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David W. Wise

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THE CONSTITUTION AND THE INDIVIDUAL RIGHT TO POSSESS
FIREARMS: A DIFFERENT TAKE

DAVID W. WISE*

The Second Amendment has nothing to do with an individual right to possess firearms. Even the impressive success by individual right revisionists over the past four decades to persuade even strong supporters of gun regulation to genuflect before nonexistent “Second Amendment rights” does not change the fact that the Second Amendment was not intended to, and therefore does not, support an individual right to possess guns. Like the popular misconception about another common truism that “possession is nine tenths of the law,” repeating an untruth often enough to make it seem true still does not make it so. Nor does a narrow 5–4 Supreme Court ruling in *District of Columbia v. Heller*,¹ which overturned years of precedent in a court decision that even respected jurists such as, U.S. Circuit Judge J. Harvie Wilkinson III (a Reagan appointee), condemned as having “impos[ed] judicial value judgments based on thin and shaky grounds.”² Stanford’s Jack Rakove, perhaps the nation’s leading constitutional historian, declared the *Heller* decision to be “materially defective.”³

The Second Amendment is only one sentence. It includes just these twenty-seven words: “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.”⁴ (Commas excluded here). The controversy surrounds the meaning of just three of those words: “Militia” and “the people.” It is sometimes argued that “Militia” and “the people” were intended to mean the same thing, which would undermine the most extreme gun rights position. It would be impossible to cite this reading of the Second Amendment as barring all gun regulations, when that reading would not merely call for “the people” to be regulated, but “well regulated.” It is clear from the drafting history that neither James Madison, the principal author, nor the First Congress, which passed the Second Amendment, intended that this amendment apply to the populace at large, for they dropped the clause “body of the people” in the final version, and such a

* David W. Wise, a resident of Annapolis, Maryland, is a businessman who publishes frequently on public policy issues. He holds a Master of Arts in Law and Diplomacy from the Fletcher School of Law and Diplomacy at Tufts University.

1. 554 U.S. 570 (2008).

2. J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 68 (Geoffrey R. Stone ed., 2012) (alteration in original); see also J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 262 (2009).

3. See Jack N. Rakove, *Thoughts on Heller from a “Real Historian”*, BALKINIZATION (June 27, 2008), <http://balkin.blogspot.com/2008/06/thoughts-on-heller-from-real-historian.html>.

4. U.S. CONST. amend. II.

“body” would, in any event, define a collective and not an individual right.⁵ No right is absolute in any event.

The drafting history of the Second Amendment is clear. Every single version of the proposed amendment, from its inception through to the final version passed by both houses of the First Congress, dealt with arms in the military context. Some prior versions of the amendment even contained language about the rights of conscientious objectors.⁶ The context in which the amendment was debated in the state ratifying conventions was quite clearly in the context of whether the national government could disarm the state militias and leave military power solely in the hands of a standing army controlled by the national government. In a search of a congressional database of documents from the founding period, Professor Michael Dorf found that “nearly all” references to the phrase “bear arms” were in a military context.⁷ Citing an unpublished table of his own research, Saul Cornell discovered that ninety-six percent of the public references to this phrase in publications during the founding period were about a collective right.⁸ Americans might find such issues quaint today, but it was a fiercely debated issue at the time supported by contemporary political and philosophical treatises that were overwrought with fear of standing armies.

The Second Amendment does not exist in a vacuum. It is an amendment to the Constitution and must be read in reference to the entire body of the Constitution. The Constitution, as Madison stated, is a compact,⁹ a social contract among the states, and as with any contract, when a phrase has been defined in the contract, that definition is determinative and must be used in interpretation. Article I, Section 8 of the Constitution defines “Militia” as a military body with officers appointed by the states subject to call into service of the United States.¹⁰

The recent finding of an individual right has been criticized, even by some conservatives, as an example of “law office history,” which means the type of selective argument constructed by an advocate to support a desired

5. See Brief for Petitioner at 28, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 102223; see also Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 126 (2000).

6. See generally Don Higginbotham, *The Second Amendment in Historical Context*, 16 CONST. COMMENT. 263 (1999); see also Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 195–99 (2008); Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 255–57 (2008). For various iterations of the Second Amendment through the drafting history by the First Congress, see *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS* 4, 12, 30, 38–39 (Helen E. Veit et al. eds., 1991).

7. See Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 314 (2000).

8. See generally Saul Cornell, *The Original Meaning of the Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 164 n.70 (2007) [hereinafter *The Original Meaning*] (referring to his unpublished table).

9. See generally Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENT. 159 (1996).

10. U.S. CONST. art. I, § 8, cl. 16.

conclusion.¹¹ On the first step to the *Heller* decision, the U.S. Court of Appeals for the District of Columbia determined that the placement of commas in the Second Amendment rendered the first thirteen words of the one sentence amendment (forty-eight percent of the amendment) as not really having any meaning.¹² This truly Orwellian logic faces a number of problems. The three comma version of the amendment in the National Archives is different than the one comma version that was certified by Secretary of State Thomas Jefferson as the one ratified by the states. Some states ratified a two comma version. There was also a four comma version.¹³ In point of fact, commas in the 18th century were used profusely and often without clear grammatical logic, a practice that was exacerbated by the fact that different transcribers making hand-written copies had different styles. As one linguistic commentator has put it: “In the 18th Century, punctuation marks were as common as medicinal leeches and just about as scientific.”¹⁴ In addition, at the time of founding, a principle of construction was that grammatical symbols did not constitute a part of the document to be interpreted.¹⁵

In the 2008 *Heller* ruling, Justice Scalia compounds this flawed logic by stating that these thirteen words were merely a preamble that could not be used in interpretation of the sentence of which it is a part.¹⁶ It is to state the obvious that the fragment, “[a] well regulated militia being necessary to the security of a free state” does not make any sense without reference to the rest of the sentence. There are other problems with Justice Scalia’s thinking. First, Chief Justice John Marshall, in the very opinion that declared the right of judicial review stated, “[i]t cannot be presumed that any clause in the [C]onstitution is intended to be without effect”¹⁷ Second, Justice Scalia quoted the preeminent 18th century jurist, William Blackstone, in his decision, but ignores Blackstone’s own stricture that “the proeme, or preamble, is often called in to help the construction of an act of parliament.”¹⁸ In fact, here the preamble serves the purpose of limiting “the people” in this particular amendment to a defined group. Grammatical scholars have pointed out that the awkward construction of the amendment to modern eyes is an example of the Latinate absolute

11. See Saul Cornell, *Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss”*, 56 UCLA L. REV. 1095, 1098 (2009).

12. See *Parker v. District of Columbia*, 478 F.3d 370, 401 (D.C. Cir. 2007).

13. See *Commas and the Second Amendment*, GUNCITE, http://www.guncite.com/second_amendment_commas.html (last updated Jan. 28, 2013).

14. Adam Freedman, *Clause and Effect*, N.Y. TIMES (Dec. 16, 2007), http://www.nytimes.com/2007/12/16/opinion/16freedman.html?_r=0. See also Dennis Baron, *Second Amendment Grammar—The Framers Parsed It One Way, but Will the Supreme Court Agree with Their Analysis?*, THE WEB OF LANGUAGE BLOG (Mar. 16, 2008, 8:30 PM), <http://Illinois.edu/blog/view/25/3721?count=1>.

15. See *Hammock v. Farmers’ Loan & Trust Co.*, 105 U.S. 77 (1881) (citing references from late 18th century). See generally YULE KIM, CONG. RESEARCH SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (2008), available at <http://www.fas.org/sgp/crs/misc/97-589.pdf>.

16. See generally *District of Columbia v. Heller*, 554 U.S. 570 (2008).

17. *Marbury v. Madison*, 5 U.S. 137, 174 (1803).

18. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 60 (facsimile ed. 1979) (1765–69).

commonly used by educated people in the 18th century who learned Latin as part of their core curriculum, so that the implied concept of “because” at the very beginning of the amendment is understood.¹⁹ Does one person out of a thousand think that the five Catholic conservatives in the *Heller* majority would set aside the opening words of an amendment: “A well regulated pregnancy, being necessary to the creation of families as the foundation of a free state, the right of a women to make decisions about her medical treatment, shall not be infringed,” in a case involving abortion? Who would want to appear before a court on a DUI charge and cite a statute that said: “The concept of a well regulated designated driver, being necessary to the security of freeways, the right of the people to return home intoxicated in automobiles, shall not be infringed” in their defense?

In *Heller*, Justice Scalia unveiled a doctrine of “New Originalism,” which seeks to arrive at the original meaning of a law by pointedly and incomprehensibly ignoring the original intent of the authors who wrote the law, or of the ratifiers who made it a law, and trying instead to determine what the general public thought a bill meant (and often by citing authorities from decades after the founding moment). The highly respected conservative jurist Richard Posner has branded this as “faux originalism.”²⁰ Popular meaning cannot trump original intent. Popular meaning is all but impossible to determine and therefore creates an open door through which a judge could “find” any desired result.

Constitutional historians have noted that Justice Scalia’s approach is itself inconsistent with all of the leading theories of legal construction extant at the time of the origination of the Second Amendment.²¹ It certainly violates Blackstone, who wrote that “[t]he fairest and most rational method to interpret the will of a legislator is by exploring his intentions at the time when the law was made”²² Or elsewhere, when he said that interpretation depended on understanding “the evil to be remedied” by the legislator.²³ Here, the evil to be remedied is quite clearly disarmament of the state militias, as the legislative history and the ratifying conventions make manifestly clear. Professor Saul

19. See *The Second Amendment: Our Latinate Constitution*, LINGUISTICS RES. CENTER (Dec. 26, 2012), <http://blogs.utexas.edu/lrc/2012/12/26/the-second-amendment-our-latin-constitution/>; see also Freedman, *supra* note 14 (“To take an example from Horace likely to have been familiar to them: ‘Caesar, being in command of the earth, I fear neither civil war nor death by violence’ (ego nec tumultum nec mori per vim metuam, tenente Caesare terras). The main clause flows logically from the absolute clause: ‘Because Caesar commands the earth, I fear neither civil war nor death by violence.’”). Therefore, the Second Amendment would have been understood by its drafters and ratifiers as meaning: because a well regulated militia is necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. See *id.*

20. Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC (Aug. 27, 2008), <http://www.newrepublic.com/article/books/defense-looseness>.

21. See Cornell, *supra* note 11, at 1101–06. See generally *The Original Meaning*, *supra* note 8.

22. BLACKSTONE, *supra* note 18, at 59.

23. *The Original Meaning*, *supra* note 8, at 153.

Cornell, the former Director of the Second Amendment Research Center at Ohio State University, has gone so far as to state that the individual right revisionism takes place in a “Bizarro World,” where reality is the opposite of the claimed facts.²⁴ And it is true that these arguments are often based on quoting members of the Antifederalist minority to interpret the will of the Federalist majority who actually prevailed at the ratifying conventions and who were elected to the First Congress that drafted the Bill of Rights—an approach that would make as much sense as looking to the Tea Party and Fox News to determine the will of the majority that passed the Affordable Care Act. This minority did play an important role, and their arguments helped bring about the Bill of Rights. They influenced, but did not prevail, in what democratic majorities actually drafted, passed, and ratified. It is very interesting that even the late professor and judge, Robert Bork, who stands at the head of the pantheon of the conservative school of originalism, believed that the Second Amendment applied only to state militias and not individual citizens.²⁵

In *Heller*, the court reversed a unanimous Supreme Court decision, *U.S. v. Miller*,²⁶ which had stood for almost seventy years. It did so without any new historical or legislative facts that were not known to the court in 1939, and in the face of increased lethality and gun violence in the intervening years (and fostering public safety is one of the accepted purposes of government). *U.S. v. Miller* was related to the National Firearms Act, a sweeping gun control act passed by Congress in 1934. So recent is the individual rights interpretation of the Second Amendment that in passing the bill, the Second Amendment was never mentioned in the debates in either house.²⁷ Yet, the Supreme Court reversed this unanimous decision and scores of lower court rulings by a mere 5–4 vote, which sets a dangerous precedent of the Court disregarding its own integrity as an institution and becoming an unelected third legislative house—and the United States will not admit of a House of Lords. Here, the Scalia decision most closely falls into the Bizarro World by turning the *Miller* decision on its head and converting the Second Amendment from a collective right in support of state militias into an individual right in which “dangerous and unusual weapons”²⁸ that probably have the most to do with modern military context would be those most subject to regulation.

The Second Amendment has two components. The first is that the national

24. See Saul Cornell & Nathan DeNino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 504 (2004).

25. See Claudia Luther, *Bork Says State Gun Laws Constitutional*, *L.A. TIMES* (Mar. 15, 1989), http://articles.latimes.com/1989-03-15/local/me-587_1_state-gun-laws-constitutional; see also Miriam Bensimhorn, *Advocates: Point and Counterpoint, Lawrence Tribe and Robert Bork Debate the Framers’ Spacious Terms*, *LIFE*, Fall 1991 (Special Issue), at 96, 98 (“[T]he National Rifle Association is always arguing that the Second Amendment determines the right to bear arms. But I think it really is people’s right to bear arms in a militia. The NRA thinks that it protects their right to have Teflon-coated bullets. But that’s not the original understanding.” (quoting Robert Bork)).

26. 307 U.S. 174 (1939).

27. See *District of Columbia v. Heller*, 554 U.S. 570, 637–80 (2008) (Stevens, J., dissenting).

28. *Id.* at 571.

government cannot disarm state militias. As such, there is nothing to incorporate.²⁹ The second component supported a system prevailing at the time of founding, namely that members of the militia (a subset of the population) could possess arms for use when they were serving in the militia. The first of these will prevail as long as the United States exists. The second has been rendered archaic and obsolete for perhaps a hundred years, since soldiers were no longer required, and in fact were precluded, from bringing their own weapons to muster.

The foregoing notwithstanding, there is an individual right for Americans to own and possess guns. That right is acknowledged under the Ninth Amendment, which states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”³⁰ The incomplete historiography in the Scalia opinion fits better under this avenue of approach. At Lexington and Concord, the British tried to disarm the militia, not the individual. The subject of debate at the time of adoption of the Second Amendment was the disarmament of the state militias by the new central government that had replaced the British. The issue of disarming individual Americans was not on their minds and not of the moment. At the time of the passage of the Second Amendment, Americans possessed such rights to own and use weapons as they had under English law, and as handed down under common law of the United States. However strong that right may be, it is not the subject here. It is important to note that the right was not created by the Ninth Amendment, but acknowledged by it.

Similarly, the right to regulate firearms possessed by individuals was and is subject to the police powers of the state and local governments as it was passed down to the United States from English common law, as a “reserved” right of the states acknowledged under the Tenth Amendment as well as under regulation of interstate commerce. Regulation of firearms has been practiced from the founding era up to the present day.³¹ It is an undisputed aspect of police power and the legitimate purpose of government to “insure domestic tranquility” and to “promote the general welfare” and to ensure public safety. Even in the “wild west” that has assumed the status of national myth, it was not uncommon to come under gun regulations upon entering a town.³² On gun rights, as in several other highly contentious areas, the national solution is to be found in the federal nature of our complex Constitutional system of shared sovereignty.

29. See generally *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (decided in error in view of author of this essay).

30. U.S. CONST. amend. IX. Note the odd use of commas in this clause. See *id.*

31. See Cornell & DeNino, *supra* note 24, at 504; see also *Heller*, 554 U.S. at 681–724 (Breyer, J., dissenting).

32. In fact, the infamous gunfight at O.K. Corral was instigated by the marshal attempting to enforce the law to check firearms. See Bob Drogin, *Gun Laws Were Tougher in Old Tombstone*, L.A. TIMES (Jan. 23, 2011), <http://articles.latimes.com/2011/jan/23/nation/la-na-tombstone-20110123>; Adam Winkler, *Did the Wild West Have More Gun Control than We Do Today?*, HUFF. POST (Sept. 9, 2011), http://www.huffingtonpost.com/adam-winkler/did-the-wild-west-have-mo_b_956035.html.