

## CONFLICT, CONSENSUS & CONSTITUTIONAL MEANING: THE ENDURING LEGACY OF CHARLES BEARD

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Few books in American history have had as profound an impact on scholarly debate as Charles Beard's *An Economic Interpretation of the Constitution*.<sup>1</sup> Beard not only shaped the terms of historical debate for much of the twentieth century, his emphasis on the contested nature of politics and constitutionalism in the Founding continues to influence historical scholarship.<sup>2</sup> Although orthodox Beardianism is rare today, historical scholarship has embraced a form of soft Beardianism. Most historians accept that the Founding era was deeply divided over constitutional ideas and most also accept that socio-economic tensions contributed to this divisiveness. The contrast with legal scholarship could hardly be starker: legal scholarship on the Constitution has generally neglected Beard.<sup>3</sup> Among legal

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1. CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913). On Beard's impact on subsequent historical scholarship, see Max Edling, *Introduction to the Centennial Symposium on Charles Beard's Economic Interpretation*, 2 *AMERICAN POLITICAL THOUGHT* 259 (2013).

2. For a measured assessment of the differences between modern historiography and Beard that acknowledges his profound influence, see Eric Slauter, *Beard's "Politics," Ours, and Theirs*, 2 *AMERICAN POLITICAL THOUGHT* 283 (2013).

3. A Lexis search of the terms "Beard" and "An Economic Interpretation" yields only 202 hits between 1983 and 2013. If one eliminates historians writing in law reviews the number would be even lower. By comparison a JSTOR search for the same period yields 2648 hits. Not surprisingly, Beard's reputation has fared better among scholars working with or in the critical legal studies tradition; see Mark Tushnet, *The Constitution as an*

scholars, originalists have been the group most resistant to recognizing the importance of Beard's basic insight into Founding era constitutionalism. Rather than acknowledge the raucous and often cacophonous nature of the public debate over the Constitution's original meaning, originalists have conjured a false historical past marked by consensus.<sup>4</sup>

Constitutional ideas are not disembodied abstractions floating in some type of constitutional ether.<sup>5</sup> Recovering the historical meaning of a text involves identifying the *communicative intent* of its author and understanding the myriad ways different readers and groups of readers would have interpreted a particular author's words.<sup>6</sup> In all but the simplest cases, deciding which of those original understandings ought to be given legal effect is not a neutral choice, but a political or philosophical one. The best any originalist theory could ever hope to accomplish would be to allow us to pick sides in the Founding era's own constitutional debates.<sup>7</sup>

Many originalists have treated meaning as if it were objective, but this is clearly a mistake.<sup>8</sup> Meaning is not objective, but the public nature of meaning renders it inter-subjective.<sup>9</sup> Recovering the meaning of the Constitution requires moving beyond the text and the words on the page to reconstructing the

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*Economic Document: Beard Revisited*, 56 GEO. WASH. L. REV. 106 (1987). Legal historians teaching at law schools have also had a more serious engagement with Beard's materialist approach; for an excellent example, see G. Edward White, *The Political Economy of the Original Constitution*, 35 HARV. J.L. & PUB. POL'Y 61 (2012).

4. Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539 (2005) (arguing that the people were silent bystanders to American constitutional development); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009) (arguing that ordinary Americans defer to lawyers on questions of constitutional meaning). See also discussion *infra* pp. 402–03.

5. See generally James T. Kloppenberg, *Thinking Historically: A Manifesto of Pragmatic Hermeneutics*, 9 MODERN INTELL. HIST. 201 (2012); Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721 (2013).

6. A.P. Martinich, *Four Senses of "Meaning" in the History of Ideas: Quentin Skinner's Theory of Historical Interpretation*, 3 J. PHIL. HIST. 225 (2009) and A .P. Martinich, *A Moderate Logic of the History of Ideas*, 73 J. HIST. IDEAS 609 (2012).

7. Larry D. Kramer, *When Lawyers Do History*, 72 Geo. Wash. L. Rev. 387 (2003).

8. On the inter-subjective nature of meaning, see Quentin Skinner, *Motives, Intentions and the Interpretation of Texts*, 3 NEW LITERARY HIST. 393 (1972). For an example of originalists who argue in favor of the idea of objective meaning, see Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011) and Michael Stokes Paulsen, *How To Interpret the Constitution (and How Not To)*, 115 YALE L. J. 2037, 2059 (2006).

9. QUENTIN SKINNER, *Interpretation and the Understanding of Speech Acts*, in VISIONS OF POLITICS: VOLUME 1: REGARDING METHOD 103 (2002).

contextual factors which would have been used by listeners and readers to make sense of an author's words. Originalists have generally treated the people as if they were mute bystanders to the great constitutional drama unfolding in 1788.<sup>10</sup> Federalists and Anti-Federalists were not homogenous modern style parties, but loose coalitions who were often held together by little more than a few commonly shared texts and a general predisposition to support or oppose ratification. The existence of a common language did not always signal deeper commitment to the same legal and constitutional ideals. The meaning of a phrase such as "the right to bear arms" meant one thing to Daniel Shays and quite another to James Madison.<sup>11</sup> To understand the dynamics of the original debate over constitutional meaning one must pay attention to the familiar voices of the Founding era's elites and the less familiar voices of ordinary Americans. The time has arrived for a new constitutional historicism, a scholarly approach that would unite the top down focus of traditional constitutional history with a bottom up approach informed by an appreciation of Beard's basic insight into the contested nature of early American constitutionalism.<sup>12</sup>

The approach sketched above is consistent with recent work in the philosophy of language.<sup>13</sup> Few of the Constitution's open ended provisions, the ones most likely to spawn controversy today, are likely to yield a single uncontested meaning when subjected to a rigorous historical analysis.<sup>14</sup> The dominant paradigm among originalists, public meaning originalism, is based on an overly simplistic view of history and a flawed understanding of the philosophy of language.<sup>15</sup> Public meaning originalism treats the task of recovering original meaning as if it were akin to running the Constitution's text through something like a Google

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10. Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295, 324 (2011).

11. SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006).

12. Cornell, *supra* note 5, at 721; D. Alan Orr, *A Prospectus for a "New" Constitutional History of Early Modern England*, 36 ALBION 430, 448 (2004).

13. Andrei Marmor, *The Pragmatics of Legal Language*, 21 RATIO JURIS 423 (2008).

14. On the need to recognize the contested meanings of various constitutional provisions, see Bernadette Meyler, *Accepting Contested Meanings*, 82 FORDHAM L. REV. 803 (2013).

15. Scott Soames, *Toward a Theory of Legal Interpretation*, 6 N.Y.U. J.L. & LIBERTY 231, 232 (2011); Andrei Marmor, *Can the Law Imply More Than It Says? On Some Pragmatic Aspects of Strategic Speech*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 83, 97 (Andrei Marmor & Scott Soames eds., 2011).

translator function set to 1788 American English.<sup>16</sup> The meaning of any text depends as much on the background assumptions against which the text was originally read as it does the dictionary meaning of the words in the text.<sup>17</sup> Understanding the pragmatics of communication is at least as important as, if not more so than, the semantic content of the text.<sup>18</sup>

#### FRAMERS, RATIFIERS, AND THE PROBLEM OF ANTI-FEDERALISM

Beard's study was an ambitious effort to understand the origins of the Constitution in materialist terms. Although not a Marxist, Beard's progressive vision, rooting politics in the clash of economic interests, has influenced historical debate for nearly a century.<sup>19</sup> Two claims made by Beard have generated a lively inter-generational debate about the Constitution. Beard's primary claim that decisions within the Philadelphia Convention were motivated by the economic interests of the delegates has been attacked by many, but nonetheless continues to have supporters, mostly notably among quantitative economic historians.<sup>20</sup> Many historians would concede that economic interests played some role in the Convention's deliberations, but few would embrace Beard's brand of economic determinism.<sup>21</sup> Far less scholarly attention has been devoted to the other aspect of Beard's theory, his elaboration of Orrin Grant Libby's analysis of the geographical distribution of the vote on ratification.<sup>22</sup> In contrast to Beard, Libby is not a name many modern scholars

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16. Dictionaries figure prominently in much new originalist analysis. See Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 925–26 (2009). In more recent writing Solum has given greater attention to forms of pragmatic enrichment, but this aspect of the theory is still radically under theorized, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 459 (2013). For a critique of the use of dictionaries and other problems with Solum's emphasis on semantics over pragmatics, see Cornell, *supra* note 5.

17. Cornell, *supra* note 5.

18. Marmor, *supra* note 13.

19. For other examples of Beard's influence on the American historical profession, see PETER NOVICK, *THAT NOBLE DREAM: THE OBJECTIVITY QUESTION AND THE AMERICAN HISTORICAL PROFESSION* 104, 240, 410 (1988).

20. Economic historians have been the most sympathetic to Beard's project. See ROBERT A. MCGUIRE, *TO FORM A MORE PERFECT UNION: A NEW ECONOMIC INTERPRETATION OF THE UNITED STATES CONSTITUTION* 16 (2003).

21. For two recent statements typical of historical attitudes, see Seth Cotlar, *The View from Mount Vernon versus the People Out of Doors: Context and Conflict in the Ratification Debates*, 69 WM. & MARY Q. 369, 371 (2012), and Todd Estes, *Power and Point of View in the Ratification Contest*, 69 WM. & MARY Q. 398, 400 (2012).

22. ORIN GRANT LIBBY, *THE GEOGRAPHICAL DISTRIBUTION OF THE VOTE OF THE THIRTEEN STATES ON THE FEDERAL CONSTITUTION, 1787-1788* (1894).

readily recognize. Elaborating Libby's argument, Beard claimed that Anti-Federalism drew its greatest numerical strength from back country regions, areas in which debt-ridden farmers sought pro-inflationary economic policies. Not only has this insight been widely embraced by many historians, it has achieved an almost canonical status in American history textbooks.<sup>23</sup> In his classic work on the Constitution Beard observed that "[t]he opposition to the Constitution almost uniformly came from the agricultural regions, and from the areas in which debtors had been formulating paper money and other depreciatory schemes."<sup>24</sup> It is this soft version of Beardianism that has come to dominate historical scholarship. Subsequent scholarship has refined this basic insight in a number of important ways. Neo-Progressive historians, most significantly, Jackson Turner Main, argued that the Constitution pit commercially oriented farmers and merchants against champions of a more radical localist agrarian tradition.<sup>25</sup> Building on neo-Progressive scholarship a new generation of social historians elaborated this approach, illuminating the ideologies of farmers, artisans, slaves, and women.<sup>26</sup> Inspired by the rise of cultural history, more recent scholarship on the Founding era has focused on political culture, analyzing parades, crowd actions, and the dynamics of the emerging public sphere of print culture in the new republic.<sup>27</sup> Finally, neo-Beardians, Woody Holton and Terry Bouton have refocused attention on the role of debtor politics in early American history.<sup>28</sup>

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23. The best indication of Beard's influence is the account of ratification in standard freshmen level college textbooks; see ALLAN BRINKLEY, *Chapter 6: The Constitution and the New Republic, Where Historians Disagree*, in AMERICAN HISTORY: A SURVEY (13th ed. 2008).

24. BEARD, *supra* note 1, at 291.

25. JACKSON TURNER MAIN, *POLITICAL PARTIES BEFORE THE CONSTITUTION* (1973).

26. ALFRED F. YOUNG, *LIBERTY TREE: ORDINARY PEOPLE AND THE AMERICAN REVOLUTION* (2006); *REVOLUTIONARY FOUNDERS: REBELS, RADICALS, AND REFORMERS IN THE MAKING OF THE NATION* (Alfred Young et al. eds., 2011).

27. DAVID WALDSTREICHER, *IN THE MIDST OF PERPETUAL FETES: THE MAKING OF AMERICAN NATIONALISM, 1776-1820* (1997); *BEYOND THE FOUNDERS: NEW APPROACHES TO THE POLITICAL HISTORY OF THE EARLY AMERICAN REPUBLIC* (Jeffrey L. Pasley et al. eds., 2004).

28. TERRY BOUTON, *TAMING DEMOCRACY: "THE PEOPLE," THE FOUNDERS, AND THE TROUBLED ENDING OF THE AMERICAN REVOLUTION* (2007); WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* 14 (2007); MARJOLEINE KARS, *BREAKING LOOSE TOGETHER: THE REGULATOR REBELLION IN PRE-REVOLUTIONARY NORTH CAROLINA* (2002) constitute a "Duke School" of revolutionary historiography that has a strong Beardian strain. The Duke School reflects the social history vision of historian Peter Wood, who shaped the early American history graduate program. On Wood's historical sensibility, see Peter Wood, "*I Did the Best I Could for My*

One of the most important alternative historical paradigms to the one sketched above is associated with the work of Bernard Bailyn and his students.<sup>29</sup> Pauline Maier and Jack Rakove, in particular, elaborated the intellectual and political forces shaping the Constitution and ratification. Neither Maier nor Rakove was much influenced by Beard, but one can detect a subtle Beardian influence in another student of Bailyn, Gordon S. Wood.<sup>30</sup> In *The Creation of the American Republic*, Wood cast the Anti-Federalists as populist democrats. He drew a vital distinction between the Anti-Federalist elite and ordinary Anti-Federalists.<sup>31</sup> Wood conceded that “such ‘aristocrats’ as [Richard Henry] Lee or [George] Mason did not truly represent Anti-Federalism.”<sup>32</sup> Although Woody Holton and Gordon Wood represent two opposing poles of the contemporary historiographical spectrum, both scholars argue that elite Anti-Federalist figures such as George Mason tell us little about the motivations and beliefs of popular opposition to the Constitution.<sup>33</sup> The relationship between elite and popular thought was actually far more fluid and dynamic than either of these accounts acknowledges. Constitutional ideas flowed in both directions, percolating down from elites and bubbling up from below.<sup>34</sup>

#### *MASON’S OBJECTIONS AND THE DISSENT OF THE MINORITY: A TALE OF TWO TEXTS*

In both Pennsylvania and New York Anti-Federalism was dominated by middling democrat radicals. The American

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*Day*: *The Study of Early Black History during the Second Reconstruction, 1960 to 1976*, 35 WM. & MARY Q. 185 (1978) and Peter H. Wood, *One Nation-One Semester: High-Altitude Flights across American History*, 8 COMMON-PLACE 2 (2008), available at <http://www.common-place.org/vol-08/no-02/author/>.

29. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (rev. ed., 1967); PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788* 121 (2010); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1997).

30. Ironically, Straussian political scientists have treated Wood as if he were doing social history, not intellectual history, see Murray Dry, *The Debate Over Ratification of the Constitution*, in *THE BLACKWELL COMPANION TO THE AMERICAN REVOLUTION* (Jack P. Greene & J.R. Pole eds., 2003). For an interesting debate over Wood’s Beardianism, see Shlomo Slonim, *Forum: The Founders and the States: Motives at Philadelphia, 1787: Gordon Wood’s Neo-Beardian Thesis Reexamined*, 16 LAW & HIS. REV. 527, 527 (1998).

31. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1998).

32. *Id.* at 485.

33. HOLTON, *supra* note 28, at 235 (2008).

34. SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828* (1999).

Revolution had turned out the traditional elites and opened up politics to a new type of popular politician. Farmers and artisans from the ranks of the industrious middling sorts dominated politics in both states.<sup>35</sup> Although he may have been a planter aristocrat, George Mason's influence on popular Anti-Federalist thought should not be underestimated. Middling radicals in Pennsylvania and New York eagerly sought out Mason's *Objections to the Constitution*.<sup>36</sup> A manuscript copy of Mason's text circulated widely among Anti-Federalists in these regions prior to its publication.<sup>37</sup> Robert Whitehill, an important backcountry spokesman from Pennsylvania, consulted Mason's *Objections* before preparing the list of Amendments to the Constitution he introduced toward the end of the Pennsylvania ratification convention. Whitehill's proposals echoed some elements of Mason's arguments, but there were important differences between the two documents. One of the most striking differences between Mason's text and Whitehill's was the treatment of the militia and the right to bear arms. Mason's text echoed the language of the Virginia Declaration of Rights.<sup>38</sup> It attacked the power to raise a standing army, but did not expressly affirm a right to bear arms.<sup>39</sup> Whitehill's list of Amendments combined together two separate rights protected in the 1776 Pennsylvania Constitution, a right to bear arms and a right to hunt. These separate rights were now presented as a single provision. The Federalist majority in Pennsylvania rejected demands that Whitehill's Amendments be included in the official convention proceedings. Believing that it was vital to get the word out about these proposed amendments Anti-Federalists rushed

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35. EDWARD COUNTRYMAN, *THE AMERICAN REVOLUTION* (rev. ed. 2003).

36. CORNELL, *supra* note 34, at 74–75 (1999).

37. In the fall of 1787 George Mason traveled to Pennsylvania to help coordinate further opposition to the Constitution. New York's Charles Tillinghast reported that Mason traveled through the Pennsylvania back-country "haranguing the Inhabitants, and pointing out the dangerous effects or consequences which would inevitably flow from the New Constitution." A manuscript copy of Mason's *Objections to the Constitution* had begun to circulate among Anti-Federalists in the middle Atlantic. New York Anti-Federalist John Lamb read a manuscript copy of Mason's *Objections* at George Clinton's home and concluded that Mason was a "Man of the first rate Understanding," Charles Tillinghast to Hugh Hughes October 12, 1787, 13 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 373 (John. P. Kaminski et al. eds., 1976) [hereinafter] DHRC at 13:373.

38. SAUL CORNELL, *A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA*, 20 (2006).

39. *George Mason Virginia Declaration of Rights, 12 June 1776*, in *THE PAPERS OF GEORGE MASON* 287–89 (Robert A. Rutland ed., 1970); George Mason, "Objections to the Constitution of Government formed by the Convention, (1787) reprinted in 2 *THE COMPLETE ANTI-FEDERALIST* 13 (Herbert J. Storing ed., 2007).

them into print. The task of embedding this list in a coherent statement of Anti-Federalist principles fell to Samuel Bryan, the son of a popular Anti-Federalist politician, George Bryan.<sup>40</sup> Whitehill's amendments and Bryan's critique were published together as *The Dissent of the Anti-Federalist Minority of Pennsylvania*. The text was signed by the minority Anti-Federalist delegates to the state convention and was widely reprinted both in papers and as a pamphlet.<sup>41</sup>

Historians and originalist scholars have each cited the *Dissent*, which has enjoyed a remarkable life after death, becoming a central text in the contentious modern debate over the meaning of the Second Amendment. The treatment of this text by historians and originalists is so radically different that one might be tempted to conclude that the two scholarly communities must be talking about separate documents.<sup>42</sup> Understanding how historians and originalists have interpreted this text cuts to the very core of the difference between a genuinely historical approach and the pseudo-historical approach favored by originalists.<sup>43</sup> Historians remain committed to discovering communicative intent and where relevant to exploring the diverse contested readings of elite and popular texts. Originalists by contrast have largely abandoned the search for intent, rejected the contested nature of Founding era constitutionalism, and generally ignored the role of popular constitutional ideas. In place of a focus on actual readers, originalists have substituted imaginary readers who invariably tend to share the ideological biases and assumptions of modern originalists.<sup>44</sup>

For most historians unraveling the original meaning of any text, including the *Dissent of the Pennsylvania Minority*, requires paying attention to the whole text, not a single passage ripped out of context. One must understand the document's complicated publication history, including its distribution, and, where possible, patterns of reader response to the text.<sup>45</sup> Originalists have not only ignored all of these contexts, but they have conjured up a topsy-turvy world in which the *Dissent of the Minority* is miraculously

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40. 2 DHRC at 617–45.

41. 15 DHRC at 7–13.

42. Kevin M. Sweeney, *Firearms, Militias, and the Second Amendment*, in *THE SECOND AMENDMENT ON TRIAL: CRITICAL ESSAYS ON DISTRICT OF COLUMBIA V. HELLER* 310 (Saul Cornell & Nathan Kozuskanich eds., 2013).

43. CORNELL, *supra* note 34, at 158; Paul Finkelman, "A Well-Regulated Militia": *The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 196–97 (2000).

44. See discussion, *infra* pp. 402–05.

45. Cornell, *supra* note 5.

transformed into a text illustrating the Assent of the Majority. In this sense originalism produces a fun-house mirror effect in which the constituent parts of the past are reflected back in grotesquely distorted fashion. Nothing better captures this fun-house mirror world than Randy Barnett's claim about the meaning of this text.<sup>46</sup> In Barnett's view "[t]he fact that this particular sentiment was held by a minority of delegates tells us next to nothing about whether it reflects the common view among Pennsylvanians at large." Before making such a bold claim one might have expected Barnett to have researched the history of this text, including its composition, distribution, and something about contemporary reactions to its argument. Such information is not only absent from his analysis, but is largely irrelevant to originalist practice.<sup>47</sup> Justice Scalia cited Barnett's bizarre claims in *Heller*, using his distorted account to buttress his own dubious interpretation of the "highly influential minority proposal in Pennsylvania," which he noted "plainly referred to an individual right."<sup>48</sup> Using their originalist philosophers' stone, Barnett and Scalia are able to magically transmute the base metal of the *Dissent* into originalist gold. A text illustrating a radical minority voice becomes a proxy for how the typical reasonable and competent user of English would have understood the term "bear arms."<sup>49</sup>

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46. On this point, see *District of Columbia v. Heller*, 554 U.S. 570, 590; Kramer, *supra* note 7; Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 246–48 (2004) (reviewing H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO BEAR ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002)). To support this strange contention Barnett cites the 1776 Pennsylvania Constitution and 1790 Constitution. The argument that the 1776 Constitution affirms an individual right relies entirely on evidence about the 1790 Constitution, which completely rewrote the provision. Arguments such as these represent a form of constitutional bait and switch. Barnett also claims that the 1790 arms bearing provision and the Pennsylvania *Dissent* use the "same phraseology." Actually, it would be more accurate to say the two texts are almost completely different apart from the single common phrase "bear arms in defense of themselves." The 1790 constitutional text detached the prohibition on standing armies and affirmation of civilian control of the militia from the provision affirming a right to bear arms; see Kozuskanich, *infra* note 63.

47. Barnett's claim was made in the context of attacking Richard Uviller and William Merkel for failing to provide adequate support for treating the text as a minority voice, see Barnett, *supra* note 46, at 247. Of course, Uviller and Merkel's claim so closely tracked the established historiography, Barnett's skepticism seems hard to justify on scholarly grounds, see Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000) and Finkelman, *supra* note, 43 at 196–97.

48. *Heller*, 554 U.S. at 604. Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 226–27 (1983); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1505–06 (1998).

49. *Heller*, 554 U.S. at 604.

The first step in arriving at a genuinely historical understanding of Whitehill's amendments, and the *Dissent*, must recognize the way both texts fused together two rights treated separately in the 1776 Pennsylvania Constitution. In addition to Pennsylvania being the first state to single out the right to bear arms for explicit protection, Pennsylvania's 1776 Constitution also expressly protected a right to hunt.<sup>50</sup> Entrenchment of hunting rights was highly unusual in 1776.<sup>51</sup> Similarly, such a right was rarely mentioned in the debates around the Constitution in 1788 and the Bill of Rights in 1791.<sup>52</sup> Although there were numerous complaints about the threat to the militia aired during ratification, the subject of hunting was seldom mentioned. Nor was the right of individual self-defense much discussed.<sup>53</sup> The absence of any discussion of these rights does not mean that Americans did not value these rights. Here one must move beyond the four corners of the text and identify the background assumptions informing the public debate over the Constitution.<sup>54</sup> Originalists have generally ignored such assumptions or anachronistically reasoned backward from modern legal assumptions alien to Founding era legal culture.<sup>55</sup> Not every right protected at common law was

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50. Edward Dumbauld, *An Unusual Constitutional Claim*, 1 AM. J. LEGAL HIST. 229 (1957).

51. *Id.*

52. Donald S. Lutz, *The State Constitutional Pedigree of the U.S. Bill of Rights*, 22 PUBLIUS 19 (1992).

53. Rakove, *supra* note 47.

54. Cornell, *supra* note 5.

55. For a good example of the centrality of anachronism to originalism, see Nicholas J. Johnson, *Rights Versus Duties, History Department Lawyering, and the Incoherence of Justice Stevens's Heller Dissent*, 39 FORDHAM URB. L.J. 1503 (2012). Johnson argues that the Second Amendment could not have been a right to bear arms in a militia because modern rights are generally understood to provide strong claims against the state and do not impose obligations on citizens. Johnson is certainly correct that this is the orthodox view of modern rights. What is more remarkable is his assumption that this must have been the case in the Founding era, particularly when there is a significant body of scholarship arguing the opposite view. Compare Johnson's patently ahistorical claims with JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS*, 184 (1986); James H. Hutson, *The Bill of Rights and the American Revolutionary Experience*, in *A CULTURE OF RIGHTS: THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS, AND LAW—1791 AND 1991*, 62, 87 (Michael J. Lacey & Knud Haakonssen eds., 1993); RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* (1979). Rights and duties are not only correlative in early modern legal theory and political philosophy, but statements of rights often expressly link the exercise of a specific right with a particular obligation. The Virginia Declaration of Rights illustrates this point nicely: "That Religion, or the duty which we owe to our *Creator*, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other," 12 June 1776, *Mason Papers 1*:287–89.

singled out for express protection in 1776 or 1788.<sup>56</sup> There was broad agreement among Federalists and Anti-Federalists that matters of criminal law, including the meaning and scope of the traditional common law right of self-defense, would be addressed by the individual states, not the new Federal government. Federalist Tench Coxe wrote that “[t]he states will regulate and administer the criminal law, exclusively of Congress.” The police power of the states would not be diminished under the new Constitution and the individual states would continue to legislate on all matters “such as unlicensed public houses, nuisances, and many other things of the like nature.”<sup>57</sup> Brutus, one of the most eloquent Anti-Federalist authors, made much the same point. “[I]t ought to be left to the state governments to provide for the protection and defence of the citizen against the hand of private violence, and the wrongs done or attempted by individuals to each other.”<sup>58</sup>

The *Dissent's* linkage of the right to bear arms and hunting was not copied by any state ratification convention, nor was its language emulated by any other essayist during ratification.<sup>59</sup> Shortly after ratification ended, Whitehill and other backcountry Anti-Federalists gathered in Harrisburg, Pennsylvania to coordinate their strategy for Amendments. Many of the signers of the *Dissent* attended the meeting, but the list of Amendments produced at this meeting focused squarely on the danger of standing armies and threats to the state militias.<sup>60</sup> Whitehill's more individualistic language about arms bearing was not adopted by the Harrisburg Convention. Still, buoyed by Harrisburg, Pennsylvania Anti-Federalists vigorously campaigned for seats in the First Federal Congress. Despite such efforts Anti-Federalists were resoundingly defeated. Pennsylvania's first Congressional delegation included no Anti-Federalists.<sup>61</sup>

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56. JACK N. RAKOVE, *DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS* (1998).

57. Tench Coxe, A Freeman, PA. GAZETTE, Jan. 30, 1788, reprinted in *FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS* 95 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

58. Brutus, *Essays of Brutus VII*, in 2 *THE COMPLETE ANTI-FEDERALIST* 401 (Herbert J. Storing ed., 1981).

59. For a discussion of the debate over this question, see Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms*, in *THE SECOND AMENDMENT ON TRIAL*, supra note 42.

60. CORNELL, supra note 34, at 225. For the list of amendments proposed at Harrisburg, see *INDEPENDENT JOURNAL*, September 17, 1788.

61. Jack N. Rakove, supra note 47. As Rakove notes, “[i]f Americans had indeed been concerned with the impact of the Constitution on this right, and addressed the subject directly, the proponents of the individual right theory would not have to recycle the same

There is no evidence that Madison consulted the *Dissent's* text when preparing his own list of Amendments for Congress. Whitehill's list was not approved by the Pennsylvania ratification convention and was not published as part of the official proceedings. Thus, when all of the amendments recommended by the individual states were gathered together and published as a pamphlet the *Dissent* was not included. When Madison compiled his potential list of Amendments for Congress, Whitehill's list was not in this collection.<sup>62</sup> The claim that the *Dissent* had any influence on the framing of the Second Amendment is an invention of modern gun rights advocates and has no foundation in historical reality.<sup>63</sup>

Originalists have all assumed that the *Dissent* serves as evidence for what a reasonable speaker of English would have thought in 1788. This claim also rests on a serious historical error. It would be more accurate to describe the *Dissent* as representative of one of the more important, but decidedly radical Anti-Federalist voices from 1788.<sup>64</sup> Thomas Hartley, a Federalist member of the Pennsylvania state ratification convention, described the *Dissent* as a publication intended "to inflame" people's minds. Its appeal was to emotion, not reason.<sup>65</sup> In Massachusetts, Federalist Henry Van Schaack echoed this view; the *Dissent* was "purely calculated to inflame."<sup>66</sup> Samuel Bryan, the *Dissent's* author, bragged that its language alarmed Federalists. In short, most contemporaries recognized Bryan's gifts as a polemicist and propagandist for the Anti-Federalists, but few saw his text as a model of calm deliberate reason. The recognition of the *Dissent's* radicalism did not lessen with the passage of time. When Pennsylvania's Frederick Muhlenberg

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handful of references to the dissenters in the Pennsylvania Ratification Convention." *Id.* at 109. Finkelman, *supra* note 43, at 196–97; Saul Cornell, *The Original Meaning Of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 159 (2008).

62. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in THE FOUNDERS' CONSTITUTION, Vol. 1, Chap. 14, Document 47; Hutson, *supra* note 55 at 62, 87.

63. It is possible that by 1788, Pennsylvanians had come to see the two separate rights as indissolubly linked together, but is also possible that their juxtaposition in the text was simply an artifact of the text's hasty composition. For an exploration of this text, see Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 38 RUTGERS L.J. 1041 (2007).

64. *Heller*, *supra* note 48.

65. 15 DHRC 12. The DHRC editors' headnote provides a wealth of information about contemporary reactions to the *Dissent*. Originalists generally pay little attention to such vital contextual information resulting in a distorted account of the relative influence and importance of the sources they cite.

66. *Id.*

measured the debate in Congress over Amendments, he used the *Dissent* as a marker for the most extreme views espoused in 1788, not as guide to mainstream belief. Similarly, when William Findley, one of the signers of the *Dissent*, who had been among the most vocal Anti-Federalists in the Pennsylvania Convention, commented on the *Dissent* during the 1790s, he expressed surprise that anyone could seriously view it as a proper guide to anything. He was astonished that “the sentiments of a minority, acting under peculiar circumstance of irritation,” could be “quoted as a good authority for the true sense of the Constitution.”<sup>67</sup> If the guiding maxim of public meaning originalism is the search for what the average reasonable user of English believed, it seems perverse that one would consider the *Dissent* a good choice for reconstructing such an understanding, but this is precisely what virtually every originalist, including Justice Scalia, has done.<sup>68</sup>

#### MARX, BEARD, AND HELLER: ORIGINALISM AS CONSTITUTIONAL FARCE

The absurdity of the claims made in *Heller* merit additional attention because they show how originalist theory produces an account of the past so distorted it borders on the surreal. Although not framed expressly in anti-Beardian terms, Scalia’s originalism takes issue with the central premise that has guided virtually all historical scholarship in the last century: the contested nature of Founding era constitutional culture. Scalia’s anti-Beardianism is evidenced in a typically bombastic attack leveled against Justice Stevens. In his *Heller* dissent Stevens argued that the Court could not reconstruct the original meaning of the Second Amendment by looking at the language used in failed proposals such as the *Dissent of the Minority*, provisions that were never enacted into law and which were rejected by large majorities of Americans.<sup>69</sup> Although Stevens did not feel the need to support such a common sense argument with an elaborate scholarly defense or a long list of citations, his argument echoes the dominant soft Beardianism embraced by historians for much of the last century.<sup>70</sup> This claim drew a sharp rebuke from Justice Scalia:

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67. William Findley, *quoted in* SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSIDENTING TRADITION IN AMERICA, 1788-1828*, 225 (1999).

68. *District of Columbia v. Heller*, 554 U.S. 570, 604 (2008).

69. *Id.* at 636–62 (Stevens, J., dissenting).

70. R.B. Bernstein, *Charles A. Beard: Foe of Originalism*, 2 AM. POLITICAL THOUGHT 302 (2013); Slaughter, *supra* note 2; Edling, *supra* note 1.

JUSTICE STEVENS' view thus relies on the proposition, unsupported by any evidence, that different people of the founding period had vastly different conceptions of the right to keep and bear arms. That simply does not comport with our longstanding view that the Bill of Rights codified venerable, widely understood liberties.<sup>71</sup>

It is not clear whose "longstanding view" Scalia is referencing. While some members of the Court have accepted a consensus vision of American history, this view has hardly been universal among members of the Court in recent years and has been rejected by Scalia himself in cases where it did not suit his ideological agenda.<sup>72</sup> The consensus vision of the Founding era asserted in *Heller* was out of date the moment Beard published his influential work a hundred years ago. More than a century later, originalism's vision of the past is even less creditable.<sup>73</sup>

None of the originalist commentators who lavished attention on Whitehill's list of Amendments, or the *Dissent*, including Justice Scalia, appear to have read and analyzed the full text they are so fond of quoting. If one examines Bryan's text, it cuts against Scalia's originalist interpretation of the Second Amendment.<sup>74</sup> The private uses of arms addressed in Whitehill's amendments was not discussed in Bryan's text, which focused exclusively on the danger of standing armies and the threats to the effectiveness of the militia. Bryan did include one brief mention of the threat the Constitution posed to Pennsylvania Quakers, one of several groups religiously scrupulous about bearing arms. Ironically, it was the right *not* to bear arms, not the right to bear arms that Bryan chose to highlight. Quakers were one of several groups in Pennsylvania who opposed bearing arms for religious reasons. A

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71. *Heller*, 554 U.S. at 604–05.

72. Indeed, in *Printz v. United States*, 521 U.S. 898 (1997), Justice Scalia lambasted Justice Souter's reliance on Hamilton's authority, charging that his views were outside of the mainstream. *Id.* at 911–15. Apparently according to Justice Scalia's ever shifting standards of proof, *The Dissent of the Minority's* views are a good source for law, but Hamilton's contribution to *The Federalist* is not. *Printz* provides a case where Justice Scalia appears to have adopted a very Stevens-like view of the disagreements within the Founding generation. Evaluating the impact of *The Federalist* is a complex historical question; the point is that Scalia's yardstick for measuring the significance and impact of various Founding era sources depends largely on the outcome he desires in a particular case. On the historical impact of *The Federalist*, see Todd Estes, *The Voices of Publius and the Strategies of Persuasion in The Federalist*, 28 J. EARLY REPUBLIC 4, at 523–58 (2008).

73. See discussion *supra* at p. 387. For a trenchant historical critique of Scalia's law office history in *Printz*, see Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104 (2013).

74. Bryan's arguments in the *Dissent* attracted far more attention in the press and relatively little comment was devoted to Whitehill's amendments. See 15 DHRC at 7–13.

number of German sects, including the Mennonites, Moravians, and Dunkers, “peace churches,” all opposed bearing arms.<sup>75</sup>

In *Heller* Justice Scalia invoked the authority of the *Dissent*, and claimed that its language provides powerful evidence that bearing arms was not generally understood to refer exclusively to military use. To arrive at this conclusion Scalia ignores Bryan’s contribution to the text, including his discussion of the Quakers. The meaning of Quaker opposition to arms bearing is addressed in another section of *Heller*, in the context of Madison’s original draft of the Second Amendment, which included language that exempted those scrupulous about bearing arms from militia service. In the House debate over the Amendment’s language, Massachusetts Anti-Federalist Elbridge Gerry moved that this clause be struck out. He worried that if the federal government had this authority it might use its ability to classify who was religiously scrupulous about arms bearing as a means to disarm the state militias.<sup>76</sup>

Justice Scalia’s textualist originalism opposes the use of legislative history so it is not all that surprising that he does not accord much weight to the Congressional debate over the drafting of the Second Amendment, which included the decision to drop the clause on conscientious exemption.<sup>77</sup> To refute the claim that “bearing arms” was most commonly understood to refer to the use of arms in a military context, Scalia does take up the case of the Quakers. In one of the weirdest arguments presented in *Heller*, Scalia asserts that Quaker opposition to arms bearing actually supports his individual rights reading of the Second Amendment. Members of the Religious Society of Friends, Quakers, opposed bearing arms, not because they were pacifists opposed to war, Scalia opines, but because of a more general opposition to violence, which led them to also reject “personal gunfights.”<sup>78</sup> Elaborating on this point, Scalia notes, “Quakers opposed the use of arms not just for militia service, but for any

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75. Richard K. MacMaster, *Neither Whig Nor Tory: The Peace Churches in the American Revolution*, 9 FIDES ET HISTORIA 8 (1977). Philip Hamburger, *Religious Freedom in Philadelphia*, 54 EMORY L.J. 1603 (2005).

76. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1998). For critiques of Scalia’s opposition to legislative history see Abner S. Greene, *The Missing Step of Textualism*, 74 FORDHAM L. REV. 1913, 1919–22 (2006); Scott Soames, *What Vagueness and Inconsistency Tell Us About Interpretation*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 31, 42 (Andrei Marmor & Scott Soames, eds., 2011).

77. *District of Columbia v. Heller*, 554 U.S. 570, 590 (2008).

78. *Id.*

violent purpose whatsoever.”<sup>79</sup> Of course terms such as “gun fighting” are themselves slightly anachronistic when applied to the eighteenth century. Pistols were relatively expensive and not particularly accurate in this early period, and the notion of Quaker duelists is just silly.<sup>80</sup> As bizarre as this language seems, it does reflect a mythic version of American history, one filtered through the lens of the classic Hollywood westerns of Scalia’s youth.<sup>81</sup> Two of those iconic westerns feature Quaker characters as dramatic foils to gunslingers. The most famous of these, *High Noon*, features Gary Cooper as Marshal Will Kane and his pacifist Quaker wife, Amy Fowler Kane, played by Grace Kelly.<sup>82</sup> Scalia’s garbled version of Quaker theology misses a basic point about the beliefs and practices of eighteenth-century Friends. Quakers were not simply opposed to violence involving weapons, they were opposed to all forms of violence, including verbal assault. Quakers were also forbidden to curse or swear.<sup>83</sup> Friends in Pennsylvania successfully created a “peaceable kingdom.” Within the tight-knit Quaker communities of this region there was remarkably little inter-personal violence of any kind. Quakers simply did not fight—guns or no guns.<sup>84</sup> Scalia’s account conflates the vital distinction between bearing a gun, something many Quakers did, and bearing arms—something Quakers were prohibited from doing. Firearms were used by Friends for a variety of lawful purposes, but bearing arms was not one of them. The notion that Quakers were protesting against being forced to use privately owned guns for personal self-defense is just

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79. *Id.*

80. See generally Sweeney, *supra* note 42; JACK D. & G.S. ROWE, *TROUBLED EXPERIMENT: CRIME AND JUSTICE IN PENNSYLVANIA, 1682–1800* (2006).

81. Scalia has referenced the Westerns of his youth in the context of capital punishment; see Betsy Blaney, *Scalia, Breyer Spar Over Capital Punishment, Judicial Philosophy*, HUFFINGTON POST (Nov. 12, 2010, 10:42 PM), [http://www.huffingtonpost.com/2010/11/12/scalia-breyer-spar-capital-punishment\\_n\\_783081.html](http://www.huffingtonpost.com/2010/11/12/scalia-breyer-spar-capital-punishment_n_783081.html). For an account of the “gun fighter” myth and modern Hollywood Westerns, see RICHARD SLOTKIN, *REGENERATION THROUGH VIOLENCE: THE MYTHOLOGY OF THE AMERICAN FRONTIER, 1600–1860* (2000).

82. John Wayne’s *Angel and the Badman* and Gary Cooper and Grace Kelly’s *High Noon* are the two best examples. In *Angel and the Badman*, John Wayne plays a gun fighter who becomes involved with a family of Quakers and ultimately gives up his gun. *ANGEL AND THE BADMAN* (Republic Pictures 1947). In *High Noon*, Gary Cooper is saved by Grace Kelly, his Quaker wife, who rejects her faith’s nonviolence and takes up a gun to save her husband. *HIGH NOON* (United Artists 1952).

83. RULES OF DISCIPLINE AND CHRISTIAN ADVICES OF THE YEARLY MEETING OF FRIENDS FOR PENNSYLVANIA AND NEW JERSEY 99 (Philadelphia, 1797); THE REVISED DISCIPLINE APPROVED BY THE YEARLY MEETING OF FRIENDS HELD IN BALTIMORE 26 (Baltimore, 1793).

84. See RANDOLPH ROTH, *AMERICAN HOMICIDE* 92 (2009); MARIETTA & ROWE, *supra* note 80 at 50.

ludicrous. Although Scalia seems to have taken his historical facts about Quakers from *High Noon*, he appears to have borrowed his legal logic in this section of *Heller* from the Marx Brothers. In *Monkey Business*, Groucho famously offers his services as both a bodyguard and attacker, a move that Groucho notes will cut costs and reduce the bottom line for both attacking and defending. In a moment of surreal Marxist logic, Groucho announces, “In case I’m gonna attack you, I’ll have to be there to defend you, too. Now let me know when you want to be attacked and I’ll be there ten minutes later to defend you.”<sup>85</sup> Scalia’s reading of Quaker demands for a government exemption from having to arm and defend themselves is a bit like Groucho’s proposal. Government could not force Quakers to bear arms for personal self-defense. Indeed, this idea is so far-fetched it may even stretch the limits of Marxist logic—taking the High Court beyond Marxism into a Monty Python-esque realm of the absurd. Violence of any kind, not just gun violence, violated Quaker teaching and would have resulted in disciplinary action by the Monthly Meeting. The use of guns for self-defense may have posed a religious issue for Quakers, but it was not a legal problem requiring Quakers to petition their government for redress.<sup>86</sup> Under Pennsylvania law, anyone, including Quakers, had a legal right of self-defense. One was free to exercise this right or not as conscience dictated. The same was not true of bearing arms in the militia. All Pennsylvanians were required to do this or pay a fine. There is absolutely no evidence that Pennsylvania had ever threatened to force Quakers to arm themselves for private defense.<sup>87</sup> Until the middle of the eighteenth century the Quaker peace testimony was not generally interpreted by Friends to preclude support for secular authorities engaged in public defense. While Quakers did not bear arms, paying taxes used for public defense was not a violation of the Peace Testimony. This consensus eroded and was replaced by a more radical pacifist ideal which opposed support for any war-like behavior, including tax support for public defense.<sup>88</sup> By the era of the American Revolution this prohibition

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85. MONKEY BUSINESS (Paramount Pictures 1931).

86. For further discussion, see Cornell, *supra* note 5.

87. JANE E. CALVERT, QUAKER CONSTITUTIONALISM AND THE POLITICAL THOUGHT OF JOHN DICKINSON (2009).

88. Quaker opposition to bearing arms remained fairly consistent during the eighteenth century, but attitudes toward indirect support for government military activities shifted over time. The French and Indian War was a decisive turning point in their evolution toward a more radical form of pacifism, one that rejected any support for war-like actions. See Jack D. Marietta, *Conscience, the Quaker Community, and the French and Indian War*, 95 PA. MAG. HIST. & BIOGRAPHY 3 (1971); Hermann Wellenreuther, *The*

was extended beyond funds intended for the purchase of arms and ammunition, encompassing taxes to support the acquisition of such non-lethal military items as uniforms, tents, wagons, and drums.<sup>89</sup>

If Scalia had simply read the full text of the Pennsylvania Constitution, instead of quoting isolated snippets from it, he would have realized that a legal exemption from arms bearing requirements was not particularly controversial in Pennsylvania. The 1776 Declaration of Rights expressly recognized such an exemption.<sup>90</sup> What was controversial in the Revolutionary era was the additional Quaker demand to be exempt from fines or taxes to support public defense.<sup>91</sup>

Scalia avers that the words “bearing arms” could only be thought to have an exclusively military meaning if religious pacifists refused to carry guns in a military context but had no problem with their use in personal self-defense.<sup>92</sup> This was precisely how other pacifists in Pennsylvania understood matters. The legal meaning of arms bearing and exemptions from this obligation in Pennsylvania becomes much clearer if one sets aside the extreme case of the Quakers and considers another pacifist group who refused to bear arms, the Moravians. In contrast to Quakers, Moravians had no objections to the use of arms for personal self-defense. During the French and Indian War Moravian communities in Pennsylvania were threatened by Indian attack. Religious leaders clarified their teachings on violence, affirming that the defensive use of arms was legitimate, even if bearing arms was still prohibited. When the issue of religious exemptions to arms bearing requirements came up during the American Revolution the Moravians naturally parted ways with Quakers. Unlike the Quakers who refused to pay taxes instead of service, Moravians believed that a secular government might wage just wars even if Moravians were prohibited from

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*Quest for Harmony in a Turbulent World: The Principle of “Love and Unity” in Colonial Pennsylvania Politics*, 107 PA. MAG. HIST. & BIOGRAPHY 537 (1983).

89. Wellenreuther, *supra* note 89.

90. PA. CONST. of 1776, DECLARATION OF RIGHTS, para. 13, *reprinted in* CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA 78 (Philadelphia, 1782). On the origins of the Pennsylvania arms bearing clause, see Kozuskanich, *supra* note 63 at 1044–46.

91. RULES OF DISCIPLINE, *supra* note 83.

92. *District of Columbia v. Heller*, 554 U.S. 570, 589–90 (2008).

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bearing arms in those conflicts.<sup>93</sup> While Quakers protested, Moravians paid the tax required.

#### THE UNREASONABLE SEARCH FOR THE REASONABLE MAN

Beard's impact on legal scholarship, particularly constitutional theory, has been modest, especially when compared with his significant influence on historical scholarship over the last century. Yale Law School's Akhil Amar's treatment of Beard seems typical of the current views of many legal scholars:

But—Charles Beard notwithstanding—the act of the constitution was not some antidemocratic, Thermidorian counterrevolution, akin to a coup d'etat, but was instead the most participatory and majoritarian event the planet had ever seen (and lawful to boot). Looking backwards from today, we see all the painful exclusions—of women, of slaves—but often miss the breadth of inclusion, looking backwards from 1787.<sup>94</sup>

Amar correctly cautions against judging the Founders by modern standards of democracy. He is doubtless correct that Beard's most immediate impact was on demonstrating that the Founders were not simply disinterested patriots virtuously setting aside their own economic welfare for the good of the nation. Judged from the perspective of modern historiography the counter-revolution thesis has not been the aspect of Beard's analysis that has borne the most interesting historical fruit. It is the Libby/Beard account of the dynamics of ratification and the nature of Anti-Federalism that has had the most enduring impact on historical scholarship.<sup>95</sup>

The most important theoretical division among contemporary academic originalists is not between liberals and conservatives, but rather the split between traditional intentionalists and proponents of some form of public meaning

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93. Jared S. Burkholder, *Neither "Kriegerisch" nor "Quäkerisch": Moravians and the Question of Violence in Eighteenth-Century Pennsylvania*, 12 J. MORAVIAN HIST. 143.

94. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 496 (1994) For another critical view of Beard, see Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4 (1987). For another Progressive version of this claim, see J. ALLEN SMITH, *THE SPIRIT OF AMERICAN GOVERNMENT: A STUDY OF THE CONSTITUTION: ITS ORIGIN, INFLUENCE AND RELATION TO DEMOCRACY* (1907). Chapter Three of Smith's book was provocatively entitled, "The Constitution: A Reactionary Document."

95. See discussion *supra* p. 387.

originalism.<sup>96</sup> Supporters of intentionalism continue to affirm that the proper focus of originalist inquiry is the discovery of original intent.<sup>97</sup> This position has become increasingly marginalized in recent years. The ascendant paradigm among originalists is public meaning originalism.<sup>98</sup>

Most variants of public meaning originalism share a common assumption: the belief that focusing on some type of ideal fictive reader—sometimes described as a competent speaker of English or a fully informed reasonable reader—is the proper way to discover the original meaning of the Constitution.<sup>99</sup> Randy Barnett describes the approach as follows: “[I]t is important for me to stress that the New Originalism seeks to identify what a reasonable speaker of English would have understood the words of the text to mean at the time of its enactment.”<sup>100</sup> John McGinnis and Michael Rappaport frame the project in similar terms: “Theories of original public meaning, in contrast to original intent, interpret the Constitution according to how the words of the document would have been understood by a competent and reasonable speaker of the language at the time of the document’s enactment.”<sup>101</sup> Gary Lawson’s summary of the role of such readers in new originalism seems especially apt:

The reasonable American person of 1788 determines, for 1788 and today, the meaning of the federal Constitution. Thus, when interpreting the Constitution, the touchstone is not the specific thoughts in the heads of any particular historical people—

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96. Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 *FORDHAM L. REV.* 545 (2013) draw a distinction between New Originalism and neo-originalisms. Others scholars have also pointed out that the spread of theories claiming the mantle of “New Originalism” have proliferated to such a degree that the term may no longer have much value; James E. Fleming, *The Inclusiveness of the New Originalism*, 82 *FORDHAM L. REV.* 433 (2013); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 *GEO. L.J.* 713, 749–55 (2011); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 *DUKE L.J.* 239, 247–67 (2009); Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 *HASTINGS L.J.* 707, 722–24 (2011). In some accounts, scholars as different as Jack Balkin, Randy Barnett, and Keith Whittington are treated as New Originalists; see Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375 (2013); Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411, 413–31 (2013) and JACK M. BALKIN, *LIVING ORIGINALISM* 3–5 (2011).

97. For a defense of traditional intentionalism, see Larry Alexander, *Originalism, the Why and the What*, 82 *FORDHAM L. REV.* 539, 540–41 (2013); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 *NW. U. L. REV.* 703 (2009).

98. Barnett, *supra* note 96; McGinnis & Rappaport, *supra* note 4, at 761.

99. Solum, *Heller and Originalism*, *supra* note 16.

100. Barnett, *supra* note 96, at 415.

101. McGinnis & Rappaport, *supra* note 4, at 761.

whether drafters, ratifiers, or commentators, however distinguished and significant within the drafting and ratification process they may have been—but rather the hypothetical understandings of a reasonable person who is artificially constructed by lawyers. The thoughts of historical figures may be relevant to the ultimate inquiry, but the ultimate inquiry is legal.<sup>102</sup>

The reasonable person originalists seek is not a neutral legal construct, but an ideological construction. New originalists invoke the ideal of empiricism, claiming to be interested in “facts about the world,” but on closer inspection there is little genuinely empirical about new originalist claims.<sup>103</sup> In place of rigorous empirical research about how Americans actually understood the Constitution originalists have substituted the idea of the reasonable reader. Constructing such a reader would require an empirical methodology to deal with the multiple and conflicting intents of various authors and readers of the Constitution. Yet, new originalism emerged as a response to earlier critiques of intentionalist originalism, which failed precisely because they had no method to deal with this problem.<sup>104</sup> The turn to philosophy of language did not solve the earlier problems with originalism; it has merely camouflaged them under a new philosophically inflected theoretical jargon. Dressing up new originalist theory in philosophical terms, particularly when the philosophy is so out of step with what philosophers of language have written about meaning and intention in the last twenty years, has done little more than create a new type of law office philosophy to justify the old law office history.<sup>105</sup>

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102. Gary Lawson & Guy Seidman, *Originalism As a Legal Enterprise*, 23 CONST. COMMENT. 47, 79 (2006) at 48; ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 355, 399–402 (2012).

103. Barnett, *supra* note 97. Solum, *Heller and Originalism*, *supra* note 16, at 946.

104. On law office history, see Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479 (2008); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

105. Solum and Barnett have invoked the authority of philosopher of language Paul Grice, but the version of Grice conjured up by these new originalists bears little relationship to Grice’s philosophy and his project of creating an *intention* based semantics and pragmatics. See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* (1989). Semantic originalism claims to be able to discern Gricean sentence meaning without addressing intent. This misreading of Grice means the entire project is actually parasitic on intentionalism without realizing it. For a critique of new originalism along these lines, see Larry Alexander, *Constitutional Theories: A Taxonomy and (Implicit) Critique* 23 (San Diego Legal Studies, Paper No. 13-120, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2277790](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2277790). On Grice’s theory, see WILLIAM G. LYCAN, *PHILOSOPHY OF LANGUAGE: A CONTEMPORARY INTRODUCTION* 86–97 (2000); MICHAEL MORRIS, *AN INTRODUCTION TO THE PHILOSOPHY OF LANGUAGE* 248–70

Although New Originalists often talk about discovering how the Constitution was read in 1788, most of the scholars associated with this paradigm seem unaware of the theoretical and methodological debates spawned by reader response literary criticism and the history of reading.<sup>106</sup> The shift from imaginary readers to empirical studies of actual readers was driven by the simple realization that real readers seldom behaved in the manner that critics had envisioned. Fictive ideal readers invariably tended to mirror the ideological biases of the critics responsible for creating them.<sup>107</sup> Ascertaining historical evidence of actual reading practices is notoriously difficult. In the case of the Constitution, a document that was both highly political and bitterly contested, the problems are even more intractable.<sup>108</sup> Should the fully informed reasonable reader we construct use Federalist interpretive practices or Anti-Federalist ones? If we choose a Federalist should our reader be Hamiltonian or Madisonian? Did the reasonable reader interpret the Constitution against background assumptions drawn from Anglo-

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(2007). Philosopher Stephen Neale's explication of Grice underscores the centrality of intention to his conception of sentence meaning: "[S]entence meaning (more broadly, *utterance-type* meaning) can be analysed (roughly) in terms of regularities over the intentions with which utterers produce those sentences on given occasions," Stephen Neale, *Paul Grice and the Philosophy of Language*, 15 LINGUISTICS & PHIL. 509, 515 (1992). By contrast, Solum claims "the sentence meaning (or 'expression meaning') of an utterance is the conventional semantic meaning of the words and phrases that constitute the utterance," Solum, *Heller and Originalism*, *supra* note 16, at 949. More recently, Solum has argued that "'Public Meaning Originalism' names the version of originalist theory holding that the communicative content of the constitutional text is fixed at the time of origin by the conventional semantic meaning of the words and phrases in the context that was shared by the drafters, ratifiers, and citizens." See Solum, *Originalism and Constitutional Construction*, *supra* note 16, at 459. The obvious problem with Solum's formulation is that communicative content in Gricean terms can only be discerned by reference to speakers' intentions, or in the case of sentence meaning, the patterns of intentionality corresponding to utterances in a particular linguistic community. Correctly construed, Grice's theory could only lead to an intentionalist, not a semantic theory of originalism; see Larry Alexander, *supra* note 97, at 540–41.

106. Literary scholars and historians have been writing about reading for more than twenty years. On the history of reader-response criticism, see generally Philip Goldstein, *Reader-Response Theory and Criticism*, in THE JOHNS HOPKINS GUIDE TO LITERARY THEORY AND CRITICISM 793 (Michael Groden et al. eds., 2d ed. 2005); Robert Darnton, *History of Reading*, in NEW PERSPECTIVES ON HISTORICAL WRITING 140 (Peter Burke ed., 1991); Roger Chartier, *Texts, Printings, Readings*, in THE NEW CULTURAL HISTORY 154–75 (Lynn Hunt ed., 1989). For a theoretical discussion of the implications of this method for intellectual history, see Martyn P. Thompson, *Reception Theory and the Interpretation of Historical Meaning*, 32 HIST. & THEORY 248 (1993).

107. On the need to study actual readers, see JANICE A. RADWAY, *READING THE ROMANCE: WOMEN, PATRIARCHY, AND POPULAR LITERATURE* (1984).

108. Some of the empirical problems of constructing actual histories of reading are discussed in Ian Jackson, *Approaches to the History of Readers and Reading in Eighteenth-Century Britain*, 47 HIST. J. 1041 (2004).

American law or would the reasonable reader start with the assumption that the American Revolution marked a sharp break with English law?<sup>109</sup> The significance of Beard's original insight about the Constitution remains as important as ever: attitudes towards the Constitution in 1788 were determined, at least partially, by socio-economic interests and socio-cultural differences. The full range of American legal thought in the Founding era included a spectrum that ran from the artisan Benjamin Austin to the new nation's most gifted legal theorist James Wilson.<sup>110</sup> Austin gained most of his knowledge from the popular press. Wilson was a university educated lawyer who became a professor of law and a Supreme Court Justice. Both men were rational and competent users of English in 1788, but they interpreted the Constitution in radically different ways. Choosing one interpretive framework over the other is not a neutral exercise, but an inescapably political and philosophical one.<sup>111</sup> Given the contentious nature of Founding era legal culture it seems unreasonable to assume that one can identify a single set of assumptions and practices from which to construct an ideal reasonable reader who could serve as model for how to understand the Constitution in 1788.<sup>112</sup>

In an important essay, philosopher Andrei Marmor has provided a useful reminder that many of the key ideas in legal and constitutional law are best understood as essentially contested concepts.<sup>113</sup> The meaning of reasonableness in 1788 would depend

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109. On the importance of this question to Founding era constitutional controversy, see Saul Cornell, *supra* note 10 at 324.

110. On Austin, see Aaron T. Knapp, *Law's Revolution: Benjamin Austin and the Spirit of '86*, 25 YALE J.L. & HUMAN. 271 (2013). For other discussions of anti-lawyer sentiment in the Founding era, see RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 115 (1971); MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876* (1976).

111. Ironically, using Wilson the better educated figure as our model would result in a jurisprudence most modern Americans would reject. It would require a repudiation of much modern First Amendment doctrine, see Cornell, *supra* note 5.

112. SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* 87 (2007). On interpretive pluralism in the Founding era, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003). Nelson attempts to save the originalist project by asserting that by the Marshall Court era interpretive assumptions had become settled. The evidence for this aspect of Nelson's erudite essay seems unpersuasive. There is no principled reason to claim that interpretive assumptions should be frozen in the Marshall Court era. Once we concede that new theoretical insights can bring about a better understanding of the original principles embedded in the Constitution, we must also conclude that each generation is able to engage in the same process of interpretation, see BALKIN, *supra* note 96.

113. Andrei Marmor, *Meaning and Belief in Constitutional Interpretation*, 82 FORDHAM L. REV. 577 (2013).

in large measure on which sets of background assumptions one takes to be normative and which of several competing constitutional values one took to be foundational.<sup>114</sup> By invoking a single unproblematic concept of reasonableness, when the concept was actually deeply contested, originalists can selectively pluck evidence from whatever source suits their particular ideological agenda and proclaim this to be identical to what a reasonable speaker of English would have believed. Such a pseudo-empirical methodology is little more than a constitutional shell game: an example of the old law office history dressed up in a new wrinkle-free set of eighteenth-century britches and a tri-cornered hat. Using this approach one can take an idiosyncratic usage such as the Pennsylvania *Dissent's* use of bearing arms and treat it as if it were evidence of what an imaginary reasonable reader of the Constitution actually believed. As the use of the Pennsylvania *Dissent* in *Heller* makes clear, one can transform a marginal or radical voice into a proxy for the objective public meaning of the Constitution.<sup>115</sup>

Gary Lawson is more forthright than many New Originalists when he concedes that the idea of an objective reasonable reader of the Constitution is a legal fiction. Although the “reasonable man” continues to play an important role in many areas of law, the concept has come under increasing criticism.<sup>116</sup> Even the most stalwart defenders of the utility of this concept concede that it is easily manipulated and often reflects ideological and cultural biases.<sup>117</sup> The concept of the reasonable man in originalist theory

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114. Marmor, *supra* note 13. Although New Originalists have tried to frame their enterprise in terms of interpretation and construction, such a dichotomy seems problematic. Founding era texts refer to theories of construction when discussing questions of interpretation, which makes the new originalist terminology inconsistent with Founding era language and usage; on this point, see BARBER & FLEMING, *supra* note 112, at 92–97. For a more general theoretical critique of New Originalism’s confusion of legal meaning with semantic meaning, see Berman & Toh, *supra* note 96.

115. As Marmor notes, “In short, general evaluative concepts are typically *superpolysemous*; such concept-words have a very wide semantic range, and they tend to designate different types of concerns, depending on context, background assumptions, the speaker’s intention, etc.,” Marmor, *supra* note 113, at 592. As Fleming notes, “the move within originalism from intention of the Framers to original public meaning is largely a public relations move—one that seems to acknowledge the flaws in the old originalism, yet to leave the actual practice of originalism unaffected,” Fleming, *supra* note 96, at 446.

116. Legal studies of gender have been particularly attuned to the cultural construction of reasonableness in gendered terms. These constructions are never neutral, Victoria Nourse, *After the Reasonable Man: Getting Over the Subjectivity/Objectivity Question*, 11 *NEW CRIM. L. REV.* 33 (2008); Barbara Y. Welke, *Unreasonable Women: Gender and the Law of Accidental Injury, 1870-1920*, 19 *LAW & SOC. INQUIRY* 369 (1994).

117. For a useful overview of the importance and problems with this construction, see Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative*

serves as a way to avoid dealing with the core methodological problem of originalism: the absence of a sophisticated empirical methodology to deal with the contested nature of constitutional meaning in the Founding era. In this sense the practice of originalists is a bit like the joke about the economist trapped on an island with a cache of supplies in tin cans whose solution to the problem of opening them is to create a model that assumes the existence of a can opener. The construction of a reasonable person necessarily requires ideological choices on the part of the originalist interpreter.<sup>118</sup> In practice these choices almost always match up with the ideological predilections of the originalist interpreter. In short, public meaning originalism is really an ideology, not a genuine scholarly methodology.

Even if one were able to create the perfect hypothetical reader without any ideological bias such a reader would be an artificial construction and not a suitable basis for recovering the legal meaning of a document created and read by real eighteenth-century Americans. Using a fictional constructed reader who never participated in the process of ratification as the basis for interpreting the Constitution, instead of the actual readers who approved the document and gave it legal effect at the time, makes a mockery of any pretense that originalism has any connection with democratic theory or any foundation in a theory of consent.<sup>119</sup>

The notion of empirically investigating actual patterns of Founding era reading and interpretation and using these to promote a better understanding of the foundations of our constitutional system makes a good deal of sense. There is much to be learned from the Founding generation's efforts to grapple with the implementation of the Constitution.<sup>120</sup> As a practical

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*Perspective*, 14 LEWIS & CLARK L. REV. 1233 (2010). Moran accepts that the concept has been used to advance particular ideological agendas, but he nonetheless believes that the concept can be rehabilitated.

118. Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y. 5 (2011); Robert Post & Reva Siegel, *Originalism As a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006). On originalism's contemporary importance to political and ideological arguments about the Constitution in American politics, see Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009).

119. On the role of consent in originalist theories, see Barnett, *supra* note 97.

120. Originalist Randy Barnett seems confused by the widespread opposition of so many historians to originalism and the willingness of many of the same historians to sign amicus briefs, *id.* at 416. Part of Barnett's confusion arises from a failure to distinguish between scholarship and advocacy. For an important discussion of this distinction, see William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237 (1986). Historians writing scholarly articles are constrained by the norms of historical writing that aim at truth seeking. Historians participating in amicus briefs are engaged in

matter New Originalism's emphasis on ideal readers and public meaning makes it too easy to manipulate evidence and churn out law office histories designed to justify almost any contemporary policy preference.<sup>121</sup> Focusing on what actual historical actors said and believed has the advantage that one can hold originalists accountable to accepted historical standards of proof. The lesson from *Heller* seems clear: originalism places almost no meaningful restraints on judges and is an open invitation to judicial activism.<sup>122</sup>

#### CONCLUSION: BEARD AND BEYOND

A healthy dose of Beardianism seems essential to any sophisticated approach to understanding the original debate over the Constitution's original meaning. Of course what may be salutary in moderate doses can easily prove harmful if taken in too large a dose.<sup>123</sup> Beard urged Americans to recognize that the Constitution was born out of deep conflicts rooted in the socio-economic divisions of eighteenth century American society. These tensions and divisions contributed to the emergence of radically different visions of what the Constitution meant in 1788 and 1791. There is no need to embrace Beard's materialism to appreciate the power of his insight. More than a hundred years after the publication of Beard's pioneering work the time seems right for legal scholars to embrace a new constitutional historicism that acknowledges the true complexity of the original debate over the Constitution.<sup>124</sup>

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a legal process and governed by the norms of legal advocacy. The issues raised by such genre crossing have not been properly theorized by historians or legal scholars. For a thoughtful preliminary effort to begin such a process, see Joshua Stein, Note, *Historians Before the Bench: Friends of the Court, Foes of Originalism*, 25 YALE J.L. & HUMAN. 359 (2013). Legal scholars are also divided over the connections between scholarship, advocacy, and amicus briefs. For two contrasting views of the proper role of legal scholars in amicus briefs, compare Richard H. Fallon, Jr., *Scholars' Briefs and the Vocation of a Law Professor*, 4 J. LEGAL ANALYSIS 223 (2012), with Amanda Frost, *In Defense of Scholars' Briefs: A Response to Richard Fallon*, 16 GREEN BAG 2D 135 (2013).

121. Kay, *supra* note 97.

122. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009); Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 32, 38-40; Charles Fried, *The Second Annual Kennedy Lecture: On Judgment*, 15 LEWIS & CLARK L. REV. 1031 (2011).

123. Bernstein, *supra* note 70.

124. Meyler, *supra* note 14.