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Examining the Role of Cultural Paradigm Shift on Originalist Interpretation: Implications on the Second Amendment

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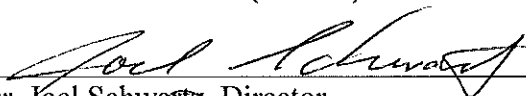
Examining the Role of Cultural Paradigm Shift on Originalist Interpretation: Implications on the
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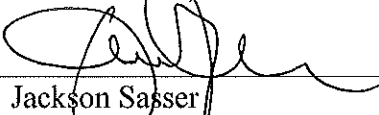
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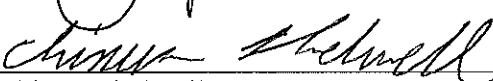
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Table of Contents

| | |
|---|-----------|
| Introduction | 2 |
| Cultural Contexts of the Second Amendment | 7 |
| <i>Republican Origins</i> | 7 |
| <i>Transition to Liberal Individualism</i> | 12 |
| <i>History of the Second Amendment</i> | 14 |
| <i>Judicial Opinions and the Right to Bear Arms</i> | 25 |
| Originalist Interpretations, Paradigm Shifts, and the Second Amendment | 33 |
| <i>Originalism and its Forms</i> | 33 |
| <i>Originalism Across Paradigms</i> | 36 |
| <i>Heller Majority Opinion Against Paradigm Shifts</i> | 40 |
| Conclusion | 45 |
| References | 50 |
| Acknowledgments | 53 |

Introduction

In this project, I offer an analysis of originalism in constitutional interpretation. I employ the example of the Second Amendment to demonstrate that when there has been a systematic cultural shift, as there has between civic republicanism of the founding era to the liberal individualism, which began in the Jacksonian America of the early 19th century, it is no longer possible to make a compelling originalist argument.¹

Originalism is an umbrella term to describe the wide range of interpretive theories that regard “the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present” (Whittington 2004, 599). It gained credence as a mode of constitutional interpretation beginning in the 1970s, as a reaction to the decisions of the Burger and Warren courts. Critics of these courts maintained that Burger and Warren liberally interpreted the constitution, and “had effectively been making, rather than interpreting, the law, an act inconsistent with the judicial role in a democracy” (Smith 2011, 711).

Second Amendment discourse, both in the academy and in mainstream societal space, has been traditionally dominated by this originalist mode of constitutional interpretation. I will elaborate on the specific modes of originalism that have emerged and are crucial in the context of the Second Amendment following the landmark Supreme Court case, *District of Columbia v. Heller* (Nelson 2003, Greene 2009, Cornell & Kozuskanich 2013). In essence, both proponents and opponents of gun control will appeal to this early American historical context in order to justify their respective beliefs.

¹ For the purposes of this paper, I will use the term ‘Founding Era’ in a general sense to describe the time period between the 1760s and the 1790s.

The mainstream debate in the secondary literature generally separates two camps of understanding the Second Amendment – the individual rights, and the collective rights ideologies. The former claims that the Amendment guarantees constitutional protection for individuals to own arms, while the latter holds that the purpose of the amendment was for states to prevent the federal disarmament of militias, and thus its protection cannot be extended to individuals. I will chronicle relevant early American history, describing important events and ideas that reigned paramount in shaping the Second Amendment. During the founding era, historical examination demonstrates that the militia was intimately linked to notions of civic duty, humanism, and republicanism (Wood 1969, Crell 1984, Cornell 2006). I will also address the classical influences on the founders, giving a historical grounding to these notions of civic republicanism (Richard 2008, Shalev 2009). Having described this civic republican context, I will endorse Saul Cornell’s civic right interpretation, a paradigm separate from both the individual and collective right interpretations. Thus, any serious commitment to originalism must embed the language of the Second Amendment in the civic republican paradigm in which it was originally understood. (Cornell 2004, Cornell 2006, Kozuskanich, 2008).

The early 19th century saw the American political conscience begin to stray away from traditional republican values and virtues, into the individualism of liberal theory. This can be seen in the emergence of Jacksonian Democracy, which lifted the role of the individual to new heights (Kohl 1989). I argue that today’s political and societal climate follows in this liberal individualist tradition, and while we have still retained certain elements of our republican past, we are nowhere near as civically committed as the first “American” populations.

The republican tradition placed primary emphasis on the public sphere, a realm for the shared, civic life that was seen as the sphere where humans could achieve their highest potentials. As demonstrated below in Table 1, founding-era citizens were threatened from both anarchic individuals and the oppressive government. The “public sphere” to which the Second Amendment was dissolved in the post-Jacksonian era, and the role of the individual was elevated in its place, thus creating a dualistic clash between the individual and state.

This departure from the republican paradigm has dire implications for the vast spectrum of originalist interpretations of the Second Amendment. How can we expect to ascertain any general or concrete original meaning from the Amendment in our liberal, individualist society, when it was crafted under clearly a civic republican context? Originalism is grounded in an assumption of conceptual continuity, which does not exist for the Second Amendment as a result of the shift in societal paradigm.

Cultural Context of the Second Amendment (Table 1)

| Time period | Dominant Paradigm | Conception of Individualism | Civic Sphere | Central Government |
|---|--------------------------|------------------------------------|--|---|
| <i>Founding Era</i> | Civic Republicanism | Threat of anarchy of the mob | Militia as critical element to public good | Threat of English Crown to civic sphere |
| <i>19th- Century – Present Day</i> | Liberal Individualism | Individual Rights | N/A | Threat of government to individual rights |

The figure above represents an important (albeit somewhat simplified) conceptual scheme that I believe is pivotal in articulating the danger of appealing to originalism in

the context of the Second Amendment. There is a common misconception that Founding-era Americans only feared the tyranny of the English crown, and that fear alone fueled the ratification of the Bill of Rights. While they did hold strong fear regarding their tyrannical rulers, they equally dreaded the prospect of the lawless, anarchic mob (Cornell 2006). The militia served the crucial role as the intermediary between these two extremes – that is, of the individual and the government. The militia’s role in the Founding Era cannot be overstated. It served as a social institution that held parades and galvanized voters (among many other things), a rudimentary police force, as well as a form of military. The notion of maintaining the public good undergirds all of the Founding-era militia’s roles. They held the public sphere paramount, ensuring that citizens would not be harmed as a result of any extreme action on the end of neither those lawless individualists nor the tyrannical central government.

But transition out of civic republicanism more or less erased the space of the public sphere from American society. Liberal individualism has dissolved the collective conscience, and no longer does the Rousseauian notion of the ‘general will’ carry any weight; even modern public opinion polls are not so much ‘public’ opinion, but an aggregation of multiple individual opinions. The crafters of our Constitution could not have possibly foreseen the dissolution of republicanism (and as a result, the public sphere), nor could they have predicted the gradual decline in the militia’s role in society. I argue that those who maintain an originalist reading of the Amendment to support an individual right to bear arms are erroneously conflating modern manifestations of individualism with the civic and public connotations of the Amendment. Similarly, those who support a collective right interpretation understate the role of arms to early militias

(and civic life), as guns were undoubtedly a key component of Founding-era life. They permeated innumerable aspects of early American culture, and were certainly present in the life of the average 18th-century citizen. Proponents of this reading similarly gloss over the existence of a separate public sphere, which provided the context for arms use.

While those who ratified our Constitution were writing for posterity's interpretation, the Second Amendment is especially unique as it is wedded to its age. Originalism seeks to go back to particular historical moments in order to ascertain the correct application of Constitutional ideas. But attempting to extract ideas and direction from the Founding-era and applying them to modern society produces radical disconnectedness, an idea that I will elaborate upon.

In this project, I will first describe the paradigm within which the Second Amendment initially existed. I will analyze the shift from civic republicanism to liberal individualism, before describing the history of the Second Amendment and its case law over the past two centuries. Following that, I will describe the difficulties of originalist interpretation given the paradigm shift, specifically detailing how they affect the majority opinion in *District of Columbia v. Heller* (2008). I ultimately posit that genuine commitments to originalism require that we repeal the Second Amendment. I also criticize the general discourse for neglecting the crucial connection between paradigm shift and constitutional interpretation.

Cultural Contexts of the Second Amendment

As presented in Table 1, the transition from a civic republican to a more liberal individualist society facilitated the dissolution of the public realm, and this has vast implications for how an originalist ought to consider the Second Amendment. In Part I of this section, I will further describe the heavy value that the founders placed on the public realm in the Founding Era. Part II briefly describes the transition to a more individualist society, beginning in the early 19th century and continuing through the present day. My purpose is not to pinpoint the exact cause of this shift, but rather to demonstrate the existence of a severe paradigm shift across American history and, eventually, to identify the implications for the doctrine of originalism. Part III will detail the early, ratification-era history of the Second Amendment. Part IV will describe the case history of the Second Amendment to the current day, demonstrating how the Amendment's judicial interpretation altered alongside the societal paradigm.

Republican Origins

At the core of American political thought lies a debate between the ideologies of civic republicanism and liberal individualism. The former preaches the importance of the communal good, championing the public good, “prior and independent of individual desires and interests” (Mouffe 1992, 71). The good of the collective public is placed at the forefront of the citizens' consciences, and while they maintain private lives, their ultimate successes and validations arise from the collective successes. Very generally, liberalism refers to an ideology that emphasizes the separateness of individuals' private-public lives. This view posits that the government and will of the state dictates the terms

of individuals within the public sphere, they may not be able to do so within the private sphere. That is exclusively reserved for decisions made by the individual, and thus individual liberties are protected. But taken to an extreme, liberalism may be distorted into an ideology that promotes selfishness and the attainment of material wealth, and I argue that this is the iteration of liberalism of which the founders were fearful. I believe that providing some historical context and insight into the roots of republicanism as it pertains to our founders will assist in delineating its role when considering modern day issues of constitutional interpretation.

Prior to beginning my description of civic republicanism and its role in early American history, I would like to provide the disclaimer that the debate over the ideological origins of the United States (i.e., between civic republicanism and liberalism) is still hotly contested.² While I put forth the dominance of civic republicanism, I do not mean to wholly dismiss the role of liberal individualism, and doing so would be a superficial treatment of history. My main purpose in asserting civic republicanism is ascertaining the existence, and subsequent dissolution, of a distinct public sphere.

Early Americans strove to design a way of life that was antithetical to the tyranny of the English, and the adaptation of republicanism may be understood as a direct response to such sentiment. In addition to eliminating any monarchy and adding a representative means of election, republicanism added a moral element to the political and social life of early Americans. Citizens, elected officials, and institutions were expected to adhere to a high standard of morality, as they believed only virtuous societies

² See Alan Gibson (2000) for a brief survey of the existing literature on the liberalism-republicanism debate.

and civilizations thrived. To affirm this commitment to virtue and moral excellence, they often turned to stories of antiquity.

John Dickinson, Governor of Pennsylvania and Delaware, a signatory of the Constitution, author the *Letters from a Farmer in Pennsylvania*, exemplified these commitments, as he concluded each letter with a classical quotation from the great Greek and Roman historians and poets (Wood 1969, 49). The founders admired the democracy of Athens and the Roman republic from an early age, as well-to-do schoolchildren (and thus, future statesmen) were well versed in the tales of the classical age splendor and triumph (Richard 2008). However, just as they esteemed the successes of these ages, their downfalls served as cautionary to the dangers of moral decrepitude. The decline and ultimate collapse of the Roman Empire in particular was viewed largely as a result of the gradual moral decay, beginning in the imperial period. The decay was seen as the result of the decline in Rome's civic realm and the unfortunate growth of excessive individualism, as well as excessive state power. First, Enlightenment-era historians specifically identified an excess of individualism and pinpointed the Imperial era of Roman history as the beginning of the lavish, materialistic obsessions that caused the decline of Rome (Bederman 2008, Richard 2008). No longer did the citizens uphold the virtuous, republican ideals that propelled Rome to global domination. Concentrated power within the elite, coupled with a selfish citizenry fractured the empire and catalyzed its ultimate downfall. Second, excessive imperial, state-centric conquests and aspirations were regarded with analogous disdain. And while the Roman Republic certainly possessed imperial elements, the Empire was portrayed to have elevated this imperial tendency to levels of lust, far from the moral virtue found in the republic. Most of the

individuals whom modern scholarship would label as ‘founders’ would have surely been educated in these vices of ancient Rome, likely fearing the results of both these individualist and statist mentality on the United States. Instead, it would have been prudent to invest in the overall success of the new republic by propagating the idea of the public good.

“No phrase except ‘liberty’ was invoked more often by the Revolutionaries than ‘the public good.’ It expressed the colonists’ deepest hatreds of the old order and their most visionary hopes for the new” (Wood 1969, 55). Civic republicanism treasures the notion of the public good; in fact, the public good is one of the cornerstones of republicanism as an ideology. Consider the etymology of the word republic – it comes from the Latin phrase *res publica*, which loosely translates as ‘public affair.’ While this attitude towards the public good was seen as a radical shift from that of the previous English monarchy, it was by no means a new concept or ideal. The familiar tales of Roman and Greek antiquity boasted strong republican and democratic values that heavily emphasized the role of the public domain in the overall societal welfare. Also important was the notion of the “general will,” an idea introduced by Jean-Jacques Rousseau in the years preceding the American Revolution, which essentially held that the public conscience ought to be prioritized over individual needs and goods, i.e., the particular will. Rousseau proved to be immensely influential to the framers, as his notion of classical republicanism maintained the ideal of a virtuous citizenry setting aside their particular wills in favor of what ought to be done for the greater good.

Though it would be tempting to dismiss the notion of a separate “public” sphere as a convenient metaphysical construction for those purporting to identify civic

republican origins, an examination of early American history inextricably points to the existence of such an entity. Even the most cursory examination of the Constitution's preamble, beginning with "We the People," indicates an attention to a collective mode of consideration. The tripartite dynamic of the founding-era civic republican society – as evidenced in Table 1 – is unique as it posits the public as entirely distinct, in between the extremes of the individual and the state. This notion of a "public" is much more than just an amalgamation of individuals – at least in a classical, founding-era sense, the citizenry was understood in a collective rather than an individual context. The structure of early American society elevated the role of the public: "As de Tocqueville observed in his study of the United States in the 1830s, involvement in public life is seen not as just a duty, but as something offering its own personal rewards" (Dahlgren 2006, 269). Any excessive emphasis on the individual was deemed to be problematic to the common good and similarly, the totalitarian control of the state was seen as clearly oppressive to the public.

When considering the scope of early American political thought, it would be misinformed to ignore the impact of classical liberalism on the founders. Federalists such as John Adams and Alexander Hamilton especially embraced ideals of the individuality of the citizens against the communitarian tendencies of republicanism. Classical liberalism is often associated with the protection of individual liberties from the state; in this sense, it closely resembles modern day libertarianism. Still, I maintain the dominance of civic republicanism over these emerging liberal strands within the Founding-era conscience. Having a basic understanding of republicanism as an ideology and its general

impact on early political thought, I will now explore the transition, beginning in the early 19th century, to a more liberal individualist society.

Transition to Liberal Individualism

In *The Republic Reborn: War and the Making of Liberal America, 1790-1820*, Steven Watts comprehensively details the relationship between republicanism and liberalism within the context of early America. He synthesizes a number of causes – for example, economic growth and development, geographic movement westward, the rise of Protestant Christianity, and nationalist pride following the War of 1812 – in order to assert the ideological evolution to liberalism. He points out the presence of “nascent” liberal tendencies, subtly visible as early as the mid-18th century: “Enmeshed with the social distentions and creeping commercialization of the Revolutionary era, American cultural values and attitudes became strained and uncertain by the late 1700s” (Watts 1987, 9). He asserts the initial dominance of the republican conscience, with its emphasis on civic humanism; the economy of household production; and virtue, which he describes as “the subordination of private interests to the general good of the commonwealth” (Watts 1987, 11). But by 1820, the political and societal landscapes have radically altered, “if almost imperceptibly,” and though republican rhetoric continued into the 19th century, “contexts and meanings had altered in significant ways” (Watts 1987, 12).

The half-century following the Revolution ushered in an era of rapid and large-scale transformation in just about every aspect of society. Lawrence Frederick Kohl (1989) succinctly, yet comprehensively, surveys the changes by the time of the Jacksonian-era:

In the half-century since the Revolution the population of the country had nearly quadrupled. The nation’s boundaries had been pushed southward to the Gulf of Mexico

and westward to the foothills of the Rockies. Industrialism took root in the Northeast, while America's burgeoning population poured over the Appalachians in search of fertile land. (4)

He continues on by describing the social and economic implications of this geographic expansion westward: "Economic enterprise throughout the nation was stimulated by legal changes which enhanced the opportunities of the risk-taker in the economy [...]. Storekeepers became merchants, craftsmen became capitalists" (Kohl 1989, 4). These changes in social, geographic, and economic aspects of society culminated in a culture shift that began to place supreme emphasis on the individual and his accomplishments: "The idea of the self-made man emerged as individuals scrambled to improve their station in life" (Kohl 1989, 4). The aforementioned republican emphasis on the public good and virtue are all but lost in this new society: "Men found themselves [...] lost in a bustling world of strangers" (Kohl 1989, 4). The rise of individualism ought not be ascribed to the evolving social, geographic, and economic facets of society alone – Kohl describes a transformation occurring throughout the Western world at the turn of the 19th century, demarcating a transition from 'traditional' to 'modern' societies that reflects, on a larger scale, these societal changes seen in the United States.

The changing nature of human interaction detached "the individual from the tight web of human relationships which characterized traditional societies" (Kohl 1989, 7). Traditional conceptions of the individual and his relationships, at least insofar as Kohl describes, are largely the result of the limited scale of life. In this context, the individual has no choice but to be closely bound to others. Though Kohl never mentions it, the idea of a traditional, socially interconnected life is not just compatible, but necessary for notions of Republicanism and civic humanism. Founding-era communities were often so small that they required this sort of social layout – all were interdependent on one

another, and from that collective investment arises a desire to ensure the public good. But as networks grew larger beyond traditionally smaller communities, the necessity for interconnectedness diminished. Tocqueville alludes to this societal transition when he first introduces the notion of ‘individualism’ as a departure from Western tradition. It is crucial to note that he does not intend to present individualism in a pejorative context; in fact, Tocqueville is careful in separating individualism from selfishness, labeling it as a “mature and calm feeling” that a man’s fate is in his own control (Kohl 1989, 11).

It is evident that the modern context is much more a product of the liberal individualist society than that of civic republicanism. Despite sincere efforts to inspire civic involvement by countless politicians and organizations, the traditional ideals of community did not survive to the present day, irreparably fading from the conscience of the typical American.

History of the Second Amendment

Having just described the actual paradigm transition from civic republicanism to liberal individualism, I will now address that shift in relation to the Second Amendment, describing the Amendment’s ideological origins and historical examples of early interpretation.

Consider the relationship between the republic and its militia in antiquity. Citizen-soldiers were integral to the fabric of classical republics, as they demonstrated the ultimate commitment to one’s land. Despite carrying on private lives and endeavors, citizens volunteered to collectively take up arms and defend the community. In doing so, they were not in pursuit of individual glory, but the public good. We can turn to

Pericles's Funeral Oration to demonstrate both the level and nature of the sacrifice attained by the citizen-soldier who died in defense of Athens. Throughout the oration, Pericles never mentions any specific names of individuals who perished in warfare, instead emphasizing their collective status as Athenians, and posterity's commitment to the future of Athens (Wick 1982, 112). Machiavelli and other Enlightenment-era Republicans also aver the usage of citizen armies for two reasons – first, citizen-soldiers were particularly invested in the land they are defending; second, serving the country in times of war has lasting, educatory effects on individuals, thus making them better citizens. Contrast these venerations of the militia and citizen-soldier, who served the state insofar as it preserves the public and common good, with the notion of a standing army, which was regarded as solely a vehicle of the state as a matter of its occupational duty. Having described the role of the militia within the historical canon of Republicanism, I will now describe the early American debate between standing armies and citizen militias as a means of contextualizing the origins of the Second Amendment.

The framers were careful in explicitly prohibiting the standing army as a means of defense. It appeared to be one of the most direct manifestations of tyranny and unchecked power for the colonies. Instead, early Americans sought militias in order to preserve their safety. While there existed a general consensus on the existence of militias for defense, the composition of militias was the subject of much debate in the time immediately following independence. Following his years on the frontline and witnessing the relative ineptitude of militia soldiers against the professional British military, George Washington was quick to start on a plan to shape up the military. Henry Knox, Washington's Secretary at War, spearheaded the reform and eventually presented to the Second

Congress in January of 1790 (Cornell 2006, 66). The plan contained three stratifications of militia overseen by the federal government – advanced corps, main corps, and reserve corps. Though this system may not seem too foreign to a modern audience given the current structure of our military, it enraged early senators and representatives. Members of Congress struck down the proposal, and consensus was not reached. Discussion was temporarily tabled until later in the year, when Native Americans in Ohio Territory attacked and defeated American forces (Cornell 2006, 66).

While the Knox plan was ultimately not revisited, congressmen were quick to propose alternative solutions. Elias Boudinot, a Federalist from New Jersey, tried to prevent the creation of a universal militia; this aversion was very much in line with traditional Federalist thought, which preferred the Federal government organize such matters. James Jackson, a congressman from Georgia, fiercely argued in favor of universal militia service, calling on the republican obligation to be a soldier, “if it was only to prevent the introduction of that greatest of all evils, a standing army” (Cornell, 2006, p. 67). Cornell also mentions Jackson’s civic implication of the right to bear arms, citing it as one of the “most important duties we owe society” (Cornell 2006, 67). Much to the chagrin of the Federalists, Congress ultimately (albeit narrowly) passed the Uniform Militia Act in March of 1792. Federalist criticism cited the overall lack of preparedness of the military, as well as the lack of consistency across states; those in favor of the bill lauded it as a crucial step in the effort to ensure protection of freedom, on individual as well as state levels.

As exemplified, the general discourse surrounding the Second Amendment within the early years of the United States was far from a consensus – despite this, both

statesmen and common folk maintained that citizens had an obligation to defend their states and communities. This mentality reflected a level of civic virtuousness that calls on ideals of republicanism that were held so chiefly during the 18th century. The 1776 Pennsylvania Constitution grants citizens the right to “bear arms in defense of themselves and the state.” Proponents of the individual right are quick to ascribe this particular section as proof of a commitment to self-defense within a broad American conscience (Hardy 2007, 1253). By ascertaining this, they are utilizing (what they understand to be) a commitment to self-defense as evidence against a collective (or civic) understanding of the Second Amendment at large. However, a more comprehensive examination of the Pennsylvania Constitution reveals the fallacious nature of such an understanding rooted in self-defense. The Constitution not only permits the right to bear arms, but it legally binds citizens to bear arms:

That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service, when necessary [...] Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent.

This section exemplifies the context under which the right to bear arms is presumed to have operated within the 1776 Pennsylvania Constitution. Citizens had a legal obligation to bear arms and defend their communities – if for whatever reason they could not fulfill this requirement, they were expected to pay something resembling a tax (Cornell 2004, 255). Had the Pennsylvania State Convention seen the right chiefly as a means of individual self-defense, as commonly defended by pro-gun advocates, there would have been no need to qualify parameters regarding the mandatory ownership of arms, or delineate consequences for those who choose not to bear arms.

Although he is not referencing the Pennsylvania Constitution in particular, Akhil Reed Amar (1997) aptly describes the prevailing viewpoint at the country's Founding by comparing it to what he describes as political rights (though I understand them to be more as civic rights) such as voting, office-holding, and jury service (258). These rights are not exercised in an individual sense, but rather in one that embodies a republican right to the people. Whereas an individual right would refer to a right that is intended to have been applied on a singular, personal level. Consider the Fifth Amendment as an example of this, which begins with the text, "No person shall be held to answer for a capital, or otherwise infamous crime." Within the text of this Amendment, the subject is clearly presented in a singular sense, as a "person." While there may be classical republican morals within its context, we can read an overt individual-level protection into this Amendment. We can compare the texts of the Second and Fifth Amendments, thereby realizing their stark differences. With its rhetoric delineating the context of the militia, and referring to a "people" as opposed to "person," the former lacks the individualized focus of the latter. Amar (2005) elucidates this distinction in the context of the Second Amendment, writing, "[W]hen the original Constitution spoke of 'the people' rather than 'persons,' the collective connotation was primary" (324).³

When examining ratification-era debates between both the Federalists (who were more sympathetic towards federally-supported militias) and Anti-Federalists (who vehemently defended state and community militias in fear of tyranny rooted in federal control of militias), the right to bear arms was almost explicitly utilized in the context of

³ Amar's interpretation of the Amendment close resembles Cornell's 'civic right.' He describes it as a 'republican reading,' against both collective and individual rights interpretations.

militias. Only one instance within the time period of ratification has been identified, and that is the Anti-Federalist Dissent of the Pennsylvania Minority. The authors of this Dissent, the Pennsylvania Constitutionalist Party, set out to protect arms specifically for purposes of self-defense, defense of the state, and killing game. They additionally sought to prohibit any laws disarming the population, unless a given population was deemed a threat to public safety. The modern libertarian may be quick to identify with the Pennsylvania Constitutionalist Party, using the group as an example of a pervasive individual-rights conscience during the era of ratification. While their Dissent is worth noting, attempting to extrapolate anything substantive from it would be problematic. Historians generally agree that it was an atypical document given the preexisting climate of arms-related discourse. These were radical statesmen from a rural area of the country that, by and large, did not have an effect on the ratification of the Constitution:

The Dissent had almost no impact on the deliberations of the First Congress that drafted the Second Amendment. Pennsylvania Anti-Federalists were routed during the first federal election. Not only did the signers of the Dissent not participate in the First Congress, but Federalist Frederick Muhlenberg, who represented the state in Congress, disparaged the extremism of the Dissent in a letter to Federalist Benjamin Rush. Nor is there any evidence that Madison consulted the Dissent when he proposed his own draft of the Bill of Rights. (Cornell 2004, 260)

By explicating the anomaly of the Pennsylvania Constitutionalist Party's Dissent, I hope to have demonstrated the strong association of the right to bear arms and the militia. Modern discourse has divorced the two ideas, which is especially problematic given its alleged allegiance towards originalism. An honest originalist line of thought could not be so negligent as to ignore such a crucial component to the right to bear arms.

The founders' fear regarding the anarchy of the mob was realized in the Carlisle Riot of late 1787. Upon Pennsylvania's adoption of the Constitution, Federalists took to the street to celebrate their victory – they encountered Anti-Federalists, and their

interaction quickly escalated to violence (Cornell 2006, 56). Anti-Federalists were imprisoned for having instigated conflict, though it was not long before the local militia broke into the jail and freed those arrested. The militia acted separately from state (and federal) authority, asserting its own grounds for acting to liberate the jailed Anti-Federalists. This populist interpretation regarding the militia and its lawful limits was far from the civic conception present within the minds of not only the Federalists, but also the (in their own right) radical Anti-Federalists who penned the Pennsylvania Constitutionals' Dissent. The Carlisle rioters placed the role of the community paramount, above both state and federal powers. They saw themselves as protecting against the impending Federalist disarming of the population, before ultimately instilling a standing army. One motivation for these riots was to galvanize moderate Anti-Federalists into a more radical breed of their ideology – by exemplifying the disproportionate power possessed by the federal government, perhaps the state's Anti-Federalists could move to strike down the Constitution. However, these riots had the opposite effect, effectively marginalizing the extreme factions of the Anti-Federalists and pushing the coalition to a more moderate position. The riots demonstrated “that continued opposition would only lead to instability and mob rule” (Cornell 2006, 57).

Proponents of an individual right to bear arms will often appeal to the grounds personal self-defense as justification for their beliefs. One first instance of a court challenge to this can be traced back to the end of the 18th century. Amidst riots regarding the Alien and Sedition Acts, William Duane, editor of the antiestablishment *Philadelphia Aurora*, Dr. James Reynolds, and two other resident aliens were attacked by a mob of Federalists. In an attempt to scare off members of the mob, Reynolds brandished a

firearm – all four men were charged with inciting riot, and although the crowd quickly disarmed him, Reynolds was also charged with assault with a deadly weapon (Cornell 2006, 89). The subsequent trial called into question the extent to which the natural right of self-defense was to be understood. The case was crucial in setting the groundwork for attitudes towards the right to bear arms in the generation following the adoption of the Constitutional Congress. The prosecution affirmed that Reynolds and Duane had a right to assembly, but because the other two individuals in the group were aliens, they were not necessarily protected by the amendment. These constitutional protections did not constitute an individual right, they argued; rather, these protections were associated with citizenship.

When it came to the gun charge, the defense did not turn toward the Pennsylvania Constitution's statement of the right to bear arms as justification for his possession of Reynolds's firearm. The prosecution maintained Reynolds's guilt by pointing to the fact that brandishing the firearm was not his last resort. He stood his ground in order to avoid insult and/or minor injury, and thus forfeited his right to self-defense. Had his life truly been in danger, he could have just fled the scene. The right to self-defense would not be conflated with the constitutional right to bear arms – instead, Reynolds' attorneys appealed to the common law idea of self-defense. By wielding his gun to the attacking angry mob, the defense hoped to show that Reynolds was clearly not demonstrating criminal intent. One of Reynolds' chief defendants, Alexander Dallas, cited the lack of any existing law to legislate arms ownership: "There is no law in Pennsylvania to prevent it; every man has a right to carry arms who apprehends himself to be in danger" (Cornell 2006, 91). The four were eventually acquitted on all indictments, including Reynolds's

firearm charge. The ambiguous nature of self-defense in these early years is demonstrated by the contentious nature of this case. The founders left no real precedent or understanding as to how a case of this nature ought to be handled.

In 1806, the notion of self-defense was again considered in relation to the right to bear arms. Federalist Thomas Selfridge was charged with the murder of Jeffersonian Charles Austin. Selfridge's defense rested on the idea that Selfridge acted in self-defense, as Austin confronted and attempted to beat him with a cane. The state of Massachusetts argued that Selfridge did not have the right to use lethal force given the circumstances of Austin's attack. Because it was on a crowded city, and not on a highway or in an isolated town, Selfridge could have called on others for aid. The Massachusetts Attorney General, James Sullivan, argued that while there is a given time and place to bear arms, "it could not be necessary at noon day, and when going on so public a place" (Cornell 2006, 113). Sullivan likened Selfridge's concealment of his gun to that of an assassin, not an innocent citizen defending himself. Selfridge's defense invoked the right to bear arms, citing that "every man has a right to possess military arms" and "to furnish his rooms with them" (Cornell 2006, 113). However, the Second Amendment was not the primary mode by which he sought to base Selfridge's defense. Instead, it was grounded in the common law notion of self-defense, greatly resembling the defense of Reynolds less than a decade earlier. Both sides presented compelling arguments that represented a vast divergence on the extent to which self-defense could justify the possession of arms. Ultimately, the court once again decided in favor of the defendants, citing the expanding definition of the right to self-defense as grounds for arms possession and use.

Like all political debates (especially within the context of early American history), the right to self-defense was ideologically charged at the turn of the 18th century. Broadly, Antifederalists understood a significantly narrower conception of the right to self-defense and its relationship with bearing arms. Federalists, having championed notions of liberal individuality, were keen to wider definitions of self-defense and bearing arms. Instead of being a constitutional right, self-defense was a common law right. While individuals undeniably did have a right to self-defense, disagreement emerged over the extent to which this right could be exercised in the context of bearing arms – this was the arena for discourse, rather than the modern day assessment of applying the Second Amendment as a means of self-defense. There was little to no appeal to the Second Amendment specifically in the context of self-defense, and neither party would have endorsed the modern-day divorce of the right of self-defense from its common law roots.

As previously described, the time period after the War of 1812, specifically the Jacksonian period, saw drastic erosion in the traditional Republican ideology that was so pervasive during the Colonial era – Alexis de Tocqueville, in his famous travels of the United States remarked “a distinguishing characteristic of American society in the 1830s, the era of Jacksonian democracy, was a pervasive spirit of individualism” (Cornell 2006, 138). Tocqueville observed the prevalent practice of travelling with concealed arms as one manifestation of this individualist attitude. The idea of concealing arms has clear implications of self-defense, and thus is an important consideration when examining the constitutional grounding of arms for self-defense. In addition to shifts in political thought during the post-war, Jacksonian era, economic changes affected the landscape of gun ownership as well. Industrialization spurred the manufacturing of handguns – with this

increased manufacturing, handguns became cheaper, and as a result, more widely owned.

The abundance of these weapons had tangible impact on the greater society as well:

The proliferation of handguns and knives not only led to more deadly interpersonal violence, but also to an escalation in the number of mortalities resulting from collective violence. [...] Rioting and mob action wreaked havoc on American towns and cities [...] Firearms played a central role in the carnage of this era. (Cornell 2006, 140).

Beginning in 1813, states began restricting the carry of handguns so as to minimize the overall harm they presented to the population at large. Kentucky, Louisiana, Georgia, Virginia, Alabama, and Ohio all passed laws against the possession of concealed weapons. Though this attitude was prevalent in some states, other states moved towards producing a more capacious understanding of the right to self-defense in relation to arms. In 1819, Mississippi defined that each citizen had a right “to bear arms in defense of himself and the state,” and a year later, Connecticut followed suit and passed similar legislation. Missouri presented an interesting case, as it framed the right to bear arms within the right of assembly, reaffirming the original militia roots of arms in an almost civic context. We can turn to the Michigan constitutional convention in 1835 for a clear-cut discussion over these two paradigms, individual and civic. Initially, the convention adopted individual rights phrasing similar to that of Mississippi, before turning towards more civic language: “Every citizen shall have a right to keep and bear arms in the common defense.” Ultimately, the convention maintained individual rights language, but convention records indicate a lengthy debate over the merits of each respective paradigm.

Judicial Opinions and the Right to Bear Arms

I will now describe the historical trajectory of Second Amendment judicial interpretation, as I believe that this will help in attaining a more comprehensive understanding of the setting of any current discourse. As previously mentioned, the original understanding of the Amendment (and thus, the understanding that any true originalists ought to subscribe) was that of a civic right. This reserved an individual right to bear arms in the context of the militia. This was not necessarily a universal consensus, as there existed groups with contrarian views (take the Pennsylvania Anti-Federalist Dissenters as an example); still, the civic understanding was the apparent accepted view in the eyes of the founders and thus, early courts.

Bliss v. Commonwealth (1822) was the first major challenge to the recently implemented gun control laws, and it represented a major victory for supporters of the individual right. The court essentially struck down concealed carry laws on the grounds that the right to bear arms was not subject to regulation. In contrast to prior cases that defended the possession of arms on the common law grounds of self-defense, the *Bliss* court specifically cited the Constitution as reason for the striking down any gun bans: “Whatever restrains the full and complete exercise of that right [to bear arms], though not an entire destruction of it, is forbidden by the explicit language of the Constitution” (Cornell 2006, 144). The decision was met with serious backlash – the idea of constitutionally grounding an individual right to bear arms was ridiculed by members of the Kentucky State House of Representatives, who accused the court of misunderstanding the historical origins of the right. In the years that followed *Bliss*, there were similar challenges to the constitutionality of banning concealed handguns, though most decisions

did not follow its precedent. However, one case in particular is worth noting – in 1852, the defense for Matthew Ward, a Kentucky man charged with the murder of William Butler, invoked the *Bliss* decision as grounds for the constitutional right to bear arms. Ward ended up acquitted, much to the outrage of many within Kentucky who believed that the Second Amendment could not possibly be used to defend the killing of Butler.

Following *Bliss*, a multitude of court cases rejected the individual rights reading of the Second Amendment in favor of a more civic interpretation. The 1840 case *Aymette v. State* challenged the constitutionality of a Tennessee law against bowie knives by appealing to the right to bear arms. The court ultimately ruled that these regulations were perfectly constitutional. The Second Amendment had specific provisions regarding the right to bear arms, and the notion of bearing arms was said to have only referred to military weapons:

A man in pursuit of deer, elk, and buffaloes might carry his rifle every day, for forty years, and yet, it would never be said of him, that had borne arms, much less could it be said, that a private citizen bears arms, because he has a dirk, or pistol cocolaied under his clothes, or a spear in a cane. (Cornell 2006, 146)

The court affirmed that while it would certainly be unconstitutional to regulate rifles and military weapons of that sort, but the legislature was free to regulate pistols or other weapons that had negligible value in promoting the maintenance of a well-regulated militia (Cornell 2006, 146).

As demonstrated, the Second Amendment was originally understood with civic conceptions of the militia and public good in mind. The notion of bearing arms was understood in a strictly military context, with no intention on extending this right to the private, individual sphere. Even into the mid-19th century, there existed a strong relationship between gun ownership and citizenship. In the original historical context, the

notion that the Second Amendment guaranteed a right to own and operate guns for the purposes of private self-defense was preposterous, even laughable. But the Jacksonian period ushered in an era of heightened individualism, which, combined with the mass proliferation of handguns (and thus, firearm-related court cases), began changing the way the Amendment was judicially considered.

Throughout the 19th century, there was no real prevailing judicial opinion on the Second Amendment. The civic interpretation represented the traditional paradigm by which the Amendment was understood, while the latent individual interpretation represented the opposite end of the continuum of jurisprudence. The range of opinions on these cases, challenging the Second Amendment and invoking the right to bear arms, fell on a spectrum between these two extremes, with no particular camp dominating judicial opinion.

The early 1870s saw a series of lawsuits from the Department of Justice cracking down on activities of the Ku Klux Klan – the KKK seized arms of Black militias that were funded and supplied by the state government of South Carolina. These black militias assumed a role akin to that of original, Founding-era militias, soon becoming “an indispensable political and military institution, providing a means of protecting and organizing freedmen” (Cornell 2006, 176). They possessed analogous social importance as well: “the social role of the militias within the African-American community was at least as important as its military function” (Cornell 2006, 176). The militia represented the essence of African-American citizenship, and as a result, infringement on such was harmful, both practically and symbolically.

The Klan was brought up on a number of charges, including the grounds that they violated the Amendment, as they disarmed individuals who comprised a state militia. The prosecution attempted to use the Fourteenth Amendment to incorporate the Amendment on the grounds of this civic understanding, protecting the right for citizens in the civic militia context to individually possess arms. While the Klan members were ultimately convicted of different charges, the prosecution's attempt at Second Amendment incorporation failed, as the Supreme Court maintained that the Amendment represented a state right, incapable of federal incorporation. In other words, the federal right to bear arms could not, at least in this instance, be incorporated within the state of South Carolina; rather, the court ruled that this protection was up to state discretion to monitor arms usage so long as the state did not interfere with, given the Amendment's original intention of protecting state militias. Notably, the Klan's defense did not even attempt to justify its possession of arms under the guise of an individual right. Instead, the defense maintained that the Klan was protecting the state against the recklessness and terrorization of the black militias.

These cases played an important role in implementing the 'state's right' understanding of the Amendment, just before the landmark case *United States v. Cruikshank* (1876), which solidified the right for states to regulate arms usage. The case followed an incident now known as the Colfax Massacre, in which white militias attacked a group of primarily black freedmen over a disputed election. The white militia members were prosecuted on a number of charges, including the deprivation of citizens' free exercise and enjoyment of rights or privileges granted or secured by the Constitution, including the right to bear arms (Cornell 2006, 192). These sentiments are reminiscent of

prior notions of incorporation that were ultimately rejected in the earlier Klan cases. The lower circuit court ruled in favor of the prosecution, upholding the capacity for federal oversight of Second Amendment infringements. Justice William Woods, who presided over the circuit court decision, affirmed an individual rights interpretation of the Amendment. This line of thought is reasonable considering Woods's own assertion that the right to bear arms was guaranteed of the Constitution, and that the white militiamen violated this right. However, the lower-court ruling was ultimately reversed at the Supreme Court level, as the majority opinion asserted the military focus of the right, wholly unlike the purported individual focus of the earlier decision. The Court also distinguished between the common law right to keep and carry arms from the Second Amendment; while there exists a common law right to self-defense, and arms possession may be permitted under a broader definition of such, it would be erroneous to conflate the role of the Second Amendment with ideals of self-defense. This ruling effectively marginalized individual rights interpretations of the Amendment, establishing that it is solely intended to restrict the powers of the national government, and "states were free to enact whatever measures they deemed appropriate regarding the militia or firearms, as long as these laws were nondiscriminatory" (Cornell 2006, 195).

The definition of the 'state right,' as I am using it, is a distinct entity from the aforementioned 'collective right,' but before I examine this distinction, I wish to recapitulate how the original 'civic right' ought to be understood. The civic right holds individual citizens' arms ought to be protected in militia contexts. There is a protection of individuals' right to bear arms within the civic right, but it differs from the individual right interpretation; the latter centralizes self-defense as justification for arms possession,

while the former protects arms possession in defense of the public sphere. The state/collective right cannot affirm an individual right in any capacity, leaving arms regulation to states as long as their regulations do not infringe on state militias, or later, the National Guard.

The beginning of the 20th century saw vast changes for the traditional mode of militia infrastructure. Militias were seen as obsolete institutions that could not be expected to legitimately protect against foreign threats. The Dick Act of 1903 and the National Defense Act of 1916 were crucial pieces of legislation that nationalized the function of the militia, ultimately creating the National Guard. Essentially, this reorganization meant the formal eradication of state militias as the founders imagined and intended. No longer could the ideal of the citizen-soldier, civically conditioned minuteman exist; instead, he was replaced with the National Guardsman, who was an agent of the state, an occupational defender. Of course, the transition to the National Guard was not wholly the result of a cultural shift, as there were practical shortcomings of the state militia that facilitated its demise. But this transition is important to consider, especially as it pertains to the idea of a collective rights interpretation of the Second Amendment. Instead of the interpretation assuming a 'state right' that preserves state militias, the emphasis is now the preservation of arms to the National Guard within the 'collective right.'

The 20th century saw one major Supreme Court case challenge the interpretation of the right to bear arms. In *United States v. Miller* (1939), Jack Miller and Frank Layton were charged with illegally transporting an unregistered sawed-off shotgun across state lines, in violation to the National Firearms Act of 1834. The Arkansas District Court

overturned the indictment, citing protection of the right to bear arms under the Second Amendment. However, the Supreme Court reversed the lower court's decision, citing the clear militia intentions of the Amendment. The Court manufactured a two-layered test to determine its applicability to its interpretation of the Second Amendment — whether the type weapon could be used in a militia, and whether it was being used in a militia context (Cornell 2006, 203). The Court lambasted the notion that a sawed-off shotgun could pass for a militia weapon, even if Miller and Layton were operating within the scope of a militia. The majority opinion fused civic and state/collective views of how we ought to consider the Amendment, though throughout the 20th century, scholars emphasized the latter due to its “hegemonic dominance” of legal thought (Cornell 2006, 202).

Since the mid-19th century, the individual rights interpretation was pushed to the margins of Second Amendment interpretation given its apparent lack of historical legitimacy. Supporters of the individual right won their first recent victory, albeit a minor one, in the 2001 Fifth Circuit case, *United States v. Emerson*. While the ruling upheld an individual right to bear arms, it did not engage in judicial review to alter any preexisting regulations of arms possession. The individual right won its first major victory in the 2008 Supreme Court Case *District of Columbia v. Heller*, which centralized a commitment to self-defense within the Second Amendment. Much of the majority decision consisted of a historical review, tracing the supposed relationship between arms possession and self-defense from English common law, as well as writings of Blackstone and Locke. *Heller* had an enormous impact on jurisprudence since the ruling, given the lack in judicial precedent over the Amendment. It endorsed the individual right as the mode by which the . It has been cited in numerous cases, most notably in a 2010 Supreme

Court Case, *McDonald v. Chicago*, which effectively incorporated the individual right and applied it to the states.

Originalist Interpretations, Paradigm Shifts, and the Second Amendment

In this chapter, I argue that it is impossible to maintain any serious commitments to originalism as applied to Second Amendment cases, given the radical discontinuity across cultural paradigms. Because the conceptual orientation of the Founding-era differs to such an extent from that of today, no form of originalism (or level of originalist abstraction) can provide adequate means for guiding modern Second Amendment interpretation. I criticize the majority opinion of *Heller*, which affirms the individual right on grounds of original meaning, on the grounds of cursory historical analysis, as well as neglect of the paradigm shift.

Originalism and its Forms

In this section, I will define originalism and distinguish different versions of originalism that have been advanced over time. I draw largely on the distinctions of originalism outlined by Peter J. Smith's, "How Different are Originalism and Non-Originalism?" (Smith 2011). I understand the label of 'originalism' to represent any theory of constitutional interpretation that sees "the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present" (Whittington 2004, 599).

Early originalists, in the 1970s, sought to utilize the original intent of the framers in an effort to ground the Constitution in a set framework, thereby preventing loose interpretations of the document (Berger 1977). This first conception of originalism was introduced in response to the perceived recklessness of judicial activism, and thus served primarily a reactive and critical role, leaving little room for positive interpretation. This

form of originalism – privileging the original intent of the framers – is what Smith refers to as “Old Originalism” (Smith 2011, 708). These intentions were regarded as static notions, frozen over time, and thus any appeal to them would have been considered applying objective and unbiased standards. Strictly adhering to this sort of originalist ideology proved to be difficult for two additional reasons: first, it is virtually impossible to derive any uniform “collective” intent out from the writings of the Founders; second, historical examination has indicated that the founders specifically did not intend on posterity considering their intent in Constitutional interpretation (Powell 1985, Powell 1987, Smith 2011).

In response to the difficulties presented by Old Originalism, some originalists moved to analyzing the “original meaning,” or “public meaning” of the text. These “New Originalists,” as Smith calls them, maintain that some objective textual meaning can be ascertained in interpretation, and the primary way by which textual meaning can be understood is by asking how a reasonable person in the 18th-century would have understood the given section of the Constitution. While the goal of this sort of new originalism is to get an unbiased viewpoint of the Constitution, this sort of objectivity has proved incredibly difficult because 18th-century citizens routinely disagreed over issues of meaning. The focus on original meaning inevitably commands that some degree of interpretation will occur, as the scholar must collect the relevant historical and cultural information in order to validate how a given section of the Constitution is to be understood. New Originalism abstracts the Constitution to a more general level than that of Old Originalist supporters of original intent – from framers’ intent to broad citizen agreement - and allows for positive interpretation so long as it remains faithful to the

original meaning.

Smith presents a third development, “New New Originalism,” as a fairly recent theory that emerged out of New Originalism (Smith 2011, 716). As New Originalism has its focus on objective meaning, some originalists have been led to “conclude that at least some provisions of the Constitution are properly interpreted at a high level of generality” (Smith 2011, 716). The main distinction of New New Originalism from New Originalism is that the former maintains that we can work beyond mere constitutional interpretation, into the realm of constitutional construction. This distinction between constitutional interpretation and constitutional construction is a crucial one, and Lawrence Solum (2010) articulates it well. The former refers to the recognition of actual semantic content, or linguistic meaning, of any given part of the Constitution. Solum employs the example of the First Amendment to demonstrate what constitutes semantic meaning:

[T]he First Amendment freedom of speech has a linguistic meaning, associated with the meanings of the constituent words and phrases – “Congress,” “shall make,” “no,” “law,” “abridging,” “the freedom of speech,” and further specified by the conventions of syntax and grammar that allow these words and phrases to be combined into a meaningful whole. (99)

The act of synthesizing the amalgamation of words and phrases in the constitution is precisely what comprises constitutional interpretation. At the heart of the debate between Old and New Originalism is the question of how we ought to interpret the original constitutional text itself, whether the intentions of the founders, or the objective public meaning, is being conveyed. On the other hand, constitutional construction refers to translation of “semantic content of the constitutional text (its linguistic meaning) into the legal content of the constitutional doctrine (or rules of constitutional law)” (Solum 2010, 104). Construction, which inevitably involves a creative or activist role for judges, gives meaning to the semantics and provides a legal thrust absent with solely

interpretation. Solum prescribes interpretation as a means of resolving ambiguity, and construction as a means of resolving vagueness (Solum 2009, 974). I found these characterizations to be especially useful in contextualizing applications of New New Originalism – ambiguity implies that interpretation can help decipher unclear portions of the Constitution without extra invention, whereas vagueness implies that there is implicit, perhaps intentional, generality that requires constructive effort in order to arrive at a constitutionally justified conclusion. Given the high levels of generality that New New Originalists assume, along with the refocused emphasis on construction rather than interpretation, there is significant discourse exploring whether this method of interpretation may even be considered as a form of originalism at all. New New Originalism accepts that some degree of creativity is inevitable when resolving existing vagueness. Thus, in a sense, this form of Originalism seemingly relaxes commitments to strict objectivity, as emphasized in prior iterations of Originalism.

Originalism Across Paradigms

In this section, I will investigate the nature by which originalism may be posited across cultural paradigms. I will ultimately conclude that originalism, regardless of its variation, fails to adequately account for cultural paradigm shifts.

Recapitulating earlier portions of this paper, I posit that there exists a significant shift in cultural paradigms from the colonial and Founding-eras to modern day. I maintain that a civic republican paradigm dominated early portions of American society, and, while liberalism existed to some degree, there appeared to be a primary emphasis placed on the public and its wellbeing. Civic republicanism began to fade in the early 19th

century, and liberal individualism took its place as the dominant paradigm. I argue that the public sphere, at least insofar as the founders imagined, dissolved in the transition to liberal individualism. Modern society reflects advancement within the paradigm of liberal individualism; no analogous paradigm shift has occurred since that of civic republicanism-liberal individualism.

Consider Old Originalism as a mode of Second Amendment interpretation. This dictates that the intent of the framers is to be regarded as the mode by which we determine the legitimacy of the Amendment. The difficulties of Old Originalism notwithstanding, we must ask what the Founders intended by ratifying the Second Amendment. While there was no universal consensus regarding the specifics of gun ownership, historical examinations indicate that the Amendment was to be understood in a civic context, as detailed in Chapter Two. Insofar as cultural paradigms are concerned, founding-era Second Amendment discourse operated within the arena of Civic Republicanism and therefore, it logically follows that the Founders' intentions reside within the paradigm. The Amendment was crafted under the assumption that militias would remain vitally important aspects of society, gun ownership was limited to muskets that were virtually incapable of covert self-defense, and posterity would retain the virtues of civic republicanism. It would be fallacious to assume that the Founders foresaw the dissolution of the militia, advancement and mass proliferation in gun technology, and the overall transition to liberal individualism – as a result, we cannot confidently assert any sort of interpretation. In the relatively straightforward, interpretive manner that Old Originalism seems to favor, it would be impossible to maintain commitments to original intent amidst such discontinuity.

Having shown the difficulty in subscribing to original intent originalism, or Old Originalism, I will now demonstrate the problematic implications of New Originalism, which relies on the original meaning. Exactly what was the objective, original meaning of the Second Amendment to the 18th-century citizens? Examining the Amendment's phrasing of 'bear[ing] arms' may be a start. We can turn to Nathan Kozuskanich's (2008) study of archival databases as quantitative evidence of the wording 'bear arms' indicating a military context. Kozuskanich surveyed the phrase across colonial/founding-era (1763-1791) pamphlets, newspaper articles, government documents, letters, and journals, and found that in the overwhelming majority of cases, the term 'bear arms' was used in a military context. The history and role of militias in public life confirm the obvious military connotations of the Amendment. This context aids us in understanding New Originalism's central question of how a reasonable 18th-century individual would understand a given part of the Constitution. While we are still faced with the ever-present issue of a lack of universal consensus, this instance is fairly clear-cut in regards to its objective meaning. This 18th-century individual would have seen the aim of the Amendment was to protect his gun ownership, though the wording is restrictive to military contexts. And while there are exceptions to this mainstream view – consider the Pennsylvania Anti-Federalist dissenters as an example – the abundant evidence points toward the inextricable link between the Amendment, gun ownership, and the militia.

Given these assertions, the subsequent course of action for the New Originalist would presumably be to uphold the logical extension of the objective meaning into modern jurisprudence. However, this task may prove to be impossible, given the radical discontinuity across paradigms. Jack Rakove (2000) sums up the issue with this sort of

thought experiment well:

Because eighteenth-century firearms were not nearly as threatening or lethal as those available today, we similarly cannot expect the discussants of the late 1780s to have cast their comments about keeping and bearing arms in the same terms that we would. Theirs was a rhetoric of public liberty, not public health; of the danger from standing armies, not that of casual strangers, embittered family members, violent youth gangs, freeway snipers, and careless weapons keepers. Guns were so difficult to fire in the eighteenth century that the very idea of being accidentally killed by one was itself hard to conceive (110).

Society and technology have evolved to such great lengths, that it is no longer feasible to attempt any sort of dialogue reconciling past and present evaluations of the gun's role in society. To the common, reasonably minded 18th century citizen, guns could not have been understood as vehicles for harm (or self-defense for that matter) in non-warfare settings. The evolution of the gun, as well as its role in society, has irreparably shaped any modern perceptions of it. The fact that guns could not have been understood outside this military context precludes any potential individual, self-defense rhetoric from being considered. The evident disconnectedness across the paradigm shifts, from colonial-era and modern societies, renders any serious commitment to original meaning as impossible.

Solum describes supporters for constitutional construction in the context of original public meaning (New New Originalists) as, “explicitly embrac[ing] the idea that when the original public meaning of the text ‘runs out,’ application of the linguistic meaning of the constitutional case to a particular dispute must be guided by something other than original meaning” (Solum 2009, 934). This accurately represents the problem of original public meaning in the instance of the Second Amendment, as original public meaning of the Second Amendment is simply no longer coherent in a modern context. The New New Originalist would promote construction based on factors other than strictly original meaning, including (but not limited to) political and creative acts of judicial construction (Smith 2011, 718). I agree with Smith's assertion that New New Originalism

deviates so far from the roots of originalism that it no longer may be understood as originalism. As I understand it, the scope of originalism is limited to theories of interpretation that remain “value neutral” or at most, “thinly normative” (Solum 2010, 104). The introduction of construction violates this air of impartiality, as we are now forced to consider any multitude of factors that aid us in resolving vagueness.

Now consider the implications of the cultural paradigm shift on New New Originalism. Any sort of construction that a New New Originalist endorses will require substantive “creative” work that departs far from the starting points of originalism. Chapter Two’s examination of Founding-era society and militias demonstrated the original public meaning of the Second Amendment as embedded within the civic republican context. As New New Originalists are attempting to provide modern constructions and guide modern jurisprudence of the Amendment, they will inevitably attempt to conform the Amendment to the constraints of liberal individualist society. To employ these modern readings on the Amendment, thereby divorcing it from its original meaning, is incredibly problematic. Returning to Smith’s critique of New New Originalism, this leaves us with nothing even remotely originalist about how we ought to understand the Amendment.

Heller Opinions Against Paradigm Shifts

Given *Heller*’s canonical status Second Amendment case law (as well as that of originalism), its majority serves as a valuable resource in analyzing the role of the paradigm shift. Throughout the opinion, Justice Scalia asserts that the Second Amendment guarantees an individual right to bear arms. He begins by separating the

prefatory and operator clauses of the Amendment – the prefatory clause contains the initial part, “A well-regulated militia, being necessary to the security of a free state,” while the operator clause consists of “the right of the people to keep and bear arms, shall not be infringed.” He utilizes this distinction to affirm that the prefatory clause “announces the purpose for which the right was codified,” but cannot limit or expand the scope of the operator clause (*District of Columbia v. Heller*, 2008). Scalia arrives at this conclusion after systematically dissecting every phrase of the Amendment, teasing out an individual rights reading in each instance.

For example, take his attempt at ascertaining the ‘people’ of the operative clause. Scalia strikes the legitimacy of the militia as the subject of the ‘people,’ given the tendency for ‘the people’ to have referred to all members of the political community. The militia’s composition, being of male, able-bodied, within an age range, is restrictive in this regard, as it is not encompassing of all members of the political community. As a result, we cannot maintain any militia implications for the clause. I take issue with this dismissal, and I believe it to be a dangerous oversight of historical analysis. While, Scalia is correct in asserting that participation in militia was populated by white men of certain status, he fails to pronounce the link between militia participation and citizenship. ‘The People’ of the Founding era, i.e., the political community by Scalia’s definition, did not possess any sort of universal characteristic, as seemingly assumed in the majority opinion. Blacks and women were two major groups that were marginalized from inclusion within a political community – they did not comprise ‘the People.’⁴ It appears

⁴ And if inclusion into ‘the People’ was a universal trait, how could the Founders maintain the sacred ideal that “all men are created equal” despite overt inequality to members within this purported community?

that Scalia superimposes modern standards of universal inclusion of the political community, attempting to extrapolate such ideals to an era that only permitted inclusion for white males of a certain status.

The Founding-era equated the ‘People’ with those who participate in the militia, and modern efforts to divorce the two are problematic. Dismissing the militia connotations of the Amendment on the basis of defining ‘the People’ as “unambiguously refer[ring] to all members of the political community,” is unwarranted and indicative of clearly ideological jurisprudence (*District of Columbia v. Heller*, 2008). In the same sentence, the opinion reads that the ‘people’ are not to protect “an unspecified subset” (*District of Columbia v. Heller*, 2008). “This implies that the militia is an “unspecified subset,” an assertion that could not be further from the truth. In a Founding-era context, the militia is clearly delineated as to include all citizens, therefore, all members of the political community. The opinion is gravely mistaken when it reads, “[T]he ‘militia’ in colonial America consisted of a subset of ‘the people’—those who were male, able bodied, and within a certain age range” (*District of Columbia v. Heller*, 2008). So long as we define ‘the People’ by members of the political community, the militia was not merely a “subset,” but the militia and the ‘people’ were one in the same entity. Given the interconnectedness of the ‘People’ and the militia, this definition of the ‘People’ does not contradict a militia reading of the Amendment; in fact, I believe that it endorses such a reading.

We ought not dismiss the militia meaning of the Amendment out of convenience, as this treats originalism (which in this instance is original meaning) with light regard. We cannot remain steadfast in commitments to original meaning while distorting its

scope. These ideas linking citizenship and militia service are embedded within the Founding-era paradigm – how can we reconcile the paradigm transition with modern inclusivity? The political community has grown to become substantially more capacious of individuals of all groups willing to legally attain citizenship. In order to make sense out this question, perhaps the New Originalists would ask the following question: if civic militias still existed (and thus, we never transitioned out of the civic republican paradigm), would it be fair to assume that non-Whites, along with women, would be obligated to serve in the militia given their statuses as citizens, members of the political community, and entities within the proverbial ‘People’? If the answer to this question is yes, then perhaps we may be more sympathetic to some sort of broader-based right – still, not for the purposes of individual self-defense, but a civic right, the public’s ability to protect itself. But the reality is that the paradigm transition from the Founding-era to today, whereby the civic militia and the civic realm that it inhabited dissolved, renders such thought experiments useless. As long as the civic militia no longer exists, a serious originalist could not abstract any right from such a thought experiment (and use it to justify or oppose arms ownership), especially when considering that the Amendment is derived from the existence of a militia and its role within the civic sphere.

The militia context of the Amendment has obvious implications for its interpretation. The majority opinion conveniently dismisses the power of the prefatory clause, having cited its role as “announc[ing] the purpose for which the right was codified,” but voiding it of power to expand or reduce the scope of the operative clause (*District of Columbia v. Heller*, 2008). Now free of the originally intended context that the prefatory clause establishes, the majority opinion reads modern liberal individualist

values into the operative clause, and thus, the right to individual right to bear arms as a means of self-defense is created. We can point to the cultural paradigm shift as the impetus for this confusion and disconnectedness. Both the prefatory and operative clauses are embedded within the civic republican paradigm, and by divorcing them, we are stripping them of their respective meanings. Especially in this instance wherein the majority opinion assigns the operative clause to a modern, liberal individualist context, there is discontinuity between the operative clause and the prefatory clause, which cannot be reasonably understood outside of a civic republican, militia context. The majority opinion's dismissal of the prefatory clause is the direct product of this paradigm transition, and serves as the bedrock for the argument endorsing an individual right to bear arms for the purposes of self-defense.

Conclusion

In existing scholarship, both pertaining to the Second Amendment and originalist modes of interpretation, I have yet to encounter an appreciation for the critical role that cultural paradigms play in constitutional interpretation. Scholars have alluded to implications of societal change (consider Solum's notion of objective meaning "running out"), but none have specifically attributed difficulties in Second Amendment interpretation to any such paradigm shift. Founding-era history and context is embedded within the Second Amendment, and so long as we maintain commitments to originalism, we must try and ascertain either the Founders' intention or the original public meaning of a given part of the Constitution, both of which are wedded to the societal paradigm. Regardless one's specific originalist reading, the civic mode of interpretation emerges as the clear original meaning/intention of the Amendment, as any comprehensive historical examination of the Amendment and its context will indicate. The militia stood as a crucial institution to this time period, and arms ownership had an inseparable relationship with citizenship. The obligation for citizens to participate in militias was not necessarily a legal one (though it was legally mandated), but more so an obligation predicated on the importance of the public and community. However, the paradigm shift (I consider technological, political, and moral evolutions of society to be subsumed under the umbrella of the paradigm shift) has not only rendered traditional republican virtues as obsolete, but it has completely altered the culture of guns. These radical changes between Founding-era and modern societies have made it impossible to remain loyal to originalist interpretation.

The paradigm shift from civic republicanism to liberal individualism did not happen instantaneously. I posit that modern society is not the product of natural growth from the Founding-era. Instead, there were crucial pivot moments or periods of time that served as catalysts for non-incremental change – I attempt to lay out some of these points in the section entitled “Transition to Liberal Individualism.” Having asserted these key moments, the liberal individualist society that pervades the modern paradigm now has its roots, and we can better understand the emergence of modern values such as individual rights and protections.

To elucidate the nature of this paradigm change, consider the example of a pious man who converts religions from Islam to Buddhism. He likely did not wake up one morning and decide to become a Buddhist, the process was presumably long, with several crucial moments that helped shape the nature of his faith. By the end of his life, he fully embraced the Buddhist lifestyle, and his personal values and virtues substantially differed from his life prior to his conversion. We should not read experiences from his earlier life behind a Buddhist lens, given that his Buddhist conversion did not take shape until significantly later in his life. While there may have been latent strands of Buddhist philosophy engrained within his lifestyle, their importance is minimized in the face of the dominance of Islam on his life. We can only interpret his “intentions” and the “meaning of his actions” from his early life within the perspective of Islam, and similarly, his intentions and actions post-conversion ought to be seen within the context of Buddhism. We can trace the trajectory of the American cultural paradigm analogously to the

converted man.⁵ The Founding-era United States was largely dominated by a civic republican society, and while there existed elements of liberal individualism within this time period, those elements were relatively insignificant in comparison to the role of the public and public good. Modern society reflects a development of those liberal elements, while the remnants of civic republicanism have all but dissolved. Just as we must not interpret actions during the pious man's period as a Muslim devotee behind a Buddhist lens, it is dangerous to read modern, liberal values of individual rights into a paradigm which championed civic republicanism. The values, events, and writings of the Founding-era are embedded within civic republicanism, and originalists' attempt to divorce them within the context of Second Amendment discourse is irresponsible, ideologically-driven interpretation.

Given the severe discontinuity between Founding-era and modern cultural paradigms, a true originalist, acknowledging the arguments developed in this thesis, would maintain that we must repeal the Second Amendment. It is impossible to reconcile these two paradigms, as we cannot abstract any conceptions regarding guns or societal norms into the modern paradigm while staying loyal to originalism. Regardless of which iteration of originalism one subscribes to, originalism's commitments to history remain steadfast. The alternative would be fostering a complete change in society, to a reintroduction of militias and attempting to recreate their civic, social role. This is obviously far-fetched, as it would be virtually impossible to even imagine (let alone

⁵ The difficulty with this analogy is that a religious conversion culminates, or may culminate, in one particular moment wherein an individual has formally adopted a new faith. Though the civic republican-liberal individualist paradigm lacks this singular moment, I still see the analogy to be instructive insofar as it demonstrates the pitfalls of misinterpretation.

implement) a modern-day civic republican society in the vein of the Founding Era. But even in this instance, we are still left with the ‘expiration’ of original meaning. The nature of guns and military weapons have evolved to such an extent that we could not derive any sort of practical instruction from the Founders. Repealing the Amendment would not necessarily issue a ban on guns, rather it would assert that there cannot be an originalist Constitutional protection for the right to bear arms; instead, the regulation of arms would be completely yielded to the legislative branch.

An obvious question follows this realization – what are the implications of a paradigm shift to other Amendments? It varies, depending on Amendment. More research specifically focusing on early American history will help in illuminating each respective Amendment’s association with its paradigm. The Second Amendment is particularly peculiar in this sense, given its connection to the Founding-era society. It is a direct product of the civic republican paradigm and as a result, suffers immeasurably from the transition to liberal individualism. Other Amendments are not necessarily as linked to civic republicanism, and thus, originalist interpretation may not be as harmful. Consider the Eighth Amendment as an example. A cursory reading of the Amendment indicates that protection against cruel and unusual punishment appears to be out of a basic respect for humanity and right to life. There is most certainly more context and reasoning that went into the Amendment’s ratification, but assuming the original intent of the Framers (and thus an Old Originalist perspective) was to protect the individual right exclusively, then the Amendment can withhold the transition to the liberal individualist paradigm. We can reasonably deduce how cruel and unusual punishment will translate in modern society – the protection of the Amendment was not restricted to Founding-era

punishments, such as flogging or tarring and feathering. In *Heller*'s majority opinion,

Scalia attempts to draw on a similar sentiment:

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, e.g., *Reno v. American Civil Liberties Union*, 521 U. S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, e.g., *Kyllo v. United States*, 533 U. S. 27, 35–36 (2001), the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding (*District of Columbia v. Heller*, 2008).

Unfortunately, Scalia is direly mistaken with this line of reasoning. Had gun culture remained unchanged from the Founding era, Scalia's ideas would be valid. But in reality, the mass proliferation in guns (especially the concealable handgun), technological advances of military weapon, eradication of militias, as well as the cultural context in which guns and their use has meaning, have altered the context of bearable arms in society. I would point to Jack Rakove's passage on page 38 as an articulation of the danger in assuming uniform contexts between time periods, especially regarding the Second Amendment.

In conclusion, the notion of the paradigm shift has apparently been overlooked by constitutional law scholarship. This project describes the radical discontinuity across the civic republican and liberal individual paradigms, subverting the traditional grounding for Second Amendment discourse. I hope to have demonstrated the importance of appreciating the role that cultural paradigms must play in constitutional interpretation.

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