The Second Amendment's Fixed Meaning and Multiple Purposes

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Dedicated to my parents, Regina and Luiz Carlos

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**Abstract**

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The faith to the Constitution's textual meaning may provide the interpreter with the ability to perceive the adaptability of a constitutional provision to different social and political contexts. The text of the Constitution refers to principles of law; principles that are indispensable in different ways throughout time. Textualism as a constitutional interpretation model may offer the path to a more versatile Constitution.

To support this statement, this work examines the cases in which the Supreme Court interpreted the Second Amendment to the Constitution. The focal point of interest is the uses of history and historic research in constitutional adjudication. The main argument is that the adoption of the textualist stream of originalism by the Court has enabled it to understand how the right to keep and bear arms has been crucial in different ways and in different contexts throughout American history.

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## Introduction

Being enacted by the First Congress in 1789, the Second Amendment to the Constitution had never, until 2008, been carefully scrutinized be the Supreme Court, albeit the vivid debates that gun regulation has provoked throughout American history.[1]

During the nineteenth century, there was not a significant debate over the nature of the right to keep and bear arms. The right protected by the Second Amendment was generally discussed in the context of the racial conflicts and the granting of constitutional rights to the free African American population. It was only in the beginning of the twentieth century that the first claims that the Second Amendment had its exercise limited by the militia use appeared. This view was strengthened after the 1960's, with the rise of gun violence and the emergence of a more articulate gun control movement, which claimed a serious limitation in gun ownership. The argument that the Second Amendment should be viewed as dependent on the militia use of arms was part of the debate over gun control that such movement advocated.[2]

Notwithstanding the intensity of the debates over the right to keep and bear arms, the Supreme Court had never examined the Second Amendment profoundly. The two first cases regarding the Second Amendment—*United States v. Cruikshank*[3] and *Presser v. Illinois*[4]—did not require such examination. In the first, the Court had to decide if the Bill of Rights, and hence the Second Amendment, imposed restrictions on private action, in addition to the limitation it imposed in the government. The Court answered

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[1] See Cottrol, Robert J. and Diamond, Raymond T., Public Safety and the Right to Bear Arms. THE BILL OF RIGHTS IN MODERN AMERICA, David J. Bodenhamer, James W. Ely, Jr., eds., Indiana University Press, 2008; GWU Law School Public Law Research Paper No. 389; GWU Legal Studies Research Paper No. 389, at 1 and 2. Available at SSRN: http://ssrn.com/abstract=1088728 on 4/16/2012.
[2] *Id.*, at 10-24.
[3] 92 U.S. 542 (1876) [hereinafter *Cruikshank*].
[4] 116 U.S. 252 (1886) [hereinafter *Presser*].

negatively. The second case dealt with the incorporation of the Second Amendment as a right enforceable against State action by the Fourteenth Amendment. The Court held that the Amendment had not been incorporated.[5]

A third case, *United States v. Miller*[6], resulted from a 1930's regulation on guns, as a response to the increase of gang related crimes. In this case, the Court only heard the government's argument. It remanded the case to the lower courts to decide if the type of gun was suitable for use in a militia. This case is an object of great debate. Advocates of the collective right to keep and bear arms argue that the Court supported their view. On the other hand, the Court's view of the militia is one that includes all individuals, what would strengthen the individual right understanding of the Second Amendment.[7]

The Second Amendment was finally carefully interpreted by the Supreme Court in *District of Columbia v. Heller*[8] in 2008 and *McDonald v. City of Chicago*[9] in 2010. In the first case, a District of Columbia handgun ban was challenged. The central issue of the case was whether the Second Amendment protected an individual right to keep and bear arms, or if its exercise depended on participation in a State militia. In McDonald, a similar law was challenged, and the Court was to determine if the Second Amendment had been incorporated as a protection against State and local action by the Fourteenth Amendment.

[5] Cottrol, Robert J. and Diamond, Raymond T., *supra* note 1, at 14 and 15.
[6] 307 U.S. 174 (1939) [hereinafter *Miller*].
[7] Cottrol, Robert J. and Diamond, Raymond T., *supra* note 1, at 18-20.
[8] 554 U.S. 570 [hereinafter *Heller*].
[9] 130 S.Ct. 3020 [hereinafter *McDonald*].

The Second Amendment is one of the best viewpoints to observe the complex debates that occur in the field of constitutional theory and interpretation.[10] The protection of the right to keep and bear arms is the only constitutional provision in which the framers stated the practical purpose for its codification. The amendment also challenges the conventional expectations regarding the country's political opinions and their respective constitutional claims. The liberal approach that usually emphasizes individual liberties against government intervention tends to understate the individual content of the Second Amendment, and the reverse is equally true.[11]

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

In the current days, history is a vital component of constitutional adjudication. This is partly due to the emergence of the originalist theory of interpretation. This theory has had considerable influence in the Supreme Court, what it easily perceived by the reading of *Heller*. It is possible to say that *Heller* is a case as much about originalism as it is about the Second Amendment.[12] To explore the uses of history in constitutional

[10] See Eugene Voloch, Robert J. Cottrol, Sanford Levinson, L.A. Powe, Jr., and Glenn Harlan Reynolds, The Second Amendment as Teaching Tool in Constitutional Law Classes, 48 Journal of Legal Education, 591 (December 1998).
[11] *Id.*, at 592.
[12] An illustration of this assertion is the placement of *Heller* in the topic dedicated to "Methods of Interpreting the Constitution" in GREGORY E. MAGGS'S AND PETER J. SMITH'S CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH (West, 2011).

adjudication, and specifically in the Court's interpretation of the Second Amendment, it is necessary to examine originalism.

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

From the one hand, originalism is profoundly related to what is known the counter-majoritatian difficulty, a term that represents the problematic position of judicial review in a democratic society. This is the subject of Chapter 1. Originalism presents itself as a solution to such difficulty, by offering a democratic basis for judicial review: the democratic legitimacy that derives from the events that led to the enactment of the constitutional text.

From the other hand, originalism enhances the relevance of history to constitutional adjudication. Chapter 2 investigates the uneasy relationship that history and law have had during the twentieth century, which is done by examining the path that both legal and historic scholarships have been through. This is the history of the decline of the ideal of law as an autonomous discipline and of the ideal of objectivity in historic research. Lastly, Chapter 2 seeks to identify what the relevance of history to constitutional adjudication is; what it can afford to the legal field.

Chapter 3 finally examines originalism. The focus is on its evolvement, and the shift from the initial original intent theory—the proposal that the constitutional rule of law is defined by the original intent of the framers and ratifiers of the Constitution—to

the original textual meaning model—based on the idea that the constitutional rule of law is defined by the original meaning of the constitutional text. The final part of the chapter observes how the debate over originalism has revived a long-going thread over textualism and intentionalism in legal interpretation. This is the theoretical locus of the present study, as it intends to observe how each of these paradigms of legal interpretation deals with history.

Part II examines the cases in which the Supreme Court interpreted the Second Amendment. Its focus is essentially on the historic research carried out by the opinions. Chapter 4 briefly exposes the processes that led to the Supreme Court decisions and their main opinions. Chapter 5 is the central point of the examination of the historic inquiries made by the Supreme Court justices. It analyzes the sources in which the justices relied on and the results they reached. It argues that the sources used depended on jurisprudential choices, and thus the results obtained, albeit grounded on historic research, were essentially the result of legal reasoning.

From the opinions in *Heller* and *McDonald*, it is possible to observe the history of the right to possess arms in the United States, since its English background until the present days. Chapter 6 intends to tell this story, as it may be captured from the Supreme Court opinions.

Finally, Chapter 7 supports the idea that, from the perspective of the Supreme Court's opinions in *Heller* and *Mcdonald*, the Second Amendment has a fixed textual meaning, which has served to multiple practical intents throughout American history. This statement is based on the idea that textualist originalism has enabled the Court to see

the Second Amendment in a form which is adaptable to different social and political contexts.

# Part I – Background

## Chapter 1 – The Counter-Majoritarian Difficulty

Before originalism emerged as a theory of constitutional interpretation, the main concern of constitutional scholarship had been the legitimacy of the judicial review in the American democratic scheme. This concern has been referred to as the "counter-majoritarian difficulty". Originalism is profoundly related to this debate. It is presented as a solution to such a difficulty, a statement that will be examined in Chapter 3. The purpose of the present chapter is to present an overview of the main issues of the debate over the counter-majoritarian difficulty. This is essential to allow a better comprehension of the theoretical context in which originalism developed.

The placement of judicial review in the institutional design of American democracy is a permanent concern in the country's political debate.[13] Currently, this issue is perceived under the name of "counter-majoritarian difficulty". Although it does not have a fixed concept, there is no doubt about its meaning, which is described by Barry Friedman as "the problem of justifying the exercise of judicial review by unelected … judges in what we … deem as a political democracy."[14]

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

[13] Jesse H. Choper, The Supreme Court and the Political Branches: Democratic Theory and Practice, 122 University of Pennsylvania Law Review, 810, 810 (1974) (cited by Barry Friedman, The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, 73 New York University Law Review, 333, 340 (May 1998)).

[14] Barry Friedman, The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five, 112 Yale Law Journal 153, 155 (November 2002).

> [t]hey [the judges] will give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or controul their adjudications. From this court there is no appeal. And I conceive the legislature themselves, cannot set aside a judgment of this court, because they are authorised by the constitution to decide in the last resort. The legislature must be controuled by the constitution, and not the constitution by them.[15]

Examining the issue, Alexander Bickel, in 1962, affirmed that "[t]he root difficulty is that judicial review is a counter-majoritarian force in our system".[16] This gave birth to the term "counter-majoritarian difficulty", which has become one of the most turbulent issues in the constitutional debate in the United States in the last 50 years.[17]

The main premise of the counter-majoritarian difficulty thesis rests on the account that democracy takes on public will. Because democracy is defined by popular will, the power given to the courts to strike down legislation [or to uphold rights] in alleged conflict with the majority's opinion undermines the democratic system.[18] Thus, the counter-majoritarian difficulty argument rests on ideas about the American democratic system and the role of the Judiciary in its institutional design.

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[15] Anti-Federalist Papers no. 11.
[16] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (Yale University Press, 1986).
[17] Barry Friedman, *supra* note 14, at 155.
[18] Barry Friedman, *supra* note 13, at 335.

The issues at stake in the discussion about the counter-majoritarian difficulty are whether democracy is truly a system laid upon majority's will; whether the courts' behavior demonstrates a disregard of popular will and; finally, what the consequences of the counter-majoritarian difficulty theory in constitutional scholarship are.

Barry Friedman claims that the counter-majoritarian difficulty is not grounded on eternal and universal truths. Rather, he affirms, "it is the product of a historically contingent set of circumstances. It is true that courts have been criticized throughout American history when they acted contrary to the will of people"[19]. However, he considers that the majority of legal scholarship is not concerned with a profound democratic theory and the insertion of the Judiciary on that theory.[20]

The preoccupation with majoritarianism and judicial review, Friedman argues, is nothing more than a smoke screen to hide truly normative theories. Authors have been supporting ideas on how courts should address specific problems and present those ideas as solutions to the counter-majoritarian difficulty. The problem, he claims, "represents … a need to justify present-day political preferences in light of an inherited intellectual tradition"[21].

One notable work to understand the debate over democratic theory and the judicial role is John Hart Ely's Democracy and Distrust[22], in which an idea of the judicial role in a democratic system is set forth. Ely dismisses both interpretavism (an approach on interpretation strongly attached to the text of the Constitution) and noninterpretavisim

[19] Barry Friedman, s*upra* note 14, at 256.
[20] *Id.*
[21] *Id*., at 156-157.
[22] JOHN HART ELY, DEMOCRACY AND DISTRUST (Harvard University Press, 1980).

(a more open-ended approach that takes into account extra-constitutional values).[23] In his opinion, both approaches share, by different ways, the problem of indeterminacy. Interpretativism's problem lays on the lack of determinacy of the constitutional text, while noninterpretativism grounds on a concept of fundamental rights is certainly unclear.[24]

Indeterminacy presents an obstacle to the majoritarian democracy, and this is the starting point of Ely's theory[25]. In his opinion, "the central problem … of judicial review [is that] a body that is not elected or otherwise politically responsible in any siginificant way is telling the people's elected representatives that they cannot govern as they'd like"[26].

The democratic system Ely visualizes is mostly grounded on the Carolene Products Footnote Four[27]. This means that his idea of democracy is a procedural one. His focus is on the representative system, and he thus claims that courts' most fundamental

[23] *Id*., at 1.
[24] *Id*., at 4 and 5.
[25] See Jane S. Schacter, Ely and the Idea of Democracy, 57 Stanford Law Review 737, 739 (December 2004).
[26] JOHN HART ELY, s*upra* note 22, at 4-5.
[27] *United States v. Carolene Products Company*, 304 U.S. 144 (1938). Footnote four read as follows:
"There may be narrower scope for operation of the presumption of constitutionality when *legislation appears on its face to be within a specific prohibition of the Constitution*, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth…
It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.
Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious … or national … or racial minorities …: whether prejudice against *discrete and insular minorities* may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

task is to maintain a fair political process.[28] Court's role in the democratic system, thus, would be to enhance the majoritarian principle.[29]

Nevertheless, a different conception of the democratic system has also had influence in the United States. This is one of substantive democracy, not of merely procedural democracy. Jane S. Schacter sees in Tocqueville one of the origins of this idea of democracy, one that "is not only an electoral system, but a community of citizens whose collective interactions with one another are in many ways as important as the precise institutional arrangements by which the state itself is constitutes"[30]. This democratic culture is grounded not only on the process by which political decisions are made, but by the commitment made to substantive principles, "commitments defining the values that we as a society, acting politically, must respect"[31].

Accordingly, the counter-majoritarian difficulty rests on an idea by which democracy is majoritarian decision-making. This idea, however, is not a unanimous one. On the contrary, it is subject to criticism for being narrow and for not taking into account the broader and substantive values inherent in the constitutional order.

Furthermore, the concept on which the counter-majoritarian difficulty theory rests upon is challenged, in a certain extent, by the ideas championed by what came to be called the social choice theory. Based on the work of the economist Kenneth Arrow, studies on the characteristics of processes of collective decision-making have called attention to its incapacity to be fair or rational.[32]

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[28] See Jane Schacter, *supra* note 25, at 740-741.
[29] *Id.*, at 741.
[30] *Id.*, at 747.
[31] Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theorie, 89 Yale Law Journal 1063, 1065 (May 1980).
[32] Elizabeth S. Anderson and Richard H. Pildes, Slinging Arrows: Social Choice Theory, Value Pluralism, and Democratic Politics, 90 Columbia Law Review 2121, 2124 (December 1990).

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

> From across the political spectrum of the current constitutional law academy, scholars have proposed such reassessments. In his recent Supreme Court Foreword in the Harvard Law Review, Erwin Chemerinsky makes Arrow's Theorem a centerpiece in his argument that democratic legislatures cannot 'reflect the views of a majority in society.' From the radically skeptical left, Mark Tushnet takes Arrow's Theorem to have proven 'that constitutional theory must fail in the task' of reconciling judicial review with democracy. Representing the liberal wing, Laurence Tribe suggests the Theorem might establish that representative processes cannot reflect majority will meaningfully; at the least, he argues, the Theorem 'puts the burden of persuasion on those who assert that legislatures (or executives) deserve judicial deference.' And from the libertarian right, Judges Easterbrook and Posner between them have asserted at various times that the Theorem suggests that legislatures are incapable of formulating intelligible policy, that courts should no longer seek to harmonize the policies in distinct statutes, that statutory interpretation has been dealt a 'mortal blow,' and that courts should no longer be criticized for issuing inconsistent decisions.[33]

Erwin Chemerinsky affirms that the Executive and the Legislature—which are deemed as the democratic branches of government, in opposition to the Judiciary, according to the counter-majoritarian difficulty theory—do not necessarily act in a way

[33] Elizabeth S. Anderson and Richard H. Pildes, *supra* note 32, at 2124 and 2125.

that reflect the majority's views.[34] The ideas championed by the social choice theory have shaken the stable arena in which the debate over democracy has been made. It is as if it had taken the one idea that sustained the democratic system: the majority's rule.[35]

Summed to this shift in democratic theory are studies which focus on the relationship between the courts, politics and public opinion. These studies have called attention to the overall convergence between courts' decisions and the public opinion.[36] The whole institutional design of the American democratic process ensures that the courts, at most "ha[ve] the power to impose delay on majoritarian policy preferences"[37].

It is possible to see, at this point, the three different debates in which the counter-majoritarian difficulty theory falls: the debate over procedural versus substantive democracy; the thread about the effectiveness of collective decision-making; and discussions between the judiciary, politics and the public opinion.

From all of these discussions arises Barry Friedman's assertion that the counter-majoritarian difficulty theory is an academic obsession that serves as a disguise for normative claims. This practice, he affirms, "serves only to obscure that what is on offer is the author's own view, as opposed to a theoretical solution … More explicit normativity might liberate scholars and improve the quality of the arguments"[38].

Steven G. Calabresi, on the other hand, argues that the counter-majoritarian difficulty is a real problem for two main reasons. The first rests on the possibility of a true inconsistency between the majorities represented by the political branches and the

[34] Erwin Chemerinsky, The Vanishing Constitution, 103 Harvard Law Review 43, 77 (November 1989).
[35] Elizabeth S. Anderson and Richard H. Pildes, *supra* note 32, at 2124 and 2125.
[36] Steven G. Calabresi, Textualism, Textualism and the Countermajoritarian Difficulty, 66 George Washington Law Review 1373, 1385-6 (June-August 1998). See also Barry Friedman, *supra* note 13, at 337-339.
[37] Steven G. Calabresi, *supra* note 36, at 1386.
[38] Barry Friedman, *supra* note 14, at 257.

judiciary, due to the different timing that govern their actions. This reason is summed to the power of agenda making by the federal courts and the difficulty of policy-making through the lengthy legislative process.[39]

The second reason for the real existence of the counter-majoritarian difficulty is the prevalence the federal government (and therefore national majorities) gains against local minorities.[40]

> Federations like the United States are typically characterized by a high degree of cultural, religious, racial, and even linguistic heterogeneity. Federal structure are thus ideally suited for liberal, tolerant societies that value and respect cultural pluralism. The National Supreme Court of such a federation must thus be something more than the agent of a national majority coalition.[41]

It seems that the debate over the existence of a difficulty in placing judicial review in a democratic system is not going to be over in a near future. The divergence in views about democracy—if based on the will of the majority of on the protection of substantive rights—may be observed since the founding era. The movements within this conflict are reflected in a series of other theories and ideas on the constitutional interpretation. Chapter 3 will be occupied with originalism. This is one of the theoretical debates that surround the emergence of such theory and a thorough comprehension of it request an overview of the counter-majoritarian difficulty.

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

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[39] Stevens G. Calabresi, *supra* note 36, at 1386-8
[40] *Id.*, at 1387.
[41] Stevens, G. Calabresi, *supra* note 14, at 1389.

## Chapter 2 – Back To History

During the end of the nineteenth century, the arrival of John Austin's analytical positivism to American legal field was meant to isolate law from other fields of knowledge.[42] One of the most salient elements in Austin's legal thought is the autonomy of law, the separation of law as it is and as it ought to be.[43] The study of law, in Austin's theory, must concentrate on what law is (to be explained through the assessment of its internal elements: command, duty and sanction), and not on the relations law might have with other fields of human experience, such as politics and morality.[44]

The isolation of law was motivated by the necessity to understand the law in scientific terms and thus to provide it with academic recognition. This isolation served the legal community as a means to the rise of a trained technical profession.[45] This movement was part of comprehensive scientific paradigms and academic arrangement. This objective was shared among the entire academic world of the period. As Christopher Tomlins puts it,

> … when the Langdellian law school was establishing the terms of its own, and law's professional and methodological differentiation from other subjects areas and modes of inquiry, it was doing little that was different from other sectors of the university, or of society at large. Langdell's law was no more obsessively differentiated or technically formalistic than other modes of contemporary

[42] Christopher Tomlins, History in the American Juridical Field: Narrative, Justification, and Explanation, 16 Yale Journal of Law & the Humanities 323, 336-347 (2004).
[43] Volume 1, John Austin, *Lectures on Jurisprudence*, *in* George C. Christie and Patrick H. Martin, Juisprudence: Text and Readings on the Philosophy of Law 673 (Thomson/West, 2008).
[44] *Id.*
[45] Christopher Tomlins, *supra* note 42, at 339-343.

> thought. … inquiry in general had fragmented under the impact of academic reorganization; this differentiation would continue through the following century.[46]

In effect, the isolation of academic fields had serious consequences for the relationship between law and history throughout the entire twentieth century. The use of history in legal debate has been subject essentially to two different types of criticism. The first one focuses on the history made by lawyers who are not trained as historians. The second one criticizes history made with the intention to promote legal claims.[47]

Both criticisms are based on the idea of a fundamental distinction between the methodologies and the goals of the fields. "Critics key in on the perceived difference in the underlying purposes of the respective professions: objectivity versus advocacy"[48]. One notable representative of this critique is Alfred Kelly's article Clio and the Court: An Illicit Love Affair[49]. Kelly claims that the use of history by the Warren Court was an awful one and that the poor quality revealed the underlying political intentions of the Court. This, "[i]n part, … would appear to derive from the radical difference in theory and process between the traditional Anglo-American system of advocacy and equally time-honored techniques of the scholar-historian"[50].

One way to look at the history of legal scholarship during the twentieth century is by analyzing the crisis of its isolation and the way law came to interact with other fields

[46] *Id.*, at 346-347.
[47] Matthew J. Festa, Applying a Usable Past: The Use of History in Law, 38 Setton Hall Law Review 479, 481-484 (2008).
[48] *Id.*, at 486.
[49] Alfred Kelly, Clio and the Court: an Illicit Love Affair, 1965 Supreme Court Review 119.
[50] *Id.*, at 155.

of knowledge. The criticism on the intention of law to be independent began in the beginning of the century; the products of such a criticism are still far from an end.

**a. The turn to history from the law's perspective**

The realist movement criticized what they called legal formalism for being unattached to the real world, and thus to be unable to provide sound answers to real-life legal problems. Realism was initially promoted mainly by the writings of Oliver Wendell Holmes, Jr and Roscoe Pound. Holmes, in his Path of the Law, sets up the idea of law as prediction of what the public force, through the courts, would determine.[51] He makes clear that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law"[52]. This conception had powerful consequences, as it dislocated law from theory to the reality of practice.

Roscoe Pound introduced the concept of mechanical jurisprudence. The danger of the adoption of a scientific system of law is its petrification. By this, he meant the risk that the legal system degenerates into technicalities. From his point of view, law should be evaluated by the results it achieves, and not by the internal coherence of its system.[53] He supported a movement "for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument."[54]

[51] Oliver Wendell Holmes., The Path of the Law, 10 Harvard Law Review 457, 458 (1896-1987).
[52] *Id.*, at 461.
[53] Roscoe Pound, Mechanical Jurisprudence, 8 Columbia Law Review 605, 605 (1908).
[54] *Id.*, at 609.

If the law is an instrument for the achievement of social ends, law alone cannot determine the outcome of legal (and thus social) disputes.[55] This idea is the basis for an initial dialogue between law and the social sciences. The key to understand the law, however, was still the study of law. The difference from formalism was that, for realists, the law was a tool for social progress and to be able to ensure that this goal would be achieved it was necessary "to know something about society"[56]. Mark Tushnet points out that, from the perspective of the realist jurisprudence,

> … the indeterminacy of formalistic legal rules should be replaced by a form of policy science that drew informally upon the wisdom of the social sciences to inform legal judgment. Social science would be called upon to answer questions that lawyers found interesting as they attempted to resolve conflicts that formalism left unresolved.[57]

The dialogue of law and the social sciences, at this point, rested on the idea that these disciplines had the power to promote social progress. "[L]egal 'science' became associated with inquiries that focused upon the current policy consequences of legal decisions, as illuminated by the techniques of modern social scientists."[58] This idea increased the distance between historic and legal scholarships. The legal scholarship claimed by the realist and the post-realist periods was present-minded, policy-oriented and ahistorical.[59]

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[55] Richard Posner, The Decline of Law as an Autonomous Discipline: 1962-1987, 100 Harvard Law Review 761, 762 (February 1987).
[56] *Id.*, at 763.
[57] Mark V. Tushnet, Critical legal Studies: A Political History, 100 Yale Law Journal 1515, 1532 (March 1991).
[58] G. Edward White, The Arrival of History in Constitutional Scholarship, 88 Virginia Law Review 485, 495-496 (May 2002).
[59] *Id.*, at 497.

Richard Posner enumerates some reasons for the decline of the autonomy of law.[60] Two of them are worth mentioning at this point. The first one is the broadening of the country's political spectrum, which was reflected on the legal academy and increased the political debate within it. This phenomenon might be understood under the light of what the Critical Legal Studies movement called the indeterminacy argument, which held "that within standard resources of legal argument were the materials for reaching sharply contrasting results in particular instances"[61].

Other important reason pointed by Richard Posner is the expansion of other disciplines[62], which generated another type of relationship between law and other disciplines, a relationship in which law came to be understood through the concepts offered by those disciplines. "Now, social science would not be merely instrumental to policymaking; rather, it would be a true science of law as a social phenomenon"[63]. The same idea seems to be underneath the coming about of the Law and Economics movement. As Richard Posner puts it, "[t]he economic analysis of nonmarket legal regulation can be viewed as part of the larger movement in economics towards application of the economic model to an ever greater range of human behavior and social institution"[64]. The underlying idea in both perspectives is that law came to be viewed as being part of a broader system of explanation of the reality.

[60] Richard Posner, *supra* note 55, at 766-774.
[61] Mark V. Tushnet, *supra* note 57, at 1524.
[62] Richard Posner, *supra* note 55, at 767.
[63] Mark V. Tushnet, *supra* note 57, at 1533.
[64] Richard Posner, Some Uses and Abuses of Law and Economics, 56 University of Chicago Law Review 281, 284 (1978-1979).

This is the point in which history started to be looked at. It was a moment of a profound crisis in legal scholarship, one in which law was deemed as dead[65]. In the words of Morton Horwitz, "history usually becomes the arbiter of constitutional theory only as a last resort in moments of intellectual crisis"[66].

The problem resides on what history has to offer to legal–and specifically to constitutional–scholarship. History opens the possibility to the discussion of purposes and meaning of constitutional clauses. But it seems that history has more to offer; it is able to give a meaning to the present. It provides information so that one can understand how social needs and feelings came to be or vanished. Through historical analysis, American constitutional tradition can be better understood. More than providing answers to legal problems, history enlightens these problems[67]. In the words of Justice Harlan in his dissenting opinion in *Poe v. Ullman*, "what history teaches are the traditions from which [this country] developed as well as the traditions from which it broke"[68].

Perhaps what this new dialogue with history may show is that historic consciousness might ground better legal decisions. Regardless the controversy over the existence of the counter-majoritarian difficulty, the problem of the legitimacy of law and of standards of interpretation seems to be a very real one.[69] Historic consciousness can provide an understanding of the rights on debate, the way they have been invaluable to society and the way they have been interpreted throughout history.

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[65] See Barry Friedman, The Turn to History, 72 New York University Law Review 928, 942 (October 1997).
[66] Morton J. Horwitz, Foreword: The Constitution of Change: Legal Fundamentality without Fundamentalism, 107 Harvard Law Review, 30, 40 (1993) (cited by Barry Freidman, *supra* note 63, at 959).
[67] Barry Friedman, *supra* note 65, at 962-964.
[68] 367 U.S. 497, 542.
[69] Barry Friedman, *supra* note 65, at 963.

**b. The usefulness of history**

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

The twentieth century witnessed the emergence and crisis of historicism as the main theory of historical inquiry and the way through which society perceived time and history.[70] Historicism was laid upon the legacy of modernity and its belief in secularization, science, objectivity and social progress.[71] History would be viewed as a continuum of human progress through rational human activity.[72]

This ideal of rational human progress sets the basis for an understanding of history as having precise period frames. The past is essentially different from the present, and men rational action constructed the fundamental differences. This enables men to understand history objectively[73]. Edward White puts it clearly:

> The discernible differences moderns observed between their contemporary existence and their recollected past were taken as evidence of qualitative change. And not only was the present different from the past, it was different because humans had helped make it so. Humans were harnessing the forces of modernity

[70] G. Edward White, *supra* note 58, at 498-513.
[71] *Id*., at 614-615.
[72] *Id*.
[73] *Id*., at 493-494.

to shape the course of history. With the aid of scientific knowledge, they could make change synonymous with progress.

After the experience of the totalitarian regimes of mid-century, however, a crisis arose in this concept. Rationality was not only the engine of human progress, but it could be also used to annihilate freedom and humanity. Rational social engineering could utilize the canons of modernity in the service of terror and villainy, and "scientific training … did not inevitably breed objectivity, nor did it constrain its practitioners in any meaningful sense"[74]. At this time, no external cause could be the ultimate motor of human enterprise.[75]

The historian Lynn Hunt, addressing the changes in historic methodology during the twentieth century, observes that at a certain point of the century linguistic theory and culture became the chief theoretical grounds for historic scholarship.[76] Any historical subject, then, came to be deemed as a "discursive subject", "and since they are historically grounded and by implication always changing, they cannot provide a transcendent or universal foundation for historical method"[77].

From this decline of the modern essence of historicism arose a perception of history in which time periods are not clearly distinguishable. At the end of the twentieth-century, the boundaries of present and past are not so clear anymore. The past endures in the present.[78]

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[74] *Id.*, at 616.
[75] *Id.*, at 614 and 615.
[76] Lynn Hunt, Introduction: History, Culture and Text 6-7. IN THE NEW CULTURAL HISTORY: ESSAYS BY ALETTA BIERSACK. . . [ET AL.] (Berkeley University Press, 1989)
[77] *Id.*, at 7.
[78] G. Edward White, *supra* note 58, at 491 and 492.

One reason for this is the deterioration of the idea of objectivity in history. Christopher Tomlins, citing Hayden White, asserts that "the past as such has no accessible reality, no rhyme or rhythm of its own. … [It] leaves only fragments or remnants that are already historicized in the very act of their preservation"[79]. It is the task of contemporary historians to access such fragmented sources and organize them into texts that are laid upon contemporary "theories, hypothesis, literary forms, or simply common sense"[80].

The result is that "history cannot be confined to what's done with it, as if 'the past' could be neatly boxed"[81]. The German historian Reinhart Koselleck developed the fundamental concepts of "space of experience" and "horizon of expectation" supporting this perception of time. He claims that a historical time is not fixed; instead it reflects the relationship between past and future[82]. In short, "it is the tension between experience and expectation which, in ever-changing patterns, brings about new resolutions and through this generates historical time"[83].

Once more, Edward White's explanation is clear:

> Every time contemporary humans make a decision they do so against the backdrop of their immediate past. They themselves are creations of actors and events in that past. Their contemporary institutions were forged in that past. When they seek to make changes in their external world or in their attitudes to it, their

[79] Christopher Tomlins, *supra* note 42, at 393.
[80] *Id.*
[81] *Id.*, at 394.
[82] REINHART KOSELLECK, FUTURES PAST: ON THE SEMANTICS OF HISTORICAL TIME 256 (Columbia University Press, 2004).
[83] *Id.*, at 262.

frame of reference is composed of the external landmarks and attitudes they inherit, regardless of their perspective on that inheritance.[84]

It has been stated above that the transformation witnessed in the theory of history was essential to understand the late twentieth-century convergence of law and history. One question that keeps opened is how this new perception of history may contribute to legal debate and constitutional adjudication. In the preceding section, it has been argued that history can help make sense of the present, can provide the contemporary legal community with information about rights and about their meaning and purposes throughout history; about the value and significance of those rights to society.

To think about the world—and thus about rights, their meaning and purposes—is to think historically.[85] As has been suggested previously by citing Morton Horwitz, the "experience of [the] contemporary world suggests that few other potentially stabilizing forces can readily be identified"[86]. The stabilizing force of history resides in the fact that "[h]istory roots us"[87]; the pursuit of historic knowledge reflects the pursuit of knowledge about oneself.[88]

Originalism is deeply related to the turn to history described here. Much discussion has been made on the causal connection between originalim and the emergence of history in constitutional debate. Regardless the merit of such discussion, the fact is that "the use of history has seemingly won the day"[89], as authors that do not

[84] G. Edward White, *supra* note 58, at 621.
[85] See Barry Friedman, *supra* note 65, at 957 (citing Arthur Danto, Narration and Knowledge (Columbia University Press 1985)).
[86] G. Edward White, *supra* note 58, at 622.
[87] Barry Friedman, *supra* note 65, at 960.
[88] *Id.*, at 957.
[89] Mathew Festa, *supra* note 47, at 501.

comply with originalist claim equally understand that history has a significant importance in contemporary constitutional scholarship.[90]

**Chapter 3 – Originalism**

It is helpful to start with the basic claim of originalism and then begin to unfold its elements and controversies. However, it is difficult to present in a few words the thesis supported by all originalist scholars. The risk is that this basic description might be so vague that it does not expose the theory. Nevertheless, this difficulty should not prevent the attempt. The basic claim of the originalist theory may be presented as this: the force of the law of a constitutional provision becomes fixed when it is framed and ratified.[91]

Originalism arises from the same unease that gave birth to the counter-majoritarian difficulty: the search for a limitation on the power of the Judiciary.[92] Nevertheless, originalism presents itself as a solution to the counter-majoritarian difficulty.[93] The claim is that, if restraint to the original meaning or purpose of the Constitution, the courts will be acting according to the will of the people. The will of the people of the time the Constitution was enacted outweighs any current circumstantial majority.[94]

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

[90] *Id.*, at 499 and 500.
[91] See Lawrence Solum, We are All Originalists Now 1-4, In CONSTITUTIONAL ORIGINALISM: A DEBATE, BY ROBERT W. BENNET AND LAWRENCE B. SOLUM (Cornell University Press, 2011).
[92] *Id.*, at 5-7.
[93] *Id.*, at 7.
[94] Id., at 42-44. See also Kurt T. Lash, Originalism, Popular Sovereignty, and Reverse Stare Decisis, 93 Virginia Law Review 1437, at 1444-1446.

legal activity.[95] Some of the problems that arise from this proximity of studies derive from what has been described in the previous chapter: the belief that historic inquiry has an essentially different purpose and methodology than legal adjudication, which results in an incompatibility between both fields. Other problems derive from what will receive some attention further: the difficulties of defining the intentions and meaning of a text. Although this is essentially a linguistic problem[96], it arose from the rejoin of history and law because, as has been mentioned on the previous chapter, historians have already faced such a problem.

An efficient way to unfold the elements and controversies of the originalist theory is by examining its evolvement.

**a. "Old originalism"**

The seminal works on what is now known as originalism are the ones of Robert H. Bork[97], later Chief Justice William H. Renquist[98], Raoul Berger[99] and Edwin Meese III[100]. The characteristic that distinguishes the "old originalism" is the reliance on original purposes of the framers and ratifiers of the Constitution. "The basic idea shared by the precursors of contemporary originalism is that the meaning of the text of the Constitution is a function of the intentions of those who wrote it"[101]. The innovation proposed,

[95] Lawrence Solum, *supra* note 91, at 54.
[96] *Id*., at 56.
[97] Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Indiana Law Review 1 (1977).
[98] William H. Rehnquist, The Notion of a Living Constitution, 54 Texas Law Review 706 (1976).
[99] RAOUL BERGER, GOVERNMENT BY JUDICIARY (Harvard University Press, 1977).
[100] Edward Meese III, Speech before the American Bar Association. In THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION, ED PAUL G. CASSEL (The Federalist Society, 1986).
[101] Lawrence Solum, *supra* note 91, at 8.

however, was not taking into account the intention of the framers, but the fact that these intentions were themselves the constitutional rule.

This is one of the essential elements of the originalist theory, which has been called the fixation thesis. It claims that the meaning of the constitutional text became fixed when it was framed and ratified.[102] The intention of the framers and ratifiers is the key to ascertain that fixed meaning. Courts, when interpreting the constitutional text, would ask what the framers and ratifiers thought about the specific case.[103]

The second element of originalism shaped in its first phase is the idea that the fixed meaning of the constitutional text imposes a constraint on the courts. In other words, the rule of the Constitution is within the meaning of the constitutional text, which can be found through the inquiry about the original purposes of the ones who framed and ratified it.[104]

Originalism, thus, intended to harmonize judicial review and the democratic scheme of government. Judicial review is compatible with the will of people if it is bound by the intention of those who enacted the Constitution, which is a paramount law. Supporting this view, Justice Scalia wrote in 1989 that "the principal theoretical defect of nonoriginalism, in my view, is its incompatibility with the very principle that legitimizes judicial review of constitutionality. Nothing in the text of the Constitution confers upon the courts the power to inquire into, rather than passively assume, the constitutionality of federal statutes."[105]

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[102] *Id*., at 2.
[103] *Id*., at 8.
[104] *Id*., at 3 and 4.
[105] Antonin Scalia, Originalism: The Lesser Evil, 57 University of Cincinnati Law Review 849, 854 (1989).

The originalism as proposed initially was subject to harsh criticism. One of them was the methodological difficulties of discovering one original purpose for any given constitutional provision. This is true in the case of seeking the psychological intention of any written document made by a multimember body.[106] In the case of the Constitution, the difficulties in discovering the purpose of any provision are enormous, due to the quantity and variety of people who were part of the constitutional convention and the States' ratifying conventions. The only thing historians are able to grasp is fragmentary evidence of multiple interests that frustrate the effort to find one true purpose for the constitutional text.[107] A second criticism was made by H. Jefferson Powell.[108] He argued that there is evidence that the framers of the Constitution did not want the document to be interpreted by their intentions, but by its textual meaning. A third critique on the first originalist approach focuses on the fact that only the Constitution has the force of law; the other documents in which the framers and ratifiers exposed their intentions do not have such power.[109]

The set of criticisms led originalism to change one of its elements. From the original purpose, the focus of originalism came to be the original public meaning of the constitutional text. It was only the text of the Constitution that was subject to the ratification process; thus it is only the text that has the democratic authority necessary to the law.[110]

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[106] Richard S. Kay, Original Intention and Public Meaning in Constitutional Interpretation, 103 Northwestern University law Review 103, 707 and 708 (2009).
[107] Lawrence Solum, *supra* note 91, at 9.
[108] H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harvard Law Review 885 (1985).
[109] Richard S. Kay, *supra* note 106, at 705 and 706.
[110] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Princeton University Press, 1998).

**b. "New originalism"**

The so-called "new originalism" is a new version of the same claim made by the initial originalist theory. The innovation was in the method to discover the original meaning of the Constitution. If, in the first stage, the method equalized the meaning to the intention of the people who enacted it; now the meaning of the text would be its original linguistic meaning.[111]

This is the stream of originalism championed by Justice Scalia. It is founded on the same idea of democracy that grounds the counter-majoritarian difficulty argument. In "A Matter of Interpretation", Justice Scalia argued that "it is simply incompatible with democratic government … to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated."[112]

There is a fundamental shift of perspective carried out by the "new originalism". The focus of the constitutional inquiry should be placed at the audience of the constitutional text, and not on its authors. More specifically, the focus is the linguistic context in which the text was written.[113] This shift is well explained by Lawrence Solum:

> Writing a Constitution is like putting a message in a bottle. To communicate successfully, you must rely on the public meaning of the words and phrases you employ and the standard rules of grammar and syntax. To understand what a constitution means, the reader must understand the circumstances of constitutional communication. If both the framers and the interpreters of a constitution share this understanding, then communication is possible.[114]

[111] Lawrence Solum, *supra* note 91, at 11.
[112] Antonin Scalia, *supra* note 110, at 17.
[113] Lawrence Solum, *supra* note 91, at 13-14.
[114] *Id*., at 15.

Therefore, besides the two main elements of the primary version of originalism—the fixation and the textual constraint thesis—one more was added by the "new originalism": the public meaning thesis, which states that the meaning of the constitutional text must be understood according to the linguistic practices of the time the text was framed and ratified.[115]

There is one more idea that some of the representatives of the "new originalism" support, which is a distinction between constitutional interpretation and constitutional construction.[116] Constitutional interpretation is solely the act of determining the meaning of the constitutional text; the way it is to be applied in a real situation depends on constitutional construction, which takes into account more than just the definition of the text. This distinction is necessary due to the generality and vagueness of constitutional language.[117] The topic will be better understood after considerations to be made on the debate on textualism and intentionalism in legal interpretation.

Several criticisms have been made towards this new version of originalism. They can be gathered into three main different lines of attack. The first of these lines affirms that the focus on the semantic meaning detach the constitutional text from the normative force that arises from the events that generated the Constitution. The normative force of the Constitution derives, primarily, from the authority given to those who enacted it.[118] Framing and ratifying the Constitution was a deliberate act, and that intention cannot be disregarded when interpreting its text.[119]

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[115] Id., at 4.
[116] KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DICIDED POWERS AND CONSTITUTIONAL MEANING (Harvard University Press, 1994)(cited by Lawrence Solum, *supra* note 91, at 3).
[117] Lawrence Solum, *supra* note 91, at 3 and 4.
[118] Richard S. Kay, *supra* note 106, at 715.
[119] *Id*., at 706.

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

> This person is highly intelligent and educated and capable of making and recognizing subtle connections and inferences. This person is committed to the enterprise of reason, which can provide a common framework for discussion and argumentation. This person is familiar with the peculiar language and conceptual structure of the law.[120]

Richard Kay observes that definitions such as those are quite alike the real enactors of the Constitution. Thus, the shift would not have any significant utility, since the interpretative method would be still looking at the linguistic practices and the ideas of the framers and ratifiers of the Constitution, although now under the mask of a hypothetical reader.[121]

A third set of criticism has significant importance to the present work. It argues that the original public meaning originalism offers a wide range of interpretation possibilities, which would move originalism away from its initial aspiration. Richard Kay affirms that this form of originalism gives basis "for interpretations that may deviate from any plausible estimate of the original intentions"[122].

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[120] Gary Lawson & Guy Seidman, Originalism as a Legal Enterprise, 23 Constitutional Commentaries 47, 73 (2006) (cited by Richard S. Kay, *supra* note 106, at 722).
[121] Richard S. Kay, supra note 106, at 722 and 723.
[122] *Id*., at 723.

Jack Balkin affirms that "original [public] meaning originalism … is actually a form of living constitutionalism"[123]. Focusing on the distinction between the original intended application of a constitutional provision and its original textual meaning, Balkin argues that the latter allows the interpreter to perceive the connection of the Constitution with the abstract principles of justice that ground its text. In his opinion, because original meaning theory advocates faith to the text, and not to the intended application of the framers, interpreters have more leeway in applying the constitutional principles to concrete cases.[124]

Lawrence Solum perceives the possibility of compatibility of originalism and living constitutionalism. He affirms that the two sets of ideas belong to distinct domains, and that, "if living constitutionalism accepts the fixation thesis, some theory of linguistic meaning, and some version of the textual-constraint thesis, then it is committed to the idea that the Constitution provides constitutional law a hard core"[125].

The idea of an interpretational hard core imposed by the text of the law and the possibilities of interpretation provided by the intentions it conveys was not a result of the debate over originalism. In fact, originalism revived a discussion already present, over textualism and intentionalism on legal interpretation.

### c. Textualism and intentionalism

The most significant reference on the debate over textualism and intentionalism in legal interpretation is the exchange of ideas between H.L.A. Hart and Lon Fuller in two

[123] Jack M. Balkin, Original Meaning and Constitutional Redemption, 24 Constitutional Commentaries 427, 449 (2007).
[124] *Id*., at 433.
[125] Lawrence Solum, *supra* note 91, at 67.

law review articles[126]. The vital issues that make part of the debate are exposed with excellence by both scholars.

H.L.A. Hart presents the idea that the textual meaning of a law has a core and a penumbra. Some cases deal with the text's core, and thus do not generate many difficulties of interpretation. Hart calls the penumbral cases those whose discussions are located outside the law's meaning core. In these cases, the application of the legal language cannot be made by deductive reasoning. A sound decision, in such cases, must take into account what the law ought to be; it must contemplate the aims, purposes and the questions of policy that are related to the law. The distinction between the core and the penumbra of law's textual meaning is necessary, according to H.L.A. Hart, because of the generality and vagueness of legal language.[127]

Hart's purpose was to defend the Austin's analytical positivism against the criticism made by the legal realists. In Hart's opinion, the attack made against formalism derived from a complete misunderstanding of Austin's thought; the fact that some cases demand the analysis of matters others than the text of the law does not imply that the distinction between law and morality is a false one. He emphasizes that there is a core meaning and that, if there are borderline cases, "there must first be lines"[128].

Fuller's reply to H.L.A. Hart points out that the act of interpreting legal language deals not with single words, but with sentences, paragraphs and even to the whole content of a statute. "Surely a paragraph does not have a 'standard instance' that remains constant

[126] H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harvard Law Review 593 (1958) and Lon Fuller, Positivism and Fidelity to Law – A Reply to Professor Hart, 71 Harvard Law Review 630 (1958).
[127] H.L.A. Hart, *supra* note 126, at 606-610.
[128] *Id*., at 614.

whatever the context in which it appears."[129] In Fuller's opinion, the context of the enactment and application of the law are part of its meaning and cannot be ignored by judges.[130]

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

> Professor Hart seems to subscribe to what may be called "the pointer theory of meaning," a theory which ignores or minimizes the effect on the meaning of words of the speaker's purpose and the structure of the language. Characteristically, this school of thought embraces the notion of "common usage". The reason is, of course, that it is only with the aid of this notion that it can seem to attain the innate datum of meaning it seeks, a meaning isolated from the effects or purpose and structure.[131]

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

The first one involves Hart's core and penumbra concepts. As already mentioned, some originalists claim a distinction between interpretation and construction.[132] They assert that one step in legal reasoning is to define the textual meaning of a constitutional provision; a second step is to determine its application in a specific case. This second step

[129] Lon Fuller, *supra* note 126, at 663.
[130] *Id*.
[131] *Id.*, at 668.
[132] *Supra* note 116.

is what they call constitutional construction. While limited to the definition given by interpretation, constitutional construction is not an issue addressed by originalism.[133] This idea is fully grounded on Hart's distinction of core and penumbra. Constitutional construction will have broader amplitude whenever the case does not fall within the core of the meaning of the constitutional text.[134]

The second aspect regards Fuller's critique on the linguistic theory that grounds Hart's view. Lawrence Solum informs that "new originalist" is subject to a criticism from historians who claim that the meaning of a text is not definable without reference to its context and purposes.[135] This is the same critique Fuller made on Hart's article. This point, however, is one which, in Solum's opinion, still waits for more attention from legal scholarship.[136]

One last point must be observed on the issue over textualism and intentionalism. The standard distinction between textualism and intentionalism in the context of originalism affirms the existence of a fundamental different method of interpretation taken by judges who are advocates of each of theory. Textualist originalist judges would avoid grounding their decisions on legislative history and manifestations of the intentions of the legislators, which would be the focus point "old originalism" supporters. Nevertheless, Jane Schacter affirms that such a distinction is based purely on theoretical analysis, and thus develops an empirical survey on the Supreme Court statute interpretation method.[137]

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[133] Lawrence Solum, *supra* note 91, at 22-26.
[134] *Id*., at 23.
[135] *Id*., at 57.
[136] *Id*., at 58.
[137] Jane Schacter, TheConfounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond, 51 Stanford Law Review 1, 3-4 (November 1998).

The judges' practice, Schacter argues, is not as radically different as the literature usually describes it.[138] Caleb Nelson considers that, in reality, "no 'textualist' favors isolating statutory language from its surrounding context, and no critic of textualism believes that statutory text is unimportant".[139] The most significant difference between the two interpretative approaches, Caleb Nelson argues, is of another kind. He points out that both theories of interpretation are based on the assessment of types of intention. The intention that textualists seek for is related to the rule that legislators wanted to implement, rather than the social aims that might have motivated the law.[140]

Such a perspective is supported by the ideas set forth by the mentioned social choice theory. As Caleb Nelson puts it, for textualists, "the point of most statutes is to effectuate a compromise between competing goals, and courts that extend one or another of those goals to some new area risk 'upsetting the balance of the package that the enacting legislature approved'"[141].

Textualism and intentionalism, then, would be concerned with different types of intentions. Textualism would concentrate on the text intended by legislators, while intentionalist would be concerned with real-life consequences of law. This approach enables Caleb Nelson to conclude that the real difference between textualism and intentionalism, in practical terms, is the different decision results they ground. Decisions based on textualist theory establish rules, while decisions built upon intentionalism seek to accomplish the social results aimed by the legislator. [142]

[138] *Id.*, at 5.
[139] Caleb Nelson, What is textualism?, 91 Virginia Law Review 347, 348 (April 2005).
[140] *Id*., at 356.
[141] *Id*., at 371.
[142] *Id.*

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

The understanding of the opinions that constitute the decisions in *Heller* and *McDonalds* requires the understanding of the main arguments that are part of the originalist discussion. Much of the debate that occurs in such cases are in effect about originalism and its different streams. With these arguments in mind, it is possible to carefully examine the most important opinions of those cases.

# Part II – Analysis

## Chapter 4 – *Heller* and *McDonald*

Part I of the present study has provided an overview of the main theoretical discussions that originate and are provoked by originalism. It was observed that this theory of constitutional interpretation is supported by the idea known as the counter-majoritarian difficulty, which states the problematic insertion of judicial review in a democratic system of government. On the other hand, origialism has fostered the debate over the uses of history in constitutional adjudication, over its utility and convenience.

Part II is dedicated to the examination of the two recent cases in which the Supreme Court interpreted the Second Amendment to the Constitution, in which originalism has been an essential element. Before the analysis of the opinions that are the focal point of the present work, it is necessary to take an overview of the processes that led to these opinions. The idea is to present a background of the procedural history and of the arguments that were part of those processes.

### a. District of Columbia v. Heller

The District of Columbia gun control act, enacted in 1976, banned the possession of certain types of handguns in the District's area, one of which was handguns. This was done by means of prohibiting the issuance of a registration certificate for such guns, which was necessary for the legal possession of any other gun.[143] The law also required that any licensed gun should be kept unloaded and disassembled or locked by a trigger

[143] DC ST 1981 § 6-2312.

lock or other safety device.[144] Furthermore, the law required a license for a person to carry his or her gun within the District of Columbia.[145] These legal provisions were challenged by six District of Columbia residents who claimed their individual right to keep and bear arms in their homes, for the purpose of self-defense, as protected by the Second Amendment to the Constitution.

The District Court[146] relied largely on *Miller* to hold that the right to keep and bear arms protected by the Second Amendment is related to the State militias only, and, therefore, the constitutional provision does not protect an individual right to keep and bear arms.[147] Because the plaintiffs were not part of a State militia, the District Court dismissed the case.

The Court of Appeals reversed the District Court's opinion.[148] It stated that the Second Amendment protects an individual right to possess and carry guns, albeit its important but not exclusive militia purpose. The opinion focused on the language of the constitutional provision, mainly on the terms "of the people", to draw such conclusion. It added that the amendment is part of the row of fundamental individual rights that the Bill of Rights constitutes. Furthermore, the Court argued that the militias were composed of all able adult men. In sum, the Court concluded

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

[144] DC ST 1981 § 6-2372.
[145] DC ST 1981 § 22-3204.
[146] 311 F.Supp.2d 103.
[147] 311 F.Supp.2d 103, at 105.
[148] 478 F.3d 370

> lawlessness or the depredations of a tyrannical government (or a threat from abroad). In addition, the right to keep and bear arms had the important and salutary civic purpose of helping to preserve the citizen militia. The civic purpose was also a political expedient for the Federalists in the First Congress as it served, in part, to placate their Antifederalist opponents. The individual right facilitated militia service by ensuring that citizens would not be barred from keeping the arms they would need when called forth for militia duty. Despite the importance of the Second Amendment's civic purpose, however, the activities it protects are not limited to militia service, nor is an individual's enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia.[149]

The District of Columbia filed appellate brief for the Supreme Court, and certiorari was granted. The brief presented two separate sets of arguments. The first one is focused on the meaning and purpose of the constitutional provision. The second set of argument is policy-oriented and states the reasonableness of the District's gun control measures.

The District of Columbia emphasized the prefatory clause of the Second Amendment to state that the protection of the right to keep and bear arms is limited to its use in State militias. When examining the operative clause, it argues that the expression "keep and bear arms" has a predominantly military connotation. It affirmed that there is nothing in the constitutional language that would lead to an individual right interpretation of the Second Amendment.

[149] *Id.*, at 395.

The District also claimed that the Second Amendment derived from the fear that the militia clauses of the Constitution[150] would give the federal government the power to disarm the State militias and that the States and their citizens would have to rely on a national armed force, which would enhance the potentiality of an oppressor federal government. Therefore, the Second Amendment, according to the District of Columbia, would have an exclusive federative purpose.

The second set of arguments claimed that the gun control policy adopted by the District of Columbia is a reasonable one. It first stated that the Constitution admits a reasonable restriction on guns and that traditionally every State and the Federal Government have had different kinds of gun regulation. It then argued that gun regulation should be subject to a reasonableness test that should be made according to practical considerations of gun uses, and not to categorization of guns in accordance to its historic uses.

It concluded that the District of Columbia's law is reasonable because it only bans shotguns, maintaining the permission of shotguns and rifles. This would be enough for the law to be consistent with the Second Amendment. The District also addresses the fact that the law is limited to a purely urban environment, in which handguns have no legitimate use. It finally considers the relationship of handguns and cases of crimes, suicides and accidental injuries and killings, finding that the banning of this specific type

[150] U.S. Constitution, art. I, Section 8, clauses 12-16, which grants the following powers to the Congress: "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

of gun is effective in diminishing such cases and do not present an exaggerated limit on the right to keep and bear arms.

These are, in sum, the arguments that were made on the case when the Supreme Court received it.

Justice Scalia delivered the opinion of the Court. At first, Scalia makes a defense of textualist originalism, arguing that constitutional language should be read as the society that it was directed to understood it. This permits Scalia to determine the method to be used in interpreting the Second Amendment, which should be able to establish a consistent reading of the Amendment.[151]

Justice Scalia splits the text of the Second Amendment in different parts. The principal division is between the prefatory clause—"A well regulated militia being necessary to the security of a free state"— and the operative clause—"the right of the people to keep and bear arms shall not be infringed". The analysis, however, focuses on specific sets of ideas of the Amendment—as the terms "well regulated", "free state", "the right of the people" and "keep and bear arms". He thus claims that the prefatory clause announces a purpose and should be used to resolve ambiguities arising from the constitutional language, but it does not limit or expand the scope of the right granted. For this reason, Scalia emphasizes primarily the operative clause of the amendment, after what he seeks a consistent reading of its first clause.[152]

The first part of the textual interpretation of the operative clause of the Second Amendment addresses the use of the expression "the right of the people". The opinion argues that the Constitution, by "the people", means the individuals, as opposed to

[151] *Heller*, at 576 and 577.
[152] *Id*., at 577 and 578.

collective bodies of the society. While the opinion agrees that there are times when the Constitution uses "the people" as the society as a whole, it states that, in all of those times, the Constitution is dealing with the allocation of power, and not recognizing rights. Thus, the expression "right of the people" in the constitutional text means "the right of the individuals".[153]

As to the expression "keep and bear arms", the opinion interprets it as to be the right to possess and to carry weapons in case of confrontation. The textual meaning of the whole operative clause of the Second Amendment, thus, is read by the Court as to mean the right of individuals to possess and carry weapons in case of confrontation.[154]

The Court argues that this meaning is supported by the background of the right recognized by the amendment. The abuses of King James II against his political enemies and later the ones of King George III against the colonists gave rise to the idea of the individual right to keep and bear arms for the purpose of self-defense. The importance of such background derives from the fact that the constitutional provision recognized a pre-existing right, and did not establish a new one. To understand the public meaning of the text, the Court considered crucial to know the history that this public knew.[155]

According to the Court, the meaning of the prefatory clause of the Second Amendment should be consistent with the meaning and history of the operative one. First, the opinion call attention to the fact that the Constitution was referring to the pre-existing militias and not to ones that would come to be. "Well regulated", on its turn, meant nothing more than a discipline and trained militia, which would be crucial to the security of a free state. This language is interpreted by the Court by arguing that state

[153] *Id*., at 579-581.
[154] *Id*., at 581-192.
[155] *Id*., at 598.

meant any political entity, and the Constitution can be read as addressing a free country. Accordingly, the Court claims that the constitutional text does no more than affirm that the existing trained militias were essential to the security of a free country.[156]

This meaning of both clauses of the Second Amendment permits the Court to observe that the prefatory clause described the purpose for the codification of the right to keep and bear arms, and not the purpose of the right itself. The Court points out that history of governmental abuses from which the right derived was related to the banning of guns themselves, and not from the banning of militias. Therefore, there was no reason to understand that the right was not directed to the individuals.[157]

After considering the textual meaning and the background of the Second Amendment, the Court examines the history of the debate over the right to keep and bear arms, both before and after the ratification of the Second Amendment. The opinion mentions that, before the enactment of the Bill of Rights, nine States protected the right to keep and bear arms, seven of which expressly mentioned it as an individual right.[158]

Regarding the drafting history of the Amendment, the Court states that the debate occurred over the place of the militias in the new established governmental design, and not over the individual right to keep and bear arms. The militia issue was the reason for the codification of such right, and not for its existence, which was not disputed.[159]

[156] *Id*., at 595-598.
[157] *Id*., at 599.
[158] *Id*., at 602-603.
[159] *Id*., at 603-604.

The post-ratification commentary and case-law show that the Second Amendment was meant to protect an individual right. The Post-Civil War commentaries and legislation point to the same interpretative direction.[160]

The last part dedicated to confirming the interpretation of the individual right content of the Amendment examines the precedents of the Court and asks if these precedents foreclose such interpretation. The answer is negative. The Court states that, in *Cruikshank*, the Court held only that the Amendment was applied exclusively to the federal government, and not to private individuals.[161] In *Presser*, the Court upheld a law that forbade private military associations, but the Court did not say that the Amendment was limited to the militia use of weapons.[162] Finally, the Court argues that the decision in *Miller* does no more than state that the protection of the Second Amendment extends only to certain types of weapons.[163]

In its conclusion, the Court makes a defense of a majoritarian view of democracy, stating that the Second Amendment is the result of an interest-balancing by the people, which excludes the possibility of the Court to engage in an interest-balancing interpretation of the constitutional provision.[164]

For the purpose of the present study, Justice Stevens' is the dissenting opinion that is worth mentioning. It interprets the right of the Second Amendment as limited to the reason for its adoption: a fear that the power of the federal government over the militias would violate the sovereignty of the States. As a result, the Second Amendment would protect the right to keep and bear arms for the exclusive purpose of service in

[160] *Id*., at 605-619.
[161] *Id*., at 619 and 620.
[162] *Id*., at 620 and 621.
[163] *Id*., at 621-625.
[164] *Id*., at 635.

militias. The opinion, furthermore, reads *Miller* in this same sense, giving it *stare decisis* authority over the matter.[165]

In interpreting the constitutional language, Stevens emphasizes the prefatory clause, arguing that the Framers' sole focus was on the military use of weapons. Consequently, the "right of the people" that the Constitution refers to is one that, while is directed to the individuals, can only be exercised collectively. Justice Stevens, thus, agrees that the Second Amendment protects an individual right. His divergence is related to the scope and extent of the exercise of such right. He claims that the right to keep and bear arms is only protected by the Constitution if it is related to militia use.[166]

The text of the Amendment, in Justice Stevens' opinion, should be interpreted according to the purposes for its adoption. History shows that the enactment of the Second Amendment was a response to the threat that the militias clauses of Article I of the Constitution would impose to the States' sovereignty. The purpose of the Amendment, thus, was the protection of the militias, as means to protect the States' autonomy. The right it recognizes has its exercise limited to that purpose.[167]

Justice Stevens criticizes the Court's analysis of the debate over the right to keep and bear arms. He argues that the English Bill of Rights and consequently Blackstone were concerned with totally different issues, so it is not correct to analyze the Second Amendment as if it shared those concerns. Furthermore, he claims that the post-enactment commentaries over the Amendment referred to the English Bill of Rights and were unfamiliar with the legislative history of the Amendment. The nineteenth century legislation and case law history also have little weight to support the interpretation of the

[165] *Id*., at 637 and 638.
[166] *Id*., at 640-652.
[167] *Id*., at 652-662

Amendment, according to Stevens, because the latter played little role on the debate about civilian use of weapons.[168]

Justice Breyer's opinion is one that dismisses the originalist theory of interpretation, focusing on the policy arguments over gun-control legislation. Therefore, it has little use to the present study.

**b. McDonald v. City of Chicago**

The City of Chicago and the village of Oak Park, a Chicago suburb, had laws that limited the right of their citizens to own handguns in a way similar to the one that led to *Heller*.[169]

The District Court dismissed the cases, [170] upholding the local laws grounded on Seventh Circuit Court of Appeals precedents which, relying on *Presser* and *Cruikshank*, held that the Second Amendment did not protect the individual right to keep and bear arms and was not incorporated in the Fourteenth Amendment to limit the authority of the States. The District Court delivered such decision based on the premise that it should not anticipate the overruling of a Supreme Court decision and that it should maintain itself bound to it until the Supreme Court overrules its precedent.

The Court of Appeals for the Seventh Circuit affirmed the District Court's decision. As a main reason, the Court claimed that, while *Presser*'s, *Cruikshank*'s and *Miller*'s reasoning was abandoned by the Supreme Court in *Heller*, those cases were not overruled to the effect of considering the Second Amendment applicable against State authority.

[168] *Id*., at 662-671.
[169] *McDonald*, at 3026.
[170] 617 F.Supp.2d 752

The petitioners' brief to the Supreme Court carried three lines of arguments. First, it argued that the Privileges and Immunities clause of the Fourteenth Amendment protects individual rights, including those contained in the Bill of Rights. Presenting an analysis of the history of the Fourteenth Amendment, the petitioners argued that it was a way to constitutionalize the Reconstruction, after the Civil War. Furthermore, it was the framers' intention and the public understanding that the Privileges and Immunities clause encompassed pre-existing rights, including the ones protected by the Bill of Rights.

As a consequence of this first argument, the petitioners' claimed that the *Slaughterhouse cases*[171], as well as *Cruikshank* and *Presser*, should be overruled. They argued that the Privileges and Immunities doctrine conveyed in these cases is deeply erroneous, and denied the fundamental changes the clause carried. Moreover, the decision is illogical, since the type of rights that the Court said the clause would protect was not being violated by the States; there wasn't any reason, thus, to enact the clause. *Stare decisis*, according to the petitioners, should not protect the *Slaughterhouse cases* doctrine; its preservation is not practical, since the incorporation doctrine the Court developed under the Due Process clause and, at last, there wouldn't be any upset of legitimate expectations.

Finally, petitioners argued that the Second Amendment individual right to keep and bear arms should be incorporated against the States under the Due Process clause of the Fourteenth Amendment. They claim that the Supreme Court's doctrine on incorporation of the Bill of Rights through the Due Process clause is based on the concept of an American system of ordered justice. To know if a right is part of such system, the Court looks at the historical recognition, the States` acceptance and the nature of the right

[171] The Slaughter-House Cases, 83 U.S. 36 (1873)

in dispute. The right to keep and bear arms has been recognized throughout American history and by the majority of the States. Furthermore, it is deeply related to the right of self-defense and self-preservation, which is one of the most significant values of the common law tradition.

The opinion of the Court was written by Justice Alito. At first, the Court rejected the claim that the question be analyzed under the Privileges and Immunities clause, arguing that this would not be necessary in the case at issue, since the precedents on the Second Amendment do not prevent the Court to examine its incorporation under the Due Process clause. Since the doctrine of incorporation of the Bill of Rights as enforceable against the authority of the States has been developed under the Due Process clause, there is no need to decide this case under a different prism.[172]

The Court then establishes the standard through which a Bill of Rights protection is incorporated against State action, which is to ask if the right is fundamental to the American scheme of ordered liberty, deeply rooted in the Nation's history and tradition. Moreover, the Court affirms that the incorporation of the Bill of Rights protections should be made under the Fourteenth Amendment according to the same standard that protects those personal rights against federal violation. In relation to the Second Amendment, the Court understands that *Heller* gives the affirmative answer to the question of incorporation.[173]

Justice Alito argues that the right of self-defense is universally recognized. He then refers to the history of the right to keep and bear arms to confirm its incorporation, first addressing its importance in the revolutionary period as a response to King George

[172] *McDonald,* at 3029-3031.
[173] *Id*., at 3031-3036.

III's colonists disarm. Prior to the ratifying of the Amendment, both Federalist and Anti-Federalist saw the right to keep and bear arms as fundamental to the new system of government.[174]

As the nineteenth century went by, the federalist concern that previously grounded the framing of the Second Amendment faded. However, its relevance as means of self-defense persisted. After the Civil War, the Fourteenth Amendment was enacted as the constitutional basis for the protection of the Bill of Rights—including the right to keep and bear arms—at State level. The Court believes that the right to keep and bear arms was considered a fundamental right to the American system of justice in the perspective of the generation that framed the Fourteenth Amendment.[175]

After the historical exposition, the Court contemplates some of the assertions that the municipal respondents make. First the Court reconfirms that the standard for incorporation is that the right be considered fundamental to the American scheme of ordered liberty, and that the existence of other civilized countries that do not recognize a given right does not jeopardize its incorporation. Second, the Court dispute the existence of any distinction of substantive or procedural protection to be considered in the debate over the incorporation of the Bill of Rights. Third, regarding the arguments that the Second Amendment protection has implications for public safety and can lead to costly litigation, the opinion of the Court argues that some of the arguments made by the respondents could equally be made against the incorporation of the criminal procedure clauses of the Bill of Rights. Finally, the Court addresses *Heller* to say that there is space for State experimentation in gun control measures, as long as the core of the right to keep

[174] *Id*., at 3037 and 338.
[175] *Id*., at 3038-3042.

and bear arms is not violated. It also argues that *Heller* admits the initial federative purpose for the enactment of the Second Amendment, stating, nevertheless, that this initial purpose does not limit the scope of the right it protects.[176]

The last two sections of the majority's opinion are dedicated to responding to some of the arguments that ground the dissenting opinions of Justices Stevens and Breyer. First replying Justice Stevens' dissent, the majority restates that the Bill of Rights should be applied to the States according to a single, neutral principle, and not to one that is different from the one that governs its relation to the federal government.[177]

In response to Justice Breyer's dissent, the Court makes three main arguments. It says that there is popular consensus over the fundamentality of the right to keep and bear arms, as 38 of the States and the majority of the representatives and the Senate subscribed the petitioners' claim. Second, the plurality's opinion maintains that the right to keep and bear arms protects especially minorities exposed to the violence of poor communities. Finally, the Court argues that the incorporation of every individual protection of the Bill of Rights imposes a restriction in policy experimentation and local variation.[178]

Justices Thomas opinion is worth mentioning for the innovation it conveys. Notwithstanding his concurrence with the result, Justice Thomas agrees with the petitioners that the Privileges and Immunities clause protects an individual right to keep and bear arms.[179] He argues that the Fourteenth Amendment radically changed the country's original system of government.[180]

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[176] *Id*., at 3042-3048.
[177] *Id*., at 3048.
[178] *Id*., at 3049 and 3050.
[179] *Id*., at 3059.
[180] *Id*., at 3060.

In his point of view, the *Slaughterhouse cases* marginalized the Privileges and Immunities clause. The resulting development of the substantive Due Process clause doctrine is a legal fiction. The peril of such legal fiction is that it lacks a guiding principle which is consistent with the text and history of the Due Process clause. The protection of individual rights under the Privileges and Immunities clause would also give rise to hard questions, but, as Justice Thomas puts it, "they would have the advantage of being the questions the Constitution asks us to answer".[181]

In this case, Justice Steven's dissenting opinion is also a relevant one. He dismisses the Privileges and Immunities clause argument and states this is a substantive Due Process case. He contends that the existence of a fundamental right to keep and bear arms under the liberty concept of the Due Process clause is distinct from the question about the incorporation of the Second Amendment against State action by the Fourteenth Amendment. This last question, he understands that have already been solved by the Court in *Cruikshank* and *Presser*.[182]

The basic question to be made to discover if a right falls within the concept of liberty of the Due Process clause, according to Justice Stevens, is whether it carries values implicit in the concept of ordered liberty, adding that such a concept has a universal character. To answer that question, the Court should look to precedents, the English common law tradition, legislative and social facts, scientific and professional developments, the practice of other civilized societies, and, above all, the traditions and

[181] *Id*., at 3086.
[182] *Id*., at 3088.

conscience of the American people. Justice Stevens then adds that history must be the starting point, but not the ending point of such an inquiry.[183]

These are the methodological ideas that underlie Justice Steven's opinion that the Constitution does not protect an individual right to keep and bear arms against State and local authority, which is grounded in several practical reasons. He argues that firearms have an ambiguous relation to liberty, since it may be used to defend one life or property just as it may be used in violent acts. Therefore, the right does not lead, in his opinion, to a life of autonomy and dignity.[184]

A last line of arguments Justice Stevens makes deals with the federative character of the Second Amendment. Since the Court in *Heller* recognized that the preservation of the sovereignty of the States was the reason for the Amendments codification (as have recognized the majority's opinion in *Heller*), Justice Stevens argues it could not be interpreted as a restraint on State power. He adds that federalism and deference to the States' power to experiment and regulate firearms are much older and more rooted in American tradition than the right to keep and bear arms.[185]

## Chapter 5 – Methodological differences and their results

The objective of this chapter is to observe some methodological differences made by the most important opinions just briefed, and try to see to what distinctions in the results reached such methodologies lead. The focus is not on the constitutional interpretative doctrines, but on the historic inquiry performed by the Justices.

[183] *Id*., at 3090-3103.
[184] *Id*., at 3107-3114.
[185] *Id*., at 3115 and 3116.

Differences in the historic research methodology, it is essential to have in mind, derive from choices made in the field of constitutional interpretation theory. For the interpretational theory someone chooses to follow will determine the questions to be answered by the historic research. This is perceptible in the cases under examine. Justice Stevens, in criticizing an exaggerated reliance on historic inquiry by the Court in his dissenting opinion in *McDonald*, asserts that "Justice Scalia preferred to rely on sources created much earlier and later in time than the Second Amendment itself, … I focused more closely on sources contemporaneous with the Amendment's drafting and ratification".[186] The analysis is precise, and the reason for such a difference is the fact that both Justices were seeking answers to different questions. The problem is not the lack of a yardstick to measure which Justice is correct, but the fact that there are as many yardsticks as there are methodologies.

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

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

[186] *Id.,* at 3117.

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

**a. Sources**

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

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

The sources used by the majority's opinion in *Heller's* examination of the textual meaning of the Second Amendment's operative clause encompass contemporaneous treatises, cases, Congress debates, State constitutions, news articles, the Federalist Papers and the Anti-Federalist Papers. English sources are also examined, such as the Bill of Rights of 1689 and a parliament debate in England in the eighteenth century over the right to keep and bear arms. Justice Stevens, in his dissenting opinion, cites to contemporaneous State constitutions and laws, treatises, cases, congress debates and writings.

When studying the meaning of the prefatory clause exclusively, however, the opinions adopt a perceptible different universe of sources. Justice Scalia's opinion cites to dictionaries, the Federalist Papers, the Anti-Federalist Papers, the Blackstone Commentaries, and to other constitutional provisions (essentially the Article I militia clauses, arguing that the militias already existed when the Amendment was drafted). Justice Stevens' dissent, however, have a much narrower universe of sources. It cites only to State constitutions, laws and treatises, to understand that the Framer's sole focus was on the military exercise of the right to keep and bear arms.

The breadth of each opinion's historic analysis is also significant in the investigation of the Second Amendment's history. Justice Stevens' opinion, as he observes in *McDonald*, is concentrated on the legislative history of the Second Amendment, as he wishes to demonstrate that the sole purpose for the enactment of the provision was the fear that a national standing army would impose an intolerable threat to the sovereignty of the States. The sources he uses reflect such choice. Most attention is given to the proposals made by the States (Virginia, North Caroline, New York, New

Hampshire, Maryland and Pennsylvania). Justice Stevens also relies on state ratifying debates and on writings of George Washington and Thomas Jefferson.

The latitude of Justice Scalia's opinion contrasts with the narrow focus of Justice Stevens. It is possible to distinguish three periods of the history of the right to keep and bear arms in Scalia's opinion. The first one deals with the origins of such right both in England and in the American revolutionary periods. To tell this story, Justice Scalia relies on the English Bill of Rights, on Blackstone, on contemporaneous treatises and on a news article.

The second period reported by Justice Scalia is the enactment of the Amendment. Notwithstanding the inexistence of a significant time lapse between this and the revolutionary periods, the legislative history of the Second Amendment is an object of specific attention by in the majority's opinion. For this purposes, it cites to the Anti-Federalist papers, contemporaneous writings and letters, legislative reports, State constitutions and case law, to the State proposals for the adoption of the Second Amendment and to news articles.

The third period is the post-enactment period. Justice Scalia analyzes post-enactment commentary, case law and legislation regarding the right to keep and bear arms. The focus is first on the treatises of William Rawle and Joseph Story and George Tucker's version of the Blackstone commentaries. After that, the opinion examines the State and Federal case law of the pre-Civil War period. The last of the historic section of the opinion observes the reconstruction period, relying on documents of the Freedmen Bureau and its Act, on Congress debate and on news articles.

A separate section of the opinion examines the precedents of the Supreme Court over the Second Amendment, and states that they do not foreclose the conclusion obtained in the textualist analysis–that the Second Amendment protects an individual right to keep and bear arms for purposes of self-defense.

If there is a significant difference in the scope of the historic inquiry performed by each opinion, it must be noticed that some sources are deemed as essential for both. The text of the Constitution itself is one of them. Both opinions begin their historic research by examining other provisions of the Constitution which use similar language. This puts intratextualism[187] as a vital method of interpretation, for it is the starting point of both opinions. Justice Stevens concentrates on the First and Fourth Amendment use of the expression "right of the people", just as the majority's opinion does. However, the majority's opinion goes further and examines the use of the term "the people" in other parts of the constitutional text, specifically the Preamble and Article I, section 2.

Documents relating to the legislative history are also examined by both opinions. Congress debates, State constitutions, State ratifying conventions, the mentioned State proposals and contemporaneous writings and letters are examples of sources used by both Justices when they are examining the legislative history of the Amendment.

Justice Alito's opinion in *McDonald* relies most significantly on the sources already pointed by *Heller*'s majority opinion. It does not present any new source relating to the matter, although it gives more attention to some sources not emphasized in *Heller*, such as the Congress debates over the adoption of the Fourteenth Amendment and the Congress Freedman Bureau documentation.

[187] See Akhil Reed Amar, Intratextualism, 112 Harvard Law Review 747.

**b. Results**

While considering the results that each set of opinions achieved in both cases, one could imagine that these results derived from the amplitude of sources used. It should not be ignored, however, that such amplitude, in a first moment, was determined by the different theoretical choices made by each side of the Court. The theories of interpretation adopted by each approach governed the amplitude of the sources used in each set of opinions, which contributed to the difference in the results they found.

The first thing to be considered when analyzing Justice Stevens' opinion is the critique he makes on the plurality opinion in *McDonald* arguing that it is too backward looking, and that history is an uncertain ground for constitutional decision-making. To be clear, Justice Stevens does not claim that history is useless for judicial argumentation, but he sees limitations on the benefits the Court can extract from historic inquiries, claiming that, while it can enrich debates over substantive Due Process, it does not provide objective answers.

This criticism of Stevens over the use of history on constitutional adjudication should be viewed in the light of his understanding that the debate on *McDonald* was not about the Second Amendment—which would not have been incorporated against the States. His argument, thus, is limited to the analysis of substantive Due Process. This is pertinent to note because of the significant historic research that supports the original intent theory adopted by Justice Stevens' opinion in *Heller*. If history does not provide objective enough answers when the debate concerns the substantive Due Process doctrine, it offers solid ground for determining the scope and extent of the right protected by the Second Amendment.

The adoption of the original intent theory determined the breadth of the historic inquiry and consequently its result. The question Justice Stevens sought to answer in the historic research dealt with the practical, social consequences the Framers wanted the Second Amendment to achieve, which was the balance of military power between the Federal Government and the States.

As seen in Chapter 3, the original intent version of originalism places the constitutional rule on the social consequences desired by the Framers and Ratifiers. This assumption provides an interesting result. The constitutionality of any law should be tested based on its ability to lead or to foreclose such social, practical goal. The original intent theory in Stevens' opinion, thus, provides not a rule, but a standard to test the constitutionality of gun control laws: the government cannot ban guns used by a state militia. The constitutional rule is placed on the practical consequences of the right: its use in a militia. The original intent, thus, serves also as a way to support *Miller* as a precedent. Justice Stevens sees the Court's decision on *Miller* as consistent with the original intent of the Framers of the Second Amendment.

In sum, the narrower historic research performed by Justice Stevens resulted on the answer to what were the social, practical goals intended by the framers and ratifiers of the Second Amendment. Since this social achievement is the constitutional rule itself, the constitutionality of gun-control laws should be analyzed according to its ability to foster the purposes of those who enacted the constitutional provision. Because, in Justice Stevens view, the Court's decision in *Miller* is consistent with the standard that derives from the original intent, it represents the *stare decisis* of the Court over the Second Amendment.

Justice Scalia's opinion takes a different path. Based on the theory of original public meaning, his decision could also have performed a very narrow historic research, limited to what is done in the textualist analysis of the opening section of the opinion. This section finds that the original meaning of the text of the Second Amendment protects an individual right to keep and bear arms for different purposes, among which is self-defense. This finding would be enough, according to the original public meaning stream of originalism, to state the rule enacted by the Second Amendment.

Justice Scalia's opinion, however, goes further, linking the constitutional provision to a principle: the right to self-defense. If the right to keep and bear arms is not based solely on the militia issue and on the federative system, there must be other set of ideals that justify it. Researching the background of the right to keep and bear arms, the opinion found such justification on the right to self-preservation and self-defense, as an issue risen in the context of the English and later of the American revolutionary periods.

After asserting the original public meaning of the Second Amendment's text and its link to the right of self-defense, the decision tests such findings—the meaning and the link. This test is made by a broad historic research, which asks if those findings are consistent with the uses and meanings of the right to keep and bear arms throughout the American history.

This test establishes the connection between the right to keep and bear arms and the right of self-defense, which is reinforced by the Court's opinion in *McDonald*. Once again, it is the constitutional theory that prepares the field in which the historic inquiry is made. The historic inquiry in *McDonald* sought to evaluate if the right to keep and bear arms is fundamental to the American system of ordered liberty. The plurality opinion in

*McDonald* strengthened the connection between the right protected by the Second Amendment and the right of self-defense.

The claim that, during the eighteenth century, the federalist issues related to the militias faded as the self-defense issue persisted is a significant one. The *McDonald* historic inquiry emphasizes the post-Civil War period and the role of the right to keep and bear arms in the enactment of the Fourteenth Amendment. This issue is also well explored by Justice Thomas' opinion. The idea that the right to keep and bear arms protects individuals against violence perpetrated by majorities bonds the Second Amendment to the right of self-preservation and fully divorces it from the militia issue.

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

Another consequence of the decisions that established the content and history of the right to keep and bear arms is its disconnection with the militia issue. In *Heller,* the Court argued that the debate over the militias was only the political issue that explained the codification of the right, but that does not limit its scope. In *McDonald,* the plurality's

opinion pays almost no attention to the militia issue. It only states that Federalists and Anti-Federalists agreed that the right to keep and bear arms was crucial to the new system of government and that the debate was over the adoption of the Bill of Rights, and not over the content of the right to keep and bear arms.

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

## Chapter 6 – The Supreme Court's history of the right to keep and bear arms

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

### a. English Roots and the Revolutionary Period

The story of the American right to keep and bear arms may be traced back to the English political turmoils of the second half of the seventeenth century. During that period, political opponents to the Stuart Kings were overpowered by loyal militias. The

use of these loyal militias was followed by the disarmament of the opponent population, which was basically composed of Protestants.

During the regency of William and Mary, Protestants obtained in the Declaration of Rights the assurance that they would not be disarmed. Before the protection of such right, Protestants were tremendously cautious about the concentration of military power by the Crown. The Declaration of Rights was meant to pacify that caution. It states that "the subjects who are Protestants may have arms for their defense suitable to their conditions and as allowed by law"[188]. This article is deemed as the precursor of the Second Amendment. It was considered to protect an individual right of self-defense against public or private violence. Blackstone described it as "the natural right of resistance and self-preservation"[189].

During the revolutionary period in the American Colonies, King George III used the same instrument their predecessors had used. He tried to disarm the colonists. During the 1760's and 1770's, many rebellious areas were disarmed by the Crown. These disarmaments provoked a reaction throughout the colonies, as people defended their individual right to have arms for self-defense. From the revolutionary period to the enactment of the Bill of Rights, several States protected the right to keep and bear arms through laws or through their declaration of rights.

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

[188] *Heller,* at 591.
[189] *Heller,* at 594.

### b. The Enactment of the Bill of Rights

The legislative history of the Second Amendment is an issue that the majority's opinion in *Heller* and the plurality's opinion in *McDonald* do not analyze with significant depth. This is due to an interpretative choice, as for the original meaning theory the legislative history is only relevant if it clarifies textual difficulties. Another reason is that the Amendment is deemed to protect a pre-existing right. Hence, the fact that the legislators were not creating a right, but referring to a pre-existing one, diminishes the importance of the legislative history. However, the subject is not entirely ignored, and it is possible to present a history of the enactment of the Second Amendment based on those opinions.

The codification of the right to keep and bear arms in the Bill of Rights derives from a debate over the military balance of the newly created federative system. The core of the debate was over the necessity of the provision in the Bill of Rights, and not over the existence of such right.

During the ratifying conventions, Anti-Federalists feared that the Federal Government had an excessive military power over the States under article 1, section 8, clauses 15 and 16 of the Constitution. They feared that the Federal Government could disarm the State militias and impose an oppressive power over the people. Anti-Federalist felt the need to protect the citizens' militia to fight an eventual oppressive government. Since the Federal Government had power over the militias, it was necessary to protect the citizens who were part of the militias.

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

Several States[190] proposed provisions to protect the right to keep and bear arms. The Anti-Federalist concern with the power over the militias, although mingled in the proposals, was subject to specific suggestions to modify the structural part of the Constitution. The First Congress rejected all proposals to reform the structural part of the Constitution and decided to adopt solely the individual rights amendments. The suggestion to protect the right to keep and bear arms, thus, did not point exclusively to the militia issue.

**c. Abolitionism and Reconstruction**

As Justice Alito's opinion indicates, "[b] the 1850's, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights--the perceived threat that the National Government would disarm the universal militia--had largely

[190] Virginia, New York, North Carolina, New Hampshire, Pennsylvania and Massachusetts.

faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense."[191]

Abolitionism was one of the issues in which the individual right to keep and bear arms was discussed. On the battles over the status of Kansas (if it would enter the Union as a free or a slave state), there were attempts of disarmament, what prompted the debate over the individual right to keep and bear arms.[192] Moreover, there was the issue over the rights that free African Americans would be granted. There was the idea that free black men would not be vested with all the rights granted by the Constitution. The Second Amendment protection was a central concern in the debate over the granting of constitutional individual rights to free African Americans.[193]

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

Congress concluded that legislative action was needed to assure that the freedmen would be granted the same rights as the white men. The Freedmen's Bureaus Act of 1866 stated that "the right … to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens … without respect to race or color, or

[191] *McDonald*, at 3038.
[192] *Id*.
[193] *Heller*, at 611 and 612.

previous condition of slavery".[194] Similarly, the Civil Rights Act of that same year assured the "full and equal benefit of all laws and proceedings for the secure of person and property, as is enjoyed by white citizens"[195]. The guarantee of the right to keep and bear arms was part of the assurance of the equal protection of the law to all citizens.

Due to resistance against those laws, to presidential vetoes and to the Courts precedents, Congress understood that a Constitutional Amendment would be necessary to protect the rights of all citizens. The Fourteenth Amendment, thus, emerges as the constitutional basis for the Reconstruction. The right to keep and bear arms has been a central issue on the whole Reconstruction debate. The need for legislative action resulted from the disarmament of the freedmen, and the enactment of the Fourteenth Amendment had in its mains reasons the necessity to guarantee them their right to possess weapons and defend themselves.

**d. Present Day and Urban Violence**

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

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[194] *McDonald*, at 3040.
[195] *Id*.

Considering the specificity of handguns, Justice Scalia' opinion calls attention to the benefits it has over long guns in the situation in which one needs to protect her property or herself. He argues that handguns can be more easily accessed in case of emergency, that it is more easily usable for a person that does not have the strength to manage a long gun; that it may be pointed at a criminal with one hand while the other hand dials the police. Those are some of the practical aspects of handguns that would make them immune from state prohibition, for they are the most efficient weapons for self-defense.

**Chapter 7 – One meaning, many purposes**

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

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

The right to keep and bear arms has been deemed as a critical one in different contexts and has served different purposes throughout American history. It has been

considered as crucial in the context of a political revolution, when the colonies fought for independence. The purpose was to give individuals the right to protect themselves against an oppressive power.

In the time of the ratification of the Constitution, it was perceived as an important element of the balance of military power in the new system of government. The context was one of political settlement. Its purpose was to enable the States to be protected from a tyrannical exercise of military power by the Federal Government. Protecting the right individuals had to possess a weapon was a way to keep the States able to defend themselves through the militias.

In the period soon after the Civil War, a pre-existing debate over what constitutional rights free African American would be entitled to reached its apex, and the right to keep and bear arms played a central role. Such right was a decisive form of protecting the newly freed slaves from private and public violence perpetrated by white majorities in the south. The significance of the right protected by the Second Amendment arose in a context of struggle for civil rights.

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

Because the rule of law resides in the textual meaning of the constitutional provision and not in its practical consequences, the right it protects can be relevant in different social contexts. The adaptability of the Constitution is greater in the majority's

and plurality's opinions then in Justice Stevens' dissenting opinion in *Heller*. In this opinion, the practical consequences intended by the framers of the Second Amendment would determine its content, limiting the adaptability of the Constitution to different social environments.

From this perspective, in the case of the interpretation of the Second Amendment, the original public meaning theory does look similar to a form of living constitutionalism, as Jack Balkin suggests[196]. In Balkin's words, "what matters is the original meaning of the text and its underlying principles, and not how people expected the text would be applied."[197] This idea is perfectly convergent with Justice Scalia's opinion in *Heller*. The consequence of such suggestion is that constitutional interpretation is not limited to the practical outcomes desired by the founding generation when it adopted a given provision. Today's interpreter should be faithful to the principle that underlies such provision.

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

Notwithstanding its adaptability to social change, the Second Amendment, as interpreted in *Heller* and *McDonald*, has a stabilizing element, which is the principle of law found to be enacted through it: the principle of the right to self-defense and self-protection. The understanding of the original meaning of the constitutional language was a vehicle to maintain the faith to that abstract principle of law. In this sense, Dworkin

[196] Jack M. Balkin, *supra* note 123.
[197] *Id*., at 451.

argues that "fidelity to the Constitution's text does not exhaust constitutional interpretation".[198] Balkin also sees this deep relation between constitutional text and the principles of law, claiming that principles "give unity to the entire Constitution and preserve its logic and stability over time"[199]. In *Heller* and *McDonald*, the principle of self-defense was the element that stabilized the history of the Second Amendment.

Moreover, the *Heller* opinion, in which the examination of the text was a vital piece, the Court tested the consistency of that principle with the constitutional text throughout American history. Balkin supports such approach, as he claims that "[t]he reason why we look to history—where it is available—is to act as a check on our assumptions about what 'the text can bear.'"[200] The broad analysis of the case law over the right to keep and bear arms is also consistent with Dworkin's perspective, when he argues that "[h]istory matters because that scheme of principles must justify the standings as well as the content of these past decisions."[201]

The use of history in constitutional adjudication, thus, was important not merely as means to access the original intent of the framers or the original meaning of the constitutional text. History was a vital element in understanding the principles enacted by the Constitution and the way these principles have been crucial to American life in different contexts. Between the failures of the original intent theory to provide objective answers to current problems and of the living constitution theory to integrate the past and the present of constitutional experience, Barry Friedman claims that a broad historical perspective makes the interpreter see the life of the constitutional text in American

[198] Ronald Dworkin, The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve, 65 Fordham Law Review 1249, 1250 (1996-1997).
[199] Jack M. Balkin, *supra* note 123, at 484.
[200] *Id*, at 489.
[201] RONALD DWORKIN, LAW'S EMPIRE 227 (Harvard University Press, 1986).

history. In his words, "[w]e are the product of a past recent and distant. To move from 1787 directly to 1997 is not to describe our past nor to root constitutional interpretation in it. Our Constitution is the product of constant reinterpretation since the founding."[202] History was useful in *Heller* and *McDonald* because it enabled the Court to perceive the underlying principle of the Second Amendment's text and the ways in which this principle has been a key issue in some of the most critical moments of American history. It was vital to fully understand the original meaning of the Second Amendment and to see the many purposes it has served.

[202] Barry Friedman, *supra* note 65, at 962.

## Conclusion

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

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

Among the ideas that are presented to solve the counter-majoritarian difficulty is originalism, the argument that the rule of law of a constitutional provision becomes fixed by the time it is framed and ratified. While interpreting the Second Amendment, the Supreme Court sought to be faithful to its view of the meaning of that provision, regardless the impacts it could have to current local majorities. In the words of Justice Scalia, local governments have a variety of ways to regulate guns, "[b]ut the enshrinement of constitutional rights necessarily takes certain policy choices off the

table."[203] This is a strong argument for the legitimacy of judicial review and its adequacy to the majoritarian view of the democratic process.

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

*Heller* and *McDonald* are cases in which the Supreme Court performs broad and deep historic research. The opinions of those cases examine more than three centuries of history, in both England and America. The breadth of the sources that are object of analysis is a way to see the magnitude of the Court's enterprise. Great part of the discussion on those cases was focused on specific issues on the interpretation of distant moments of Anglo-American history. These cases are an excellent example of the convergence of law and history that has begun at the end of the twentieth century.

[203] *Heller*, at 636.

History might be a valuable benefit in constitutional adjudication because it enables courts to understand the principles that are related to the constitutional text, as well as the importance of constitutional rights in different contexts throughout time.

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

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

However, history is not able to, independently, control the result of any legal interpretation. Any historic research is limited to the problems the researcher needs to see solved. When historic research is part of legal reasoning, its scope is determined by the jurisprudential commitments of the law's interpreter. For those commitments set the

questions that history should answer. In the cases analyzed in this work, it was perceptible that the jurisprudential commitments of the Justices controlled the breadth and depth of the historic research.

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

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