendment and brooks no other considerations whatsoever.

Moreover, Justice Scalia's brand of originalism is extreme; he is not one of those "moderate originalists" who look to original meaning as a starting point, but allow that the meaning of constitutional provisions may be transformed as circumstances change

¹⁵ *Id.* at 2854-66.

¹⁶ See Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997); *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 851-65 (1989).

¹⁷ *Heller*, 128 S.Ct. at 2790-2808.

over time.¹⁸ Lawrence Lessig, for one, posits that because meaning is a function of both text and context, the original meaning of a constitutional provision may be “translated” to accommodate contemporary circumstances.¹⁹ So, for example, the extension of the Fourth Amendment exclusionary rule to state criminal proceedings in 1961 is viewed by Professor Lessig as a translation of the Fourth Amendment justified by a “transformed social and legal context.”²⁰

More recently, Jack Balkin has advocated an even more fluid version of originalism that transmutes it into a kind of living constitutionalism that allows each generation to make sense of the Constitution’s words and principles in its own time.²¹ Professor Balkin maintains that proper constitutional interpretation requires fidelity to the words of the text as understood in their original meaning and to the principles that underlie the text, but does not require fidelity to the “original expected application” of the text.²² According to this view, constitutional interpretation is a never-ending process that produces change in constitutional doctrines, practices, and law.²³ Using this approach, Professor Balkin concludes that the constitutional right to abortion is consistent with the original meaning of the Fourteenth Amendment.²⁴ This is an extremely moderate species of originalism and, in fact, is the sort of jurisprudence that can be happily embraced by those who believe in a living Constitution, the meaning of which evolves over time so as to adapt to modern conditions.

¹⁸ See Michael, J. Klarman, *Antifidelity*, 70 S. Cal. L. Rev. 381, XXX-XXX (1997).

¹⁹ Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165, 1172, 1264-64 (1993).

²⁰ *Id.* at 1242.

²¹ Jack M. Balkin, *Abortion and Original Meaning*, 24 Constitutional Commentary 291 (2007).

²² *Id.* at 295-96.

²³ *Id.* at 295-303.

²⁴ *Id.* at 310-51.

There is little doubt that the Balkin version of originalism would be anathema to Justice Scalia and that he would find Lessig's theory of originalism unacceptable. Justice Scalia believes that the Court should interpret the Constitution strictly according to its original understanding and not ascribe evolving meaning to it.²⁵ As he sees it, changes in the world around us are of no relevance to the meaning of the document. Although Justice Scalia once claimed that in a crunch he may prove to be a "faint-hearted originalist," at the same time he expressed strong opposition to the idea that the Constitution may have evolutionary content and he dismissed the notion that interpretation of the document may change from age to age as nothing more than a "canard."²⁶

Certainly there is nothing faint-hearted about Justice Scalia's originalist analysis in *Heller*. That relevant circumstances concerning the Second Amendment may have changed over the years is of no moment to Scalia. He acknowledges the problem of handgun violence in the nation, but deems it irrelevant because "the enshrinement of constitutional rights necessarily takes certain policy choices off the table."²⁷ He allows that an originalist view of the Second Amendment may be outmoded in present-day society where a standing army is well-supplied with arms, where well-trained police forces provide personal security, and where gun violence is an extremely serious problem, but dismisses those considerations because "it is not the role of (the) Court to pronounce the Second Amendment extinct."²⁸

²⁵ See Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997); *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 861-65 (1989).

²⁶ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 853, 864.

²⁷ *Heller*, 128 S.Ct. at 2822.

²⁸ *Id.*

All of this, of course, begs the question by assuming that the Second Amendment must be interpreted according to its original meaning. As Justice Stevens points out in his dissenting opinion, the constitutional right that the Court announced in its opinion was not “enshrined” in the Second Amendment by the Framers; rather, it was set forth by the Court itself in a groundbreaking decision investing the Second Amendment with meaning that was not previously realized.²⁹

As we have seen, Justice Scalia’s opinion in *Heller* takes an extreme originalist stance. It engages in lengthy historical exposition to ascertain the original meaning of the Second Amendment at the time it was adopted in 1791 and allows for no evolution of the Amendment’s meaning. Changed circumstances have no bearing on Scalia’s analysis of the Amendment. Similarly, policy considerations are of no concern, and are dismissed out-of-hand. The analysis is thoroughly originalist and deeply steeped in history.

For all his love of history, however, Justice Scalia seems to be unaware of the complexities of historical research. It is a mistake to think that the original meaning of the Constitution is an existential “thing” waiting to be unearthed from old records and documents.³⁰ As any good historian knows, interpretation of the past entails considerably more than rummaging around in old archives to find hidden materials. The astute historian Edward Hallett Carr explains that “The belief in a hard core of historical facts existing objectively and independently of the interpretation of the historian is a preposterous fallacy.”³¹ Despite clichés to the contrary, historical events do not speak for themselves.³² History easily can be misread if one is not careful to engage in thoughtful

²⁹ *Heller*, 128 S.Ct. at 2846 (Stevens, J., dissenting).

³⁰ See Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U.L.Rev. 469, 477 (1981).

³¹ Edward Hallett Carr, WHAT IS HISTORY 10 (1962).

³² *Id.* at 9.

analysis of historical sources. Historical evidence often cannot be taken at face value; rather, it must be interpreted in light of its context, a complicated, though necessary, exercise. Arthur Schlesinger Jr., winner of the Pulitzer Prize for history, observes that all historians are “prisoners of their own experience....(who) bring to history the preconceptions of our personalities and of our age.”³³ The historian, he explains, “is committed to a doomed enterprise—the quest for an unattainable objectivity.”³⁴

The historian, therefore, is “necessarily selective” and the “element of interpretation enters into every fact of history.”³⁵ Historical analysis, then, entails creativity as well as discovery. “In truth the actual past is gone; and the world of history is an intangible world, *re-created imaginatively*, and present in our minds.”³⁶ Even when done properly, historical analysis leaves a good deal of room for the historian to make value judgments. The historian sees things from a particular point of view, according to a particular value system. So, the historical approach still leaves the Supreme Court with the sort of discretion that Justice Scalia so disdains.³⁷

While the open-endedness of history should not be enough to scare the Court away from historical analysis of the Constitution, the Court should understand that the meaning of the Constitution is not fixed in history (or anywhere else, for that matter) and waiting to be found. Indeed, as Erwin Chemerinsky points out:

It is misguided and undesirable to search for a theory of constitutional interpretation that will yield determinate results, right and wrong answers, to most constitutional questions. No such theory exists or ever will exist.³⁸

³³ Arthur M. Schlesinger, Jr. *Folly's Antidote*, New York Times, Jan. 1, 2007, p. A23

³⁴ *Id.*

³⁵ Edward Hallett Carr, *supra* note 31, at 10-11.

³⁶ Carl L. Becker, *What Are Historical Facts?*, 8 W. Pol. Q. 327, 333 (1955) (emphasis added).

³⁷ See Antonin Scalia, A MATTER OF INTERPRETATION 18, 22-23 (1997).

³⁸ Erwin Chemerinsky, *Constitutional Interpretation for the Twenty-first Century*, ADVANCE: THE J. OF THE AM. CONST.SOCIETY ISSUE GROUPS, Fall 2007, at 25.

As we have seen, the meaning of the Constitution does not reside in history, and when judges engage in originalist interpretation they recreate the past according to their own visions, including, it should be said, their own values. In *Heller*, then, perhaps it should come as no surprise that both Justice Scalia and Stevens can engage in what appears to be a scholarly exegesis of the original understanding of the Second Amendment, yet come to opposite conclusions as to what the Amendment means. Sandy Levinson points out that “both opinions exhibit the worst kind of ‘law-office history,’ in which each side engages in shamelessly (and shamefully) selective readings of the historical record in order to support what one strongly suspects are pre-determined positions.”³⁹ Both Scalia and Stevens treat each other with contempt, unable to accept the proposition, second nature to professional historians, that the historical record is complicated and, indeed, often contradictory.⁴⁰ Mark Tushnet makes a similar point in noting that “both Justice Scalia and Justice Stevens assert—laughably to a real historian—that the Second Amendment had only one meaning at the framing, and that the meaning was for all practical purposes universally shared.”⁴¹ Good historians know that matters are much more complex than this, and that the Second Amendment did not have a single meaning universally shared throughout the nation when it was enacted in 1791.⁴²

Even if one could somehow overcome the difficulties described in reconstructing (or constructing) the original understanding of the Constitution, it still might not be analytically valid to follow that path. Whatever the original meaning of the Constitution

³⁹ Sandy Levinson “Some Preliminary Reflections on Heller,” <http://balkin.blogspot.com/2008/06/some-preliminary-reflections-on-heller.html>, June 26, 2008.

⁴⁰ *Id.*

⁴¹ Mark Tushnet, “More on Heller,” <http://balkin.blogspot.com/2008/06/more-on-heller.html>, June 27, 2008.

⁴² *Id.*

may have been, it was formed in the context of a past reality and in accordance with past attitudes, both of which have changed considerably since the Constitution was drafted. History is inherently evolutionary, and a true historical approach to interpreting the Constitution would not come to an abrupt end with the adoption of the Constitution in 1787 or the enactment of the Second Amendment in 1791. Rather, it would recognize the evolving nature of history as an ongoing source of meaning for the Constitution. It is simplistic and ahistorical to believe that the Constitution can be interpreted simply by reference to the original understanding of the document. To transfer that understanding, fashioned under past conditions and attitudes, to contemporary situations may produce sorry consequences that are contrary to the original understanding of the Constitution. Blindly following the presumed meaning of constitutional provisions formulated in reaction to past conditions and attitudes that have long since changed does not, in the end, achieve the original understanding. Nor is it very likely to be an effective means of dealing with contemporary problems. Adherence to the original understanding of the Constitution reduces the capacity of the document to be used to respond to the needs of modern society. Originalism—or, at least, Justice Scalia’s brand of originalism—is dysfunctional, an instance of cultural lag whereby the meaning of the Constitution is left dormant while the world changes around it.

Justice Brennan once observed that “the great genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and needs.”⁴³ Therefore, he maintained, whatever the Constitution may have meant in the past should not be the

⁴³ William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. J. 433, 438 (1986).

measure of what it means today.⁴⁴ As Woodrow Wilson once put it, “The Constitution was not meant to hold the government back to the time of horses and wagons.”⁴⁵

Some scholars take this line of reasoning one step further by maintaining that the original understanding is inextricably locked to the past and cannot be transplanted to the present. In other words, because the original understanding was formed in reference to a reality and ways of thinking that no longer exist, it cannot sensibly be applied to the present. The original meaning of the Constitution is inextricably bound to the past and it is senseless to attempt to transpose it to the present or future. What the people of 1791 may have intended for their times is not what they may have intended for ours. Life constantly changes, and the reality and ideas that existed in 1791 are long since gone.

In his dissenting opinion in *Heller*, Justice Breyer makes an important point along these lines when he notes that Justice Scalia’s originalist approach ignores an important question: Given the purposes for which the Framers enacted the Second Amendment how should it be applied to modern day circumstances that they could not have anticipated?⁴⁶

Assume, for argument’s sake, that the Framers did intend the Amendment to offer a degree of self-defense protection. Does that mean that the Framers also intended to guarantee a right to possess a loaded gun near swimming pools, parks, and playgrounds? That they would not have cared about the children who might pick up a loaded gun on their parents’ bedside table? That they... would have lacked concern for the risk of accidental deaths or suicides that readily accessible loaded handguns in urban areas might bring...?⁴⁷

⁴⁴ *Id.*

⁴⁵ Woodrow Wilson, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 169 (1908); quoted in Arthur M. Schlesinger, Jr., THE POLITICS OF UPHEAVAL 285 (1960).

⁴⁶ *Heller*, 128 S.Ct. at 2870.

⁴⁷ *Id.*

These questions cannot be answered, Justice Breyer pointedly notes, simply by “combining inconclusive historical research with judicial *ipse dixit*.”⁴⁸ Indeed, whatever may be revealed by historical research concerning the Second Amendment cannot answer the questions of today about how the Amendment should be interpreted and applied to the world of 2008.

That is not to say that the past should be ignored; certainly there are valuable lessons to be learned from history. It is to say, however, that the original understanding of the Constitution should not be accepted as an infallible source that dictates the present-day meaning of the document. We should attempt to comprehend past constitutional history, insofar as we can, but should not allow it to rule us. As Chief Justice Warren said on the occasion of his retirement from the Supreme Court, “We, of course, venerate the past, but our focus is on the problems of the day and the future so far as we can see it.”⁴⁹

III. The Rejection of Balancing

After concluding that the Second Amendment does protect an individual right to possess firearms unconnected with service in a militia, Justice Scalia allowed that the right secured by the Second Amendment, like most rights, was not unlimited.⁵⁰ From Blackstone through 19th-century cases, he noted, both courts and commentators explained that the right was “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”⁵¹ To determine what limits may be placed on the right to bear arms, Justice Scalia again turned to history, noting with approval that the

⁴⁸ *Id.*

⁴⁹ Retirement Address by Chief Justice Warren, Supreme Court of the United States (June 23, 1969), *reprinted* in 395 U.S. X-XII.

⁵⁰ *Heller*, 128 S.Ct. at 2816.

⁵¹ *Id.*

Court had previously ruled in *United States v. Miller* that the Second Amendment protected possession of the sort of weapons that were “in common use at the time.”⁵² That limitation, Justice Scalia declared, “is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”⁵³ Thus, the Scalia opinion recognizes a qualification to the right to right to keep and carry arms, which limits the right to the possession of commonly used weapons that are not especially dangerous or unusual.

Justice Scalia’s reasoning in this instance is reminiscent of the reasoning in *Lochner v. New York*, which took a similar formalistic approach based on what the Court believed to be common knowledge in order to limit the authority of a state to regulate working conditions.⁵⁴ In *Lochner*, the Court struck down a New York law setting maximum hours of work for bakers on the ground that it violated the constitutional right to liberty of contract protected by the Due Process Clause of the Fourteenth Amendment. In rejecting the state’s assertion that the law was a permissible health measure designed to protect the wellbeing of bakers, the Court declared that it was commonly understood that the trade of a baker has never been understood as an unhealthy one.⁵⁵ In both *Lochner* and *Heller*, the Court erects categories to delineate the scope of a constitutional right and the authority of the state to enact laws that limit the right. In *Lochner* the category was based on “common understanding,” while in *Heller* it is based on common usage. In either case, the Court sets forth formal categories that function to define the meaning of the Constitution.

⁵² *Id.* at 2817.

⁵³ *Id.*

⁵⁴ *Lochner v. New York*, 198 U.S.45 (1905).

⁵⁵ *Id.* at 59.

The problem in *Lochner* was that in relying on its view of common knowledge, the Court ignored the reality of the situation. Whatever might have been the common understanding of the nature of the baking trade, empirical evidence had been presented to the Court (and cited in Justice Harlan's dissenting opinion) showing that the occupation of baking did in fact pose significant health risks. In other words, the Court in *Lochner* ignored that there was compelling reason to support the New York maximum hour law.

Along the same lines, the problem in *Heller* is that the Court, in relying on common practice at the time the Second Amendment was adopted, ignores the reality of the present situation. Whatever may have been the common practice concerning firearms in the 18th Century, empirical evidence demonstrates a present-day need for gun-control measures, such as the one adopted by the District of Columbia. In other words, the Court in *Heller* ignores that there is a compelling state interest to support the D.C. law banning handguns.

In fact, Justice Scalia's opinion acknowledges the serious problem of handgun violence in the nation, but asserts that the Second Amendment "necessarily takes certain policy choices off the table," thus precluding laws that prohibit possession of handguns that may be used for self-defense in the home.⁵⁶ As Justice Scalia sees it, the Second Amendment precludes balancing because it "elevates above all other interests the right of right of law-abiding, responsible citizens to use arms in defense of hearth and home."⁵⁷ Hence, the opinion flatly refuses to take a balancing approach to determine the

⁵⁶ *Heller*, 128 S.Ct. at 2822.

⁵⁷ *Id.* at 2821.

permissible limitations that may be placed on the right to bear arms.⁵⁸ Justice Scalia explicitly rejects the possibility of balancing and is sharply critical of its use.

Regarding balancing, Justice Scalia states that he “know(s) no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.” He insists that “constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.” Hence, the Court “would not apply an ‘interest-balancing’ approach to the prohibition of a peaceful neo-Nazi march through Skokie.”

This simply is incorrect. Throughout its history, the Supreme Court has continuously shaped and re-shaped the scope of constitutional rights, including enumerated constitutional rights, and for many years has done so primarily through a process of balancing interests.⁵⁹ Notwithstanding Justice Scalia’s assertion to the contrary, the free speech provision of the First Amendment stands as a prominent example of the Court’s use of balancing to define the scope of an enumerated constitutional right. Balancing became an important part of First Amendment jurisprudence at a relatively early date. Justice Holmes’ clear and present danger test, first enunciated during World War I, is a form of balancing that weighs the need to restrict speech.⁶⁰ Later, the Court adopted a refined version of the clear and present danger test as part of the balancing calculus to determine when it is constitutionally

⁵⁸ *Id.* at 2821-22.

⁵⁹ See Jeffrey M. Shaman, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY ch. 1 (2001).

⁶⁰ The clear and present danger test was first used in *Schenck v. United States*, 249 U.S. 47 (1919).

permissible to regulate speech that may incite unlawful conduct.⁶¹ In 1939, in striking down an ordinance that prohibited the distribution of leaflets on the ground that it violated the First Amendment, the Court explained that “the delicate and difficult task falls upon the courts to weight the circumstances and to appraise the substantiality of the reasons advanced in support of regulation.”⁶² As a general matter, content-based regulations of speech are subject to a strict scrutiny balancing test that asks whether they are narrowly tailored to achieve a compelling state interest. Content-neutral regulations of speech are subject to an intermediate scrutiny balancing test that asks whether they are appropriately related to an important governmental interest. Although some First Amendment rules do not involve balancing, many of them do, and balancing plays a significant role in a great many First Amendment cases.

His opinion in *Heller* does not represent Justice Scalia’s first attack on the balancing process. In a concurring opinion in *Bendix Autolite Corporation v. Midwesco Enterprises, Inc.*, decided in 1988, he argued that balancing should not be used to decide dormant commerce clause cases because “the scale analogy is not really appropriate, “since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.”

This is clever, but disingenuous. It misconceives the nature the nature of balancing by casting it as a quantitative measure rather than a qualitative one. The balance or scale certainly in an appropriate analogy—or more precisely, an appropriate metaphor—that refers to the comparative assessment of individual and governmental interests. Justice Scalia should be well aware that the term “balancing” is not to be taken

⁶¹ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁶² *Schneider v. State*, 308 U.S. 147, 162-63 (1939).

literally in the sense that interests are quantitatively weighed or measured against one and other. Rather, balancing entails a qualitative weighing of interests to “appraise the substantiality of interests” relevant to the constitutional of a law.⁶³ Balancing is a process that the Supreme Court has used for many years in many cases, including cases involving enumerated constitutional rights.

Justice Scalia’s more serious objection to balancing is that it involves the making of value judgments, a task that Justice Scalia believes is beyond the competence of the Courts and that should be left to the legislature. This criticism, though, seriously misperceives the true nature of the constitutional process. The truth is that constitutional interpretation, whether done through the process of balancing, the mode of originalism, or any other methodology, necessarily involves making value choices.⁶⁴ Despite persistent myth to the contrary, the fact is that constitutional interpretation is impossible without some choosing among values or policies. *Judging*, after all, is precisely that: making judgments or choosing among values.⁶⁵

The great value of balancing is that it brings purposefulness to the process of constitutional interpretation. Balancing is a realistic means of constitutional interpretation that acknowledges that constitutional decision-making necessarily entails the making of value judgments. Balancing brings those value judgments out into the open and directs that they be made in a considered, thoughtful way. Balancing is

⁶³ *Id.* at 161.

⁶⁴ See Jeffrey M. Shaman, CONSTITUTIONAL INTERPRETATION 44-46 (2001).

⁶⁵ See William J. Brennan, Jr., Reason, Passion, and "The Progress of the Law", The Forty-Second Annual Benjamin Cardozo Lecture Delivered at the Association of the Bar of the City of New York (Sept. 17, 1987), *reprinted in* 10 Cardozo L. Rev. 3, 4-5 (1988):

Having admitted and demonstrated that judges inevitably confront value choices, Cardozo did not shrink from the implications of that admission. He rejected the prevailing myth that a judge's personal values were irrelevant to their decision process.... He attacked the myth that judges were oracles of pure reason, and insisted that we consider the role that human experience, emotion, and passion play in the judicial process.

teleological; it calls for informed decision-making done in a purposive manner.

Balancing affords transparency and rationality to constitutional adjudication.

Still, Justice Scalia thinks that balancing is “vague and open-ended.”⁶⁶ He prefers a more formal approach that is “anchored in rules, not set adrift in some multifaceted ‘balancing test.’”⁶⁷ This position overlooks the value of balancing, while ascribing an exaggerated degree of steadfastness to rules. After all, rules, like other formal categories, tend to be artificial, arbitrary, and irrational.⁶⁸ As a result, rules are highly susceptible to manipulation.⁶⁹ The “anchor” or certainty they provide can be illusory, liable to shatter at the slightest tremor. Although balancing may be open-ended, nonetheless it is decidedly more circumspect than the formalism of a rule-oriented approach. In contrast to rules, balancing is realistic and purposive, two qualities that make for more genuine certainty than the shell game of formal rules.

In *Heller*, Justice Scalia deprecates Justice Breyer for using a “judge-empowering” balancing test, implying, of course, that balancing unduly expands judicial discretion. In response, Justice Breyer notes that balancing is an approach that the Court has taken in other areas of constitutional law.⁷⁰ Indeed, balancing is used in many other areas of constitutional law to the extent that in modern times it has become the dominant judicial method of constitutional interpretation.⁷¹ Justice Breyer also explains that while balancing does require judgment, the nature of the balancing process circumscribes judicial discretion by requiring careful identification of the relevant interests and an

⁶⁶ *Intl Containers Int’l. Corp. v. Huddleston*, 507 U.S. 60, 79 (1993) (Scalia, J., concurring).

⁶⁷ *Granfinanciera v. Nordberg*, 492 U.S. 33, 70 (1989) (Scalia, J., concurring).

⁶⁸ See Jeffrey M. Shaman, *CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY* 36-44 (2001).

⁶⁹ *Id.*

⁷⁰ *Heller*, 128 S.Ct. at 2852 (Breyer, J., dissenting).

⁷¹ Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L. J. 943, 963-72 (1987).

evaluation of the law’s effect upon them.⁷² This limits the choices that a judge may make and affords transparency that lays bare the judge’s reasoning for all to see and to criticize.⁷³ It is only through balancing—that is, what Justice Breyer describes as the exercise of “judicial judgment”⁷⁴—that the Constitution can be interpreted in a purposive way that brings rationality to constitutional interpretation . While originalism glosses over the policy questions generated by constitutional adjudication, balancing attempts to answer them through the exercise of reasoned judgment.⁷⁵

IV. Conclusion

Originalism does not eliminate the necessity of making value judgments to interpret the Constitution. Instead, it obscures the policy-making aspect of constitutional interpretation by pretending that the meaning of constitutional provisions can be recovered from historical annals. We have seen, however, that the meaning of the Constitution does not reside in history and that when judges engage in originalist interpretation they recreate the past according to their own values.⁷⁶ The interpretation of history is a complicated exercise that leaves a good deal of room for the historian to make value judgments. The historian “is committed to a doomed enterprise—the quest for an unattainable objectivity.”⁷⁷ Historical analysis is a selective enterprise through which a judge imagines the past and thereby shapes it according to his or her personal vision of reality. Justice Scalia’s historical approach, then, implicates the same trait that Scalia

⁷² *Heller*, 128 S.Ct. at 2868 (Breyer, J., dissenting).

⁷³ *Id.*

⁷⁴ *Id.* at 2852.

⁷⁵ “Unless we believe that (the Framers) intended future generations to ignore such matters, answering questions such as the questions in this case requires judgment—judicial judgment exercised within a framework for constitutional analysis that guides that judgment and which makes its exercise transparent.” *Id.* at 2870.

⁷⁶ *Supra* at notes 30-49.

⁷⁷ Arthur M. Schlesinger, Jr., *supra* note 33.

himself finds so insufferable about balancing: it invests judges with discretion to read their own values into the Constitution. Moreover, the historical approach is more insidious than balancing, because it sneaks a judge's personal views into the Constitution by denying their true nature and pretending they are nothing more than the original understanding of the document. Originalism offers an illusion of objectivity by holding out the false hope that the meaning of the Constitution exists somewhere in the past.

Originalism can be a risky enterprise for judges prone to self-deception. In searching the historical record for original meaning, there is often a temptation to discover what one wants to discover.⁷⁸ A judge may think that he or she is finding the original understanding of a constitutional text, when in truth it is the judge's own beliefs that are being revealed. Earlier originalists, purportedly searching for the intent of the framers of the Constitution, were prone to this failing⁷⁹ and later-day originalists have not been immune from it, either, as shown so pointedly in the "shamelessly selective" reading of the historical record to which both Justices Scalia and Stevens fall prey in *Heller*.⁸⁰

Practitioners of originalism also have been accused of abandoning their originalist principles when it when it suits their political purposes to do so.⁸¹ William Marshall asserts that in a number of instances originalists can be seen ignoring the historical record when it conflicts with their political agenda.⁸² He concludes that originalism often devolves into "a doctrine only of convenience and not of principle."⁸³

⁷⁸ See John Hart Ely, *DEMOCRACY AND DISTRUST* 60 (1980).

⁷⁹ *Id.*

⁸⁰ See Sandy Levinson's comment *supra*, at note 39.

⁸¹ See William P. Marshall, *Constitutional Interpretation: Reclaiming the High Road*, *ADVANCE: THE J. OF THE AM. CONST. SOCIETY* ISSUE GROUPS, Fall 2007, at 89.

⁸² *Id.* at 91-92.

⁸³ *Id.* at 92.

More principled originalists may endeavor to hew more faithfully to the historical record. Even so, they are engaged in an impossible quest: the attempt to find a pre-determined meaning for the Constitution in the recesses of history. In truth, the meaning of the Constitution is not fixed in the past, nor anywhere else, for that matter. The meaning of the Constitution is perpetually evolving and can only be determined through a creative process that at best functions through purposive decision-making. Ideally, constitutional law is a vibrant, ongoing process, rooted in the past, existing in the present, and reaching for the future.