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INTRODUCTION

What is the right theory of constitutional interpretation? As Justice Scalia once scathingly remarked in a very different context, that question may be "about as helpful [as saying] 'life is a fountain.'"[1] Not only are there as many theories of constitutional interpretation as the budgets for constitutional law professor chairs will bear, but the debate is never ending and devoid even of measuring criteria, let alone principled boundaries.[2]

Justice Scalia has also intoned, "It's a pizzazzy topic: Constitutional Interpretation."[3] (Pizzazzy—now there's a term with which I would wager the Framers were not familiar.) Perhaps not coincidentally, it is also the last topic of today's Friday the thirteenth Symposium—because the topic is a bit scary, both in its intellectual breadth and depth. For

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As Professor Sandy Levinson commented in his opening keynote remarks for this Symposium, evaluating the effect of Supreme Court decisions is a long-term venture, and it is "too early to tell" about *Heller*. *See* Sanford Levinson, *Why Didn't the Supreme Court Take My Advice in the* Heller *Case? Some Speculative Responses to an Egocentric Question*, 60 HASTINGS L.J. 1291, 1305 (2009). Of course he is correct. Nevertheless, I believe it is the responsibility of an academic to provoke and not merely to inform—particularly in the late afternoon of an all-day conference. Hence my title, and the Essay that follows.

1. H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 252 (1989) (Scalia, J., concurring in judgment). *But see* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1129 (2003) (asserting that "there *is* a single, 'true' method of constitutional interpretation").

2. *Cf.* Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 32 ("I cannot discern any principles in the pattern of the Supreme Court's constitutional interpretations.").

3. Antonin Scalia, Constitutional Interpretation the Old Fashioned Way (Mar. 14, 2005) (transcript available at http://www.cfif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.htm).

example, a LexisNexis search for law review articles with "constitutional interpretation" just in their *titles* yields a list of 244 articles in the past thirty years, produced by some of the finest minds in the academy.[4]

Indeed, merely the semantics of constitutional interpretive schools can be mind-boggling. There are textualists;[5] structuralists;[6] doctrinalists;[7] strict constructionists;[8] "loose constructionists;"[9] and originalists of many different types:[10] "skyscraper,"[11] "framework,"[12] faint-hearted,[13] lefty,[14] negative, progressive,[15] "abduced-principle,"[16] and even living originalists.[17] There are text- and principle-ists,[18] living constitutionalists,[19] pragmatists,[20] and those who advocate "the philosophic approach."[21] No

4. The search was in the "Law Reviews, CLE, Legal Journals & Periodicals, Combined" database for "TITLE ("constitutional interpretation")" and was date restricted to the last thirty years. The search was conducted on April 16, 2009.

5. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (1997) ("Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute.").

6. *See, e.g.*, CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE (1995).

7. *See, e.g.*, Brannon P. Denning, *The New Doctrinalism in Constitutional Scholarship and* District of Columbia v. Heller, 75 TENN. L. REV. 789, 790–93 (2008); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996).

8. *See* Morell E. Mullins, Sr., *Coming to Terms with Strict and Liberal Construction*, 64 ALB. L. REV. 9 (2000).

9. *See id.*

10. *See generally* JONATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2005).

11. Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 550 (2009) (coining both the "skyscraper" and "framework" labels). In this typically provocative article, Professor Balkin begins with the startling claim, in his very first sentence, that "[o]riginal meaning originalism and living constitutionalism are compatible positions." *Id.* at 549.

12. *Id.*

13. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989); *see* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006).

14. *See* Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 353 (2007).

15. *See* Jess Bravin, *Rethinking Original Intent*, WALL. ST. J., Mar. 14, 2009, at W3.

16. *See, e.g.*, Lee J. Strang, *Originalism and the "Challenge of Change": Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 930 (2009).

17. Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. (forthcoming Nov. 2009) (manuscript at 58), *available at* http://ssrn.com/abstract=1090282 ("Originalism . . . is . . . a loose collection of a staggering array of often inconsistent approaches . . . .").

18. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295 (2008).

19. *See* Leib, *supra* note 14.

20. *See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY (2002); R. George Wright, *Dependence and Hierarchy Among Constitutional Theories*, 70 BROOK. L. REV. 141, 144 (2004).

21. In their book on constitutional interpretation, Professors Sotirios Barber and James Fleming canvass a number of these methods and come down in favor of "the philosophic approach," which they liken to Ronald Dworkin's "moral reading" of the Constitution. SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS xiii (2007) (citing RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996)).

doubt the scholars here today could easily add a half dozen or more other labels to my list. Moreover, "originalism" is hardly a unified or monolithic theory. Professors Thomas Colby and Peter Smith have recently demonstrated that the rifts within the "originalist" camp are deep and many.[22]

In his 1997 book *A Matter of Interpretation*, Justice Scalia—perhaps the most accomplished legal scholar ever to sit on the Supreme Court[23]—described the "Great Divide" in constitutional interpretation: "that between *original* meaning (whether derived from the Framers' intent or not) and *current* meaning."[24] Justice Scalia is, of course, no fan of the latter, and spends the remainder of his essay deriding the extreme straw man concept that he has thereby created. Of course, no one believes that some "current" meaning of the Constitution *solely* must govern, unmoored to any facet of text or history, any more than Justice Scalia believes that pure originalism should control.[25]

More to the point, however, is the fact that Justice Scalia's dichotomy is a false one. In reality, the Maoist metaphor of "let a thousand flowers bloom" more accurately describes the landscape of constitutional-interpretative theory. Not only are there dozens of competing theories and nuances within theories, but new theories continue to be presented and old ones evolve, two centuries after *Marbury v. Madison*,[26] presenting new labels and ideas.[27]

Today, the *Heller* majority opinion may demonstrate that it is originalism that is currently "ascendant."[28] Yet the implications of *Heller*'s almost purely originalist approach for future constitutional interpretive questions are far from clear. In fact, I will briefly argue that the implications of the *Heller* majority opinion demonstrate that its purely originalist approach to constitutional interpretation, and indeed

22. Colby & Smith, *supra* note 17 (manuscript at 4). To be fair, this is also true of originalism's doppelganger, "living constitutionalism." *Compare* Leib, *supra* note 14, *with* Balkin, *supra* note 12.

23. By this I mean to describe highly-regarded law professors who then served with distinction on the Court. Some would no doubt prefer Justice Felix Frankfurter for this honorific. Other nominees might include Justices Stephen Breyer and Louis Brandeis.

24. SCALIA, *supra* note 5, at 38.

25. Scalia, *supra* note 13 (explaining that his brand of originalism is "faint-hearted" because, among other things, "in a crunch" he could not uphold "a statute that imposes the punishment of flogging," even if the punishment were accepted at the time of the Eighth Amendment's framing).

26. 5 U.S. (1 Cranch) 137 (1803).

27. *E.g.*, Balkin, *supra* note 12; *see also* ALAN GIBSON, INTERPRETING THE FOUNDING: GUIDE TO THE ENDURING DEBATES OVER THE ORIGINS AND FOUNDATIONS OF THE AMERICAN REPUBLIC vii (2006) ("Scholarship on the American Founding continues to be produced at an unprecedented pace.").

28. As Professor Ethan Leib recently wrote, "It certainly seems like the originalists are winning." Leib, *supra* note 14. *But see* SCALIA, *supra* note 5, at 38 (claiming in 1997 that it is the "Living Constitution" approach to constitutional interpretation that is "ascendant"). Of course, today's apparent ascendancy of "originalism" is due largely, if not entirely, to Justice Scalia's immense intellectual influence in this field.

the majority opinion itself—as well as Justice Scalia personally—are moved *by necessity* toward a theory more akin to "living constitutionalism" than originalism.

I. *HELLER*: THICK AND PURE ORIGINALISM

Heller's originalism is both "thick" and "pure." By this, I mean that its laborious historical detail is unprecedented for a constitutional Supreme Court decision (it is thus "thick" with historical detail); and the decision's constitutional analysis begins and ends solely with that history, making it "purely" originalist. My contention is that the unprecedented thickness and single-minded purity of *Heller*'s originalism are in fact indicators of its morbidity. *Heller* in fact is the "last gasp" of originalism.

I say *Heller* is originalism's "last gasp"[29] in the sense of being a much heavier, almost desperate, attempt to give life to the subject—just before the subject expires.[30]

In this sense—the sense of a deep, huge, expiring gasp—the historiography in *Heller* seems quite overblown. No prior Supreme Court decision has ever gone to such great depth or length to mine the historical sources in its search for meaning. Now, Judge Wilkinson attributes this to "law office history"[31]—the strained efforts of advocates, and the legions of law clerks and researchers at the Court's disposal, to find every shred of evidence that might support their position (as opposed to an unbiased search for all sources).[32] One might also add to this the immense and easily accessible wealth of materials now searchable via the Internet. But even after one slogs through all forty-five slip opinion pages of the *Heller* majority's historical effort, the impression is one of much more heat than light. Moreover, any overall feeling one might have of being impressed is quickly dispelled by Justice Stevens's equally impressive (if also equally one-sided), and directly contrary, historiography in dissent.[33]

Moreover, *Heller* is more purely, more single-mindedly, originalist than any prior constitutional interpretation by the Supreme Court. Even when the Court mines history for original meaning, it usually follows

29. *See* The Free Online Dictionary, http://www.thefreedictionary.com/last+gasp (last visited June 10, 2009) ("LAST GASP—the point of death or exhaustion or completion; 'the last gasp of the cold war' *end, ending*—the point in time at which something ends").

30. *Cf.* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 256 (2009) ("While *Heller* can be hailed as a triumph of originalism, it can just as easily be seen as the opposite . . . .").

31. *See, e.g.*, John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 196 (1993).

32. *See* Wilkinson, *supra* note 30, at 271–72.

33. As Judge Wilkinson noted in his masterful *Heller* critique published—on the web—quickly after the decision itself, "For every persuasive thrust by one side, the other has an equally persuasive parry. . . . It is hard to look at all this evidence and come away thinking that one side is clearly right . . . ." *Id.* at 271.

with a discussion of other "modalities" as Professor Ethan Leib terms them—doctrine, consequences, prudence, practice, even morality.[34] Not so in *Heller*. Once the majority is done with history, it is done—with only an over-the-shoulder nod to more recent precedents, and a dismissive one-sentence reference, without even an attempt at substantive rebuttal, to Justice Breyer's "exhaustive discussion of the arguments for and against gun control."[35]

In fact, it may easily be claimed that no prior Supreme Court decision of constitutional interpretation has ever been so single-mindedly limited to a purely historical analysis. Rather than provide a comparative string cite of prior constitution-interpreting decisions, I challenge the reader to propose any other such decision that rests, so solely and in such exhaustive historical detail, on eighteenth-century history.

II. *HELLER*'S UNSUPPORTED EXCEPTIONS: ORIGINALISM'S LAST GASP

Heller is also a "last gasp," however, because even as it proclaims textual originalism more loudly and purely than any prior constitutional decision, it ultimately leaves originalism behind. As the last breath leaves the originalist body of *Heller*, a ghost-like image of "living constitutionalism" arises, wraith-like, from the corpse. In a transparent effort to not upset the present-day order too much (whatever the "original meaning" may have been), Justice Scalia offers this plainly un-originalist—as well as unsupported by any citation—closing thought:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings,[36] or laws imposing conditions and qualifications on the commercial sale of arms.[37]

Judge Wilkinson has already amply chided the majority for this non-originalist "judicial lawmaking. . . . The Constitution's text, at least, has as little to say about restrictions on firearm ownership by felons as it does about the trimesters of pregnancy."[38] And in today's Symposium, Professor Carlton Larson's wonderful historical exegesis for what he calls

34. Leib, *supra* note 14, at 358, 361 (citing PHILIP C. BOBBITT, CONSTITUTIONAL INTERPRETATION 13–14 (1991)).

35. District of Columbia v. Heller, 128 S. Ct. 2783, 2812–16, 2821 (2008). The majority simply states, "After an exhaustive discussion of the arguments for and against gun control, Justice Breyer arrives at his interest-balanced answer . . . ." *Id.* at 2821. The majority then simply objects to such a "freestanding 'interest-balancing' approach" without discussing any substantive arguments in rebuttal to Justice Breyer's claims. *Id.*

36. Or airports. One can only wonder (smile) why the Framers did not mention airports, clearly a "sensitive place" where government might sensibly ban guns, in their Second Amendment debates.

37. *Heller*, 128 S. Ct. at 2816–17.

38. Wilkinson, *supra* note 30, at 273.

the "four *Heller* exceptions" demonstrates the lack of originalist support.[39] But I think the majority's unexplained endorsement of exceptions shows more than "judicial lawmaking." In fact, it demonstrates that even the purest originalist cannot resist the tug to implement, nay, to transport, the "original meaning" into the context and experience of our living age.

III. ORIGINALISM GONE WILD: EVEN THE *HELLER* DISSENTERS

That the constitutional interpretive approach employed by the majority in *Heller* is an originalist one seems to be widely accepted. There are well over a dozen scholarly articles that have been generated, in only the first eight months since *Heller* was decided, with the word "originalist" or "originalism" in the title.[40] The majority opinion begins and virtually ends (except for the unexplained exceptions) entirely on the historical, originalist battlefield. Thus, Justice Scalia begins by explaining that the interpretive task for the Court is to discover how "[t]he Constitution was written to be understood by the voters"[41]—voters in 1791, not in 1976 (when the law in *Heller* was enacted[42]), or in 2009. Fifty slip opinion pages later—pages filled mainly with history and nineteenth-century dictionaries, as well as a brief discussion of precedent and then some rebuttal of the dissenting opinions—the majority concludes, again with history overcoming current realities: "Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem."[43] But whatever one may think of these points, says Justice Scalia, it "is not debatable," and "it is not the role of this Court," to allow current realities to overcome the Court's 5-4 view of history.[44] Tough noogies, says Justice Scalia: historical originalism prevails.

More surprising, perhaps, than the majority's pure originalism, is the seemingly complete concession of this ground to the Court by the principal *Heller* dissent. Indeed, there is no strong voice for the "Living Constitution" to be found in the ninety pages comprising two dissents in *Heller*.[45] No Justice Warren or Brennan, let alone Douglas, to champion

39. Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial* Ipse Dixit, 60 HASTINGS L.J. 1371 (2009).

40. Search on LexisNexis in "Law Reviews, CLE, Legal Journals & Periodicals, Combined" with source string [TITLE("original!") & Heller] and date restricted from June 26, 2008 to present. The search was conducted on April 16, 2009.

41. *Heller*, 128 S. Ct. at 2788 (alteration in original) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)).

42. *Id.* at 2854 (Breyer, J., dissenting) (discussing the history of the D.C. statute at issue).

43. *Id.* at 2822 (majority opinion).

44. *Id.*

45. *See id.* at 2822–47 (Stevens, J., dissenting); *id.* at 2847–70 (Breyer, J., dissenting).

the "evolving standards of decency" regarding handguns in the home.[46] Indeed, Justice Stevens's principal dissent is entirely directed at trying to beat Justice Scalia on his own ground—a well-done, but ultimately fruitless, tilting at the Champion of Originalism.[47]

Even Justice Breyer's pragmatic, twenty-first century discussion of handgun dangers and control proceeds under a muted version of the Warren Court's unabashed contemporarianism.[48] Justice Breyer begins with his own eighteenth-century historical examples.[49] He takes on the majority on more pragmatic grounds only after this,[50] and only in an academic "even assuming they are right" sort of way.[51] This is hardly a ringing endorsement of a possible "living constitutionalist" position: that, perhaps, the Framers intended the Second Amendment to "evolve" to meet modern realities as weaponry, police forces, the army, and militia, all changed and improved since 1789.[52]

How different this constitutional interpretive approach looks, as I briefly examine below, from any of the Supreme Court's prior decisions mining other Bill of Rights provisions. And this is true from the

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46. Chief Justice Earl Warren first advanced the phrase "evolving standards of decency" to describe from whence the "[Eighth] Amendment must draw its meaning" in *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Over the next thirty years, Justice Brennan carried on and developed the concept, perhaps as best described in his 1985 Georgetown lecture. *See* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986) (originally delivered as speech at Georgetown University).

47. Justice Stevens's dissent presents forty-five slip opinion pages of history and discussion of precedent. *See Heller*, 128 S. Ct. at 2822–46 (Stevens, J., dissenting). Acknowledging that Justice Stevens argued entirely on history, Judge Richard Posner believes Justice Stevens had the better of the argument. Posner, *supra* note 2, at 35. But whatever one may think of the persuasive force of Justice Stevens's historicism, the point remains that he lost 5–4 in the vote that mattered. *Cf.* MIGUEL DE CERVANTES, DON QUIXOTE 58–59 (Edith Grossman trans., 2003) (1615) (another knight-errant tilting at windmills). The honorific "Champion of Originalism" is my own invention.

48. *See Heller*, 128 S. Ct. at 2847 (Breyer, J., dissenting). By "contemporarianism," if I am coining this term, I mean the use of an interpretive lens that is informed by contemporary realities and a society and world increasingly distant from the Framers' time. At the height of the non-originalist Warren Court era in the 1960s, Chief Justice Earl Warren was famous for asking, at oral argument, "is it fair?" *See* Roger J. Traynor, *Chief Justice Warren's Fair Question*, 58 GEO. L.J. 1, 5 (1969). The lack of regard for historical originalism in that simple and often dispositive question, is apparent.

49. *Heller*, 128 S. Ct. at 2848–50 (Breyer, J., dissenting).

50. *Id.* at 2850 ("[T]o answer the questions that are raised . . . requires us to focus on practicalities . . . .").

51. *See id.* To be sure, Justice Breyer does not think that history supports the majority. But his constitutional analysis proceeds by noting only that "to raise a self-defense question is not to answer it," but merely to begin the interpretive enterprise. *Id.* The majority, of course, posits self-defense as the Second Amendment (if nonliteral) answer, not a question.

52. To be fair, Justice Breyer does in the end ask a "living constitutionalist" question: "how should [the Second Amendment] be applied to modern-day circumstances that [the Framers] could not have anticipated?" *Id.* at 2870. He then poses some of these circumstances, and states that "[u]nless we believe that [the Framers] intended future generations to ignore such matters, . . . [o]ne cannot answer those questions by combining inconclusive historical research with judicial *ipse dixit*." *Id.*

viewpoint of any prior generation, back into the nineteenth century—even of Chief Justice John Marshall, a contemporary of the Framers—and not just of the Warren Court's decisions.

IV. LIVING CONSTITUTIONALISM: NOT A NEW THEORY

A brief aside: Justice Scalia has recently declaimed that "living constitutionalism" is a new, twentieth-century interpretive method, and that "originalism" is the Framers' one true faith.[53] I think there is considerable reason to doubt this historical claim, and that an examination of the Supreme Court's pre–Civil War constitutional discussions would demonstrate that much more than "originalism" was going on. Recall on this point the Court's broad and nonliteral interpretation of the "Necessary and Proper" Clause in *McCulloch v. Maryland*.[54] Or Chief Justice Marshall's famous nonliteral, and possibly non-originalist, declaration in *Marbury* that it is the province of the Supreme Court to say, supremely, what the law is.[55] At the very least, important structuralist and other policy-oriented discussions are present even in these early constitutional interpretations.

And one can hardly forget Justice Holmes's dramatic assertion, almost 100 years ago, of a "living Constitutionalist" approach in *Missouri v. Holland*, interpreting the Tenth Amendment:

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have *called into life a being* the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had *created an organism* . . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. . . . We must consider what this country has become in deciding what [the Tenth] Amendment has reserved.[56]

But for specific examples of other Bill of Rights constitutional interpretation decisions, let us look at three hopefully familiar examples, rendered by the Court many generations apart, starting over 120 years ago. It is unsurprising, perhaps, that my somewhat arbitrarily chosen examples are criminal procedure cases. The Bill of Rights, where the Second Amendment is found, is heavily occupied with criminal procedure rights. It is also what I teach—I call it "Con Law III."[57] But I

53. *See generally* Scalia, *supra* note 3.

54. 17 U.S. (1 Wheat.) 316, 324 (1819).

55. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

56. 252 U.S. 416, 433–34 (1920) (emphasis added); *see also* INS v. Chadha, 462 U.S. 919, 978 (1983) (White, J., dissenting) ("[T]he wisdom of the Framers was to anticipate that the Nation would grow and new problems of governance would require different solutions."); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

57. This is by reference to the canon at many law schools, to teach "Constitutional Law I:

believe my point would be well represented were we to examine civil First, Fifth, or Seventh Amendment decisions as well.[58]

A. *Boyd v. United States*

For example, over 120 years ago, when the Court first addressed, in its 1886 *Boyd* decision, the meaning of the Fourth Amendment as applied to the compelled production of documents, it noted that the practice was new, in 1863, and unprecedented in the United States or Great Britain.[59] The Court said it could find no relevant "contemporary construction of the Constitution," but there was no examination of history or sources to demonstrate this.[60] The Court did recite the general history that led the Framers to propose the Fourth Amendment—discontent with the British "general" and nonjudicial writs of assistance—but only for the "principles" it laid down for interpretation and application of the Amendment.[61] (This approach is echoed in Justice Stevens's *Heller* dissent, when he discusses the history that led to the Second Amendment for the principles it yields, rather than for its precise historical content.[62]) The *Boyd* Court then wrote its famous (if now slightly devalued by the overruling of *Boyd*'s specific holdings[63]) nontextual and non-originalist description of the Fourth Amendment's spirit: "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . this sacred right."[64]

Structure and Powers" and "Constitutional Law II: Individual Rights and Liberties." The standard criminal procedure course (unlike its civil procedure equivalent) focuses almost entirely on the constitutional rights found in the Fourth, Fifth, and Sixth Amendments.

58. Not to mention the Tenth Amendment. *See supra* text accompanying note 56. For a modern example of the Court taking into account modern-day realities when interpreting constitutional text in a civil-law context, see Justice Scalia's own majority opinion for the Court under the Fifth Amendment's Takings Clause in *Lucas v. South Carolina Coastal Council*. 505 U.S. 1003, 1014 (1992) (endorsing the view, first espoused by Justice Holmes, "that if the protection against physical appropriations of private property was to be *meaningfully enforced*, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits" (emphasis added)).

59. Boyd v. United States, 116 U.S. 616, 622–23 (1886).

60. *Id.* at 622.

61. *Id.* at 624–26, 630.

62. *E.g.*, District of Columbia v. Heller, 128 S. Ct. 2783, 2822, 2831–36 (2008) (Stevens, J., dissenting).

63. *See* United States v. Doe, 465 U.S. 605 (1984); Andresen v. Maryland, 427 U.S. 463 (1976); Fisher v. United States, 425 U.S. 391 (1976); Warden v. Hayden, 387 U.S. 294 (1967).

64. *Boyd*, 116 U.S. at 630.

B. *POWELL V. ALABAMA*

Two generations, ten Presidents, and twenty-nine Justices[65] after *Boyd*'s non-originalist constitutional interpretive approach, the Court again confronted for the first time the assertion of a Bill of Rights protection in another unprecedented context. In *Powell v. Alabama*, the African American defendants known as the "Scottsboro Boys" asserted that they had been denied the right to counsel under the Sixth Amendment, even though they in fact *had* had counsel for their one-day "trial" and had failed to retain a lawyer—not actively been denied a lawyer—prior to the start of trial.[66] These defendants were, of course, indigent, and the racial politics of the day and place were overwhelmingly obvious in their draconian and unjust treatment.[67] But the Court hardly adverted to these realities, and instead found that the Sixth Amendment (well, technically the Fourteenth[68]) required not only that the defendants have the assistance of counsel during the *pre-trial* preparation period, itself a nontextual interpretation, but also that—truly nontextual, and surely a non-originalist horror of horrors—the State had to *pay* for their lawyer(s).[69] Whatever else the Framers may have meant, and the 1791 or 1868 ratifiers understood, in the Sixth Amendment, they surely had no inkling that the provision would require the government to *pay* for the assistance of counsel.

Again, the correctness of this constitutional conclusion is not the object of my attention. Rather, the interpretive method is. In concluding that the Sixth Amendment's guarantee of the "assistance of counsel" in "all criminal prosecutions"[70] extended to the pre-trial investigative period, the Court did not even advert to the existence of an originalist, historical perspective. It simply examined the facts of the case and concluded that "[t]o decide otherwise, would simply be to ignore actualities."[71] Then, to determine whether the Fourteenth Amendment's conception of "due process" encompassed the right to counsel, the Court looked to the historical fact that a right to counsel in at least capital

65. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW lxxxii–xcii (5th ed. 2005) (chart of Justices and Presidents).

66. 287 U.S. 45, 56–58 (1932).

67. The use of "boys" itself evidenced the prejudices of the time. *See generally* JAMES GOODMAN, STORIES OF SCOTTSBORO (1995).

68. *Powell* was decided before the incorporation doctrine was adopted by the Supreme Court, and thus *Powell* discussed "due process" rather than the Sixth Amendment directly. *See* 287 U.S. at 65–66.

69. This is the practical effect of the Court's holding in *Powell* that the failure "to make an effective appointment of counsel was . . . a denial of due process," 287 U.S. at 71, and was later made explicit by the Court in *Gideon v. Wainwright*, 372 U.S. 375 (1963).

70. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

71. *Powell*, 287 U.S. at 58.

criminal prosecutions was recognized by "twelve of the thirteen colonies."[72] That was the extent of the Court's historiography; there was no examination of anything the Framers, of either the Sixth or the Fourteenth Amendments,[73] might have thought, said, or understood about the topic.

C. *MIRANDA V. ARIZONA*

Finally, in a quintessential display of a markedly different constitutional interpretive method, we can examine the Court's 1966 decision in *Miranda v. Arizona*.[74] It will cause no surprise, and requires little demonstration, to assert that the *Miranda* Court did not employ a historical, textual, or originalist approach. After briefly quoting an earlier decision outlining the British hostility to compelled confessions,[75] Chief Justice Warren's opinion for the Court was off to the "living constitutionalist" races: discussion of contemporary police practices, prior efforts to reign them in, "experience in some other countries,"[76] and the Court's recent precedents, led firmly, if not originalistically, to the constitutional meaning of the Fifth Amendment as applied to custodial law enforcement interrogations.

Now, one might simply reject *Miranda* as wrongly decided—although when confronted with that very question forty years later, one of *Miranda*'s strongest original critics, then–Chief Justice Rehnquist, instead endorsed the constitutional status of *Miranda*'s nontextual, non-originalist rules.[77] His opinion in *Dickerson v. United States* was itself remarkably un-originalist, even going so far as to rely on television and motion pictures, hardly within the Framers' contemplation.[78] But right or wrong, it is *Miranda* that is more representative of the Court's constitutional interpretive approach over the centuries: a discussion of consequences, policies, and modern day realities, in addition to history and sometimes in contravention of it. Originalism simply has not been the standard. Instead, when accurately viewed in the light of constitutional history,[79] originalism represents Justice Scalia's almost single-handed, late-twentieth and twenty-first century effort to stem the

72. *Id.* at 64.

73. The Sixth Amendment was ratified in 1791. The Fourteenth Amendment was ratified in 1868.

74. 384 U.S. 436 (1966).

75. *Id.* at 442–43, 459.

76. *Id.* at 486 (another Justice Scalia bugaboo); *see also* Roper v. Simmons, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting) ("Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.").

77. *Cf.* Michigan v. Tucker, 417 U.S. 433, 444, 446 (1974) (stating, in opinion written by Justice Rehnquist, that the *Miranda* warnings are "not themselves rights protected by the Constitution but [are] instead" merely "prophylactic" judge-made rules).

78. 530 U.S. 428, 443–44 (2000).

79. Of course I recognize, and enjoy, the smiling irony of this phrase.

tide and shift the battleground, in the face of a relatively steady "living" interpretive approach, and creeping and increasingly different modern day realities.[80]

No doubt my selection of three Bill of Rights cases from the past many generations of constitutional interpretation is arbitrary; but I do not think it unrepresentative. Perhaps I am belaboring an obvious point: *Heller*'s interpretive method is different—different from any similar constitutional opinion the Court has ever issued, in its single-minded, beginning-to-end, reliance on originalist history and analysis. Does this make it illegitimate? Hardly. But its very intensity should give pause to anyone who thinks *Heller* will henceforth represent the Court's exclusive constitutional interpretive approach. "The lady doth protest too much, methinks" is the Shakespearean jibe when one's overblown denials actually suggest admission.[81] *Heller*'s overblown originalism actually hides its non-originalist approach. It is a powerful last gasp, dooming the theory to the archives as we draw further and further away into realities the Framers did not and could not foresee. Assault weapons and M-16s in the hand of felons and the criminally insane? Not on any anyone's watch, originalist or otherwise.[82]

V. WE ARE ALL "LIVING ORIGINALISTS"

Now, I should rush to note that this Essay is *not* a broadside attack on the use of history, or text, or the thinking of the Framers as aids to constitutional interpretation. I certainly believe that text and history are, appropriately, the starting point (and even the end in some cases) of constitutional interpretation.[83] Neither is mine a claim that the Constitution is entirely open ended, with an entirely new meaning possible in every generation.[84] Rather, I focus my guns (another bad pun) only on the purely originalist approach of *Heller*, lacking any discussion of, and refusing to acknowledge any relevance for, modern-day realities. I find that approach to be unprecedented, overblown, and in fact representative of the death rattle of a purely originalist approach.

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80. *See* Barnett, *supra* note 13, at 9 (noting that Justice Scalia was "perhaps the first defender of originalism" to advance the modern-day conception of the approach); Colby & Smith, *supra* note 17 (manuscript at 7) (describing Justice Scalia as a leader in the campaign to defend and revitalize originalism).

81. WILLIAM SHAKESPEARE, HAMLET act 3, sc. 2, at 242–43 (Jack R. Crawford eds., Yale Univ. Press 1917).

82. After drafting this Essay, I was pleased to receive a copy of a new book which substantially agrees with the views on constitutional interpretation discussed herein. *See* GOODWIN LIU ET AL., KEEPING FAITH WITH THE CONSTITUTION (2009).

83. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1233, 1279 (1995).

84. Professor Leib's description of his own constitutional interpretive theory perhaps approaches this expansive view. *See* Leib, *supra* note 14, at 370.

Indeed, the necessity for even the Champion of Originalism to be a closet Living Constitutionalist is exposed directly in *Heller*. In the end, *Heller*'s analysis is itself plainly non-originalist. After referring only, if exhaustively, to history to establish the "original meaning" of the Second Amendment[85]—and then asserting that that meaning is binding, simply by the fact that it was clear in 1791[86]—Justice Scalia's opinion suddenly lurches into the twenty-first century. Noting that "we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment"[87]—and this modesty is unbecoming, since there is absolutely *no* historical analysis for what follows—Justice Scalia then endorses all of the modern-day restrictions on gun ownership that we have come to accept without question, going so far as to declare them "presumptively lawful."[88]

While the majority's un-cite-supported list of exceptions to the "original meaning" draws on commonsense and modern-day experience,[89] the assertion that the list is "presumptively lawful"—without any originalist analysis whatsoever—comes entirely out of thin air. Indeed, it is activist living constitutionalism at its best: the Second Amendment must be interpreted to permit restrictions that America's evolution has demonstrated are sensible and necessary. History must give way to reality. The dead hands of the Framers—whether or not their children took their hunting guns to school with them[90]—cannot govern the living two centuries hence.[91]

VI. JUSTICE SCALIA'S OWN NON-ORIGINALISM

Moreover, although he would surely contest this point, Justice Scalia has hardly been consistent in his constitutional interpretive approach. Two criminal procedure cases which he has authored in the twenty-first century—*Kyllo v. United States*[92] and *Blakely v. Washington*[93]—perhaps best demonstrate this point.

In *Kyllo*, holding that the detection of heat energy outside of a house by officers using a "thermal imager" on a public street constituted a

85. District of Columbia v. Heller, 128 S. Ct. 2783, 2788–804 (2008).

86. *See, e.g.*, *id.* at 2822 ("We are aware of the problem of handgun violence in this country, . . . [b]ut the enshrinement of constitutional rights necessarily takes certain policy choices off the table."); *id.* at 2817 ("[T]he fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.").

87. *Id.* at 2816.

88. *Id.* at 2816 n.26.

89. *See supra* note 37 and accompanying text (discussing these exceptions).

90. Lacking any specific historical support for this imagery, I must leave it to the reader's imagination for evaluation of its plausibility.

91. *Cf.* Leib, *supra* note 14, at 359 ("Living constitutionalists are plagued by anxiety about the dead hand of the past.").

92. 533 U.S. 27 (2001).

93. 542 U.S. 296 (2004).

Fourth Amendment "search," Justice Scalia began by noting the "advance of technology" ("technology": another term not found in the Framers' lexicon), then discussed the nontextual concept of "privacy" as "secured" by the Fourth Amendment—shades of the radical Douglas!—and then posited, far from the actual "Question Presented" in the case, that "[t]he question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy."[94] Surely at this moment, Justice Scalia was not himself, but was rather channeling the spirit of the living constitutionalist Justice Brennan, only recently departed from this Earth.[95]

But then, only four years later in *Blakely*, Justice Scalia found himself again overcome by the spirits of an "evolving Constitution." Applying the already wildly nontextual Sixth Amendment rule of *Apprendi v. New Jersey* that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum [sentence] must be submitted to a jury" not to a judge,[96] Justice Scalia confronted the question how this rule might apply to mandatory criminal sentencing regulations that require imposition of sentences well *within* a statutory maximum.[97] With typical chutzpah (another non-originalist concept), Justice Scalia proclaimed that "[o]ur precedents make clear" the answer to this question: of course, *Apprendi* applies to mandatory guideline sentencing facts within—not just "beyond"—a statutory maximum.[98] But it was Justice Scalia's explanation for reaching this nontextual (not to mention non-obvious) result that demonstrates his closet living constitutionalism: "Our [result] . . . reflects . . . the need to give intelligible content to the right of jury trial."[99] While invoking "the Framers" at every point (as though he had a direct texting, not textual, relationship with them), Justice Scalia is forced to explain that his opinion in *Blakely* actually "carries out [the Framers'] design,"[100] not that

94. *Kyllo*, 533 U.S. at 33–35.

95. Justice Brennan died in 1997. His approach to constitutional interpretation was perhaps most broadly laid out in his 1985 Georgetown lecture. *See* Brennan, *supra* note 46.

96. 530 U.S. 466, 490 (2000).

97. Blakely v. Washington, 542 U.S. 296, 303 (2004). Of course, the concept of sentencing guidelines was not within the Framers' ken, let alone intention. The Framers were, however—and contrary to *Apprendi*'s erroneous historical claim, *see* 530 U.S. at 482–84—familiar with discretionary sentencing ranges, since they enacted a number of them in 1790, and understood that judges would be choosing sentences within those ranges. *See* Rory K. Little & Theresa Chen, *The Lost History of* Apprendi *and the* Blakely *Petition for Rehearing*, 17 FED. SENT'G. REP. 69, 69 (2004) ("[T]he Framers themselves wrote over a dozen indeterminate sentencing ranges in the first federal crime bill . . . ." (citing Act of Apr. 30, 1790, ch. 9, §§ 1–29, 1 Stat. 112, 112–18)).

98. *Blakely*, 542 U.S. at 303–04. The idea that this was "clear" from *Apprendi* was belied not just by the textual language of *Apprendi*—"beyond" hardly, let alone clearly, means "within"—but also by the fact that most lower courts had concluded oppositely, not to mention the Court's own 5–4 split in *Blakely*. *See id.* at 320 n.1 (O'Connor, J., dissenting) (noting sixteen contrary decisions).

99. *Id.* at 305 (majority opinion).

100. *Id.* at 306.

it can be textually, intentionally, or originally located in the actual blueprint they wrote.[101]

Thus, Justice Scalia's "originalism," when confronted with cases the Framers simply could not have anticipated (thermal heat imaging technology in *Kyllo*; legislatively-developed sentencing guidelines in *Blakely*), is flexible enough to accommodate debatable conceptions of a constitutional "design" and the influence of unanticipated technology on the nontextual rights of privacy. Such analysis—and I am by no means contending that Justice Scalia was wrong in these interpretations—brings Justice Scalia remarkably close to his "Living Constitution" predecessors.

CONCLUSION

It has recently become fashionable to suggest that originalism and living constitutionalism are not actually so incompatible.[102] While there may be much to recommend this view, my point is different. It is not that originalism actually has aspects of living constitutionalism in it, but rather that originalism, in its pure form as represented in *Heller*, is an inadequate and dying methodology. Its immediate attraction—discerning firmly-rooted rules and meanings that do not change over time—must necessarily fade as time marches on. What the Framers said, envisioned, or meant cannot plausibly continue as the specific and exclusive meaning given to general words and phrases in the Constitution, as we grow farther and farther away from the culture, realities, and understandings that underlay the Framers' words.[103] And unless we believe that Chief Justice Marshall was wrong about his contemporaries, and that they did NOT intend their document to last for many generations beyond their own,[104] we must believe that originalism (at least in its pure form) cannot last. Instead, the exhaustive exposition of the method in *Heller* actually represents its last gasp. I predict, with respect to Professor Sanford Levinson,[105] that we shall not see the likes of *Heller* again. The force of modern and evolving realities is too strong, and the tether of meanings

101. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring) ("[The Constitution] must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is.").

102. *See, e.g.*, Balkin, *supra* note 11, at 1; Posner, *supra* note 2, at 1. *But see* Leib, *supra* note 14.

103. This is simply a less articulate articulation of Justice Holmes's view as expressed in *Missouri v. Holland*. *See supra* note 56 and accompanying text.

104. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387 (1821) ("[A] constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it."); *cf.* District of Columbia v. Heller, 128 S. Ct. 2783, 2870 (2008) (Breyer, J., dissenting) (arguing that the Framers could not have intended future generations to ignore such matters as guns near parks and playgrounds, guns accessible to minors at home, and the plague of gun suicides and urban gun violence).

105. *See* Levinson, *supra* note *; Adam Liptak, *Few Ripples from Supreme Court Ruling on Guns*, N.Y. TIMES, Mar. 17, 2009, at A14.

that held in a long-ago age is ever-weakening—even for the originalists that wrote *Heller*.