

WHY THE SECOND AMENDMENT HAS A PREAMBLE:  
ORIGINAL PUBLIC MEANING AND THE POLITICAL CULTURE  
OF WRITTEN CONSTITUTIONS IN REVOLUTIONARY AMERICA

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*This Article seeks to historicize the meaning of the Second Amendment as well as the constitutional debate now swirling about it in the wake of District of Columbia v. Heller.<sup>1</sup> This Article takes seriously the interpretive significance of the concept of “original public meaning” that figures so prominently in that decision; it seeks to examine—and even to apply—that concept more broadly to the discourse struggling to come to terms with the meaning of the Second Amendment and “the right of the people to keep and bears arms” in 1791.<sup>2</sup> This discourse, like that of the drafting of the Amendment itself, is taking place at a particular historical point in time, and the articulation of original public meaning reflects the contested nature of today’s discourse as much as it does that of any “original” discourse, which was no less contested. This Article therefore will draw not only on the continuing debate about original meaning, but also will attempt to recognize and accommodate the present-day constitutional dialogue that has brought the role and authority of judicial review into question. In addition, it recognizes and applies the significant advances in scholarship on the Founding and the early Republic by scholars outside the legal academy studying the role of the public in constitutional politics and print culture. By bringing those discourses into a common dialogue, this Article finds a common ground of meaning shared by the public at the Founding, and on that common ground, it finds a structure of public meaning sharply at odds with the majority opinion in Heller.*

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1. District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

2. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

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“This, amongst many other instances of the same sort, should make us cautious of taking it at once for granted, that what is now most clearly established and settled law, might have been so understood in this country some centuries ago.”<sup>3</sup>

### INTRODUCTION

The Second Amendment to the U.S. Constitution begins, like the Constitution itself, with a preamble: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>4</sup> Both constitutional statements contain preambles, each of which has left its own interpretive legacy. While some commentators have argued that the purposes of “We, the People” announced in 1787 must be given expansive interpretive force,<sup>5</sup> settled law remains as stated by Joseph Story in 1833—that the “true office” of the preamble “is to expound the nature and extent, and application of the powers actually conferred by the constitution, and not substantively to create them.”<sup>6</sup> Put another way, the preamble to the Constitution only states a general purpose and justifies the exercise of those powers enumerated in the document as a whole. The preamble to the Second Amendment, the subject of this Article, enjoys no such quietude. Indeed, it has been at the center of an interpretive storm ever since Sanford Levinson in 1989 provocatively raised the question of what purpose the preamble serves. “Even if we accept the preamble as significant,” he writes, “we must still try to figure out what might be suggested by guaranteeing to ‘the people the right to keep and bear arms.’” Levinson was correct in adding that such a task “presents unexpected difficulties in interpretation.”<sup>7</sup>

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3. DAINES BARRINGTON, OBSERVATIONS ON THE MORE ANCIENT STATUTES FROM MAGNA CHARTA TO THE TWENTY-FIRST OF JAMES I. CAP. XXXVII, at 160 (London, W. Bowyer & J. Nichols, 3d ed. 1769).

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

5. Most notably, 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 374–79 (1953).

6. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 462 (F.B. Rothman 1991) (1833).

7. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 645 (1989).

The U.S. Supreme Court deliberated on the meaning of the Second Amendment preamble when it decided the case of *District of Columbia v. Heller*.<sup>8</sup> In his majority opinion, Justice Scalia does not so much seek to understand the meaning of the preamble as to assert that it had, and thus continues to have, little meaning. Scalia severs the amendment into two parts—calling the preamble a “prefatory” clause and the remainder its “operative” clause. The rhetorical strategy of reducing the preamble to mere preface becomes clear when he writes, “The former does not limit the latter grammatically, but rather announces a purpose.”<sup>9</sup> By this reasoning, that purpose does not control or limit the next clause in the manner held by Justice McReynolds in *United States v. Miller*<sup>10</sup> but rather grants an individual right to bear arms. Such an interpretation, this Article contends, dismembers the amendment and does violence not only to the intent of those who drafted it, but also to the public that read it, gave it meaning, and ratified it.

This Article shoulders the task that Levinson set out. It seeks to apply careful analysis to the preamble, sensitive to the linguistic usages of the time and to the historical context of the prevailing political culture. This approach does not entirely reject Justice Scalia’s announced method of giving an original meaning to the amendment as understood by the public in 1791; indeed, it investigates what he insists as authoritative: “the examination of a variety of legal and other sources to determine the *public understanding* of a legal text in the period after its enactment or ratification. That sort of inquiry,” he writes, “is a critical tool of constitutional interpretation.”<sup>11</sup> Justice Scalia’s use of the temporal adverb “after” is crucial here, however, because it diverts us from what the Founders meant at the time of drafting and ratification, replacing it with meanings the amendment assumed only decades later. This Article, therefore, includes an analysis of post-ratification meaning in order to contrast nineteenth-century sources with the more proper object of analysis, that of the eighteenth century.

Part I of this Article revisits the emergence of original public meaning jurisprudence. Part II examines the ways that the American public between 1776 and 1800 struggled to use the language of written law to articulate what it meant in establishing republican government. Part III looks at the constitutional mechanisms created to give meaning to the American public’s ideas on the restraint of power, especially the many nonjudicial mechanisms,

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8. 128 S. Ct. 2783 (2008).

9. *Id.* at 2789.

10. 307 U.S. 174 (1939); *see text, infra* at note 15.

11. *Heller*, 128 S. Ct. at 2805.

including the “well regulated militia,” that mobilized or enlisted public participation in checking arbitrary government. Part IV turns to the use of preambles in the new state constitutions and in the Second Amendment, showing the preamble to the Second Amendment to be inseparable from “the right of the people to keep and bear Arms” and narrowing its meaning to service in state constituted militias. A brief final concluding section sees the 1790s as a liminal decade in American constitutionalism—one in which ideas were being overtaken by political changes occurring so fast that the political community had trouble recognizing the powerful historical forces that the community itself was propelling. Within a generation, a new political culture gave rise to a public understanding of an individual right to keep and bear arms that overtook the “original public meaning” of a collective right and buried what the “public” actually had meant when it ratified the amendment in 1791. What the clear articulation of that right meant in 1830, therefore, illuminates what it did not mean in 1791. Whether the Supreme Court should acknowledge the force of a “living Constitution” that evolves to accommodate new political and constitutional realities is an open question, but the Court should, at the very least, recognize the original constitutional project of the historical moment in 1791 that it has chosen as its point of interpretive reference.

#### I. THE DISCOVERY OF “ORIGINAL PUBLIC MEANING” AND THE REVIVAL OF HISTORY

Far more than Justice McReynolds’s opinion in *U.S. v. Miller*,<sup>12</sup> Justice Scalia’s opinion in *District of Columbia v. Heller*<sup>13</sup> relies heavily on historical analysis to determine the legal effect of “the right of the people to keep and bear Arms.”<sup>14</sup> McReynolds made passing reference to historical sources to support his opinion:

The Court can not take judicial notice that a shotgun having a barrel less than 18 inches long has today any reasonable relation to the preservation or efficiency of a well regulated militia; and therefore can not say that the Second Amendment guarantees to the citizen the right to keep and bear such a weapon.<sup>15</sup>

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12. *Miller*, 307 U.S. 174.

13. 128 S. Ct. 2783 (2008).

14. *Miller*, 307 U.S. at 176.

15. *Id.* at 178. Justice McReynolds’s historical analysis runs approximately five pages, *id.* at 178–83. In *Heller*, Justice Scalia denies that McReynolds’s opinion in *Miller*, as well as the dissents in *Heller*, linked the right to keep and bear arms with military service. Scalia writes:

Following McReynolds's requirement of "some reasonable relationship to the preservation or efficiency of a well regulated militia," subsequent commentary and court decisions interpreted *Miller* as accepting a historically based collective right, not an individual right.<sup>16</sup>

By 2008, Justice Scalia had decades of additional historical materials available to apply to his originalist decisions. For at least thirty years, the various components of what would be called "originalism" had been gaining force in the legal academy. Raoul Berger's 1969 book on the interpretation of the Fourteenth Amendment, aptly titled *Government by Judiciary*, accelerated originalism's acceptance in the academy. Berger's book dealt at length with the question "Why is the 'original intention' so important?" For Berger:

The answer was long since given by Madison: if "the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable government, more than for a faithful exercise of its powers."<sup>17</sup>

An increase in scholarly reliance on the Framer's intent led Paul Brest in 1980 to label this interpretive mode as "originalism" and to take "originalism seriously as a theory of constitutional interpretation in order to understand its

*Miller* did not hold that and cannot possibly be read to have held that. . . . It is entirely clear that the Court's basis for saying that the Second Amendment did not apply was not that the defendants were "bearing] arms" not "for . . . military purposes" but for "nonmilitary use." Rather, it was that the *type of weapon at issue* was not eligible for Second Amendment protection . . . .

This holding is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that "have some reasonable relationship to the preservation or efficiency of a well regulated militia"). Had the Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen. Justice [Stevens] can say again and again that *Miller* did "not turn on the difference between muskets and sawed-off shotguns, it turned, rather, on the basic difference between the military and nonmilitary use and possession of guns," but the words of the opinion prove otherwise. The most Justice [Stevens] can plausibly claim for *Miller* is that it declined to decide the nature of the Second Amendment right, despite the Solicitor General's argument (made in the alternative) that the right was collective. *Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons.

*Heller*, 128 S. Ct. at 2814 (citations omitted).

16. Despite the nuance in the opinion, explains Saul Cornell, a "collective reading of *Miller* soon became the orthodox interpretation of the meaning of the Second Amendment by the federal courts." SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 204–05 (2006).

17. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 403 (2d ed., Liberty Fund, Inc. 1997) (1977). Berger's impact and the path of thinking that culminated in his jurisprudence of "original intention" are well described by JOHNATHAN O'NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS* 111–32 (2005).

concepts, methodologies, and limitations.”<sup>18</sup> Brest’s careful examination of the many different types of originalist reasoning concluded with a warning against “guessing how other people meant to govern a different society a hundred or more years ago” and set the stage for a debate that still rages.<sup>19</sup> Although not all who would call themselves originalists agreed entirely with Berger,<sup>20</sup> he had given their position momentum.

Much of the debate that followed has been waged through terminology. In 1975, Thomas Grey asked, “Do we have an unwritten Constitution?” and described those answering in the negative as adhering to “the pure interpretive model.”<sup>21</sup> Grey was frank to acknowledge and embrace the alternative mode as “noninterpretivist,” but the term was turned against those who used it, implying that the term meant “doing something other than interpreting the Constitution.”<sup>22</sup> “Original intent” would also be turned against its practitioners: even Berger, who placed his reliance on the intentions of the ratifiers, concedes that one might ask “whether ‘ratification’ extends to objectives that were not disclosed, that were in fact expressly disclaimed.”<sup>23</sup> This Berger denies.<sup>24</sup> Nonetheless, Brest had begun a process of evaluating intent that only accelerated in the following years.<sup>25</sup> Although the term displaced “interpretivism” by the mid-1980s, “original intent” was proving less than adequate as support for the strict construction interpretivism it was intended to serve, or to reverse the noninterpretive drift toward loose constitutional construction of a living Constitution—which Justice Scalia describes as “a document whose meaning changes to suit the times, as the

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18. Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 205 (1980).

19. *Id.* at 238.

20. See, e.g., Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484 (1987) (reviewing RAOUL BERGER, *FEDERALISM: EVALUATING THE FOUNDERS’ DESIGN* (1987)).

21. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703–06 (1975).

22. O’NEILL, *supra* note 17, at 137. But see OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, *ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK* 7 (1987) (setting the contrast with interpretivists by explaining, “Unlike those who interpret the Constitution according to its original meaning, non-interpretivists contend that courts should decide constitutional issues under standards not found in the Constitution”).

23. BERGER, *supra* note 17, at 131.

24. *Id.* at 131, 171, 173.

25. Brest, *supra* note 18, at 204. Though Brest’s Article includes “Original Understanding” in its title, he cites “strict intentionalism” as among the “most extreme forms of originalism.” *Id.* “For the strict intentionalist ‘the whole aim of construction, as applied to a provision of the Constitution, is . . . to ascertain and give effect to the intent of its framers and the people who adopted it.’” *Id.* (quoting *Home Bldg. & Loan Ass’n. v. Blaisdell*, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting)). Joining Brest with a major critique was H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

Supreme Court sees the times.”<sup>26</sup> Scholars, whether they entered the fray from history or political science departments, or from law schools, quite rightly pointed to numerous intractable difficulties of determining what exactly someone’s intent was, or whose intent mattered.

By the end of the 1980s, the massive outpouring of objections to original intent jurisprudence had expanded well beyond Brest’s original critique.<sup>27</sup> A thorough analysis of such literature is beyond the purpose of this Article, but agreement exists that critiques by scholars such as Brest and Powell “helped form the scholarly consensus” of the decade.<sup>28</sup> One aspect of this debate, however, is worthy of notice here. Like Berger, Justice Scalia had to address the way that the term “intent” might fail to reveal hidden agendas.<sup>29</sup> Scalia was correct to be skeptical of acceding to the “unpromulgated intentions” of those enacting statutes, and he attempted to recapture the interpretive high ground of interpretation by embracing new terminology, substituting “original intent of the Constitution” for “original intent of the Framers.”<sup>30</sup> The weaknesses of intent had become too obvious.<sup>31</sup>

In pondering this problem in 1986, Justice Scalia advised conservatives to abandon their use of the term “original intent” as a basis for strict construction of the Constitution. “I ought to campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning,”

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26. Antonin Scalia, *Foreword to ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 43, 43 (Stephen G. Calabresi ed., 2007). Of the current state of affairs, he writes, “Originalism is in the game, even if it does not always prevail,” but, he adds, such “American constitutional evolutionism has, so to speak, metastasized, infecting courts around the world.” *Id.* at 44, 45.

27. For a useful summation of the state of the debate at the end of the decade, see Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 226 (1989). O’NEILL, *supra* note 17, at 133–89, places the decade in historical perspective, using the presidency of Ronald Reagan and the politics and constitutional issues on view in the failed nomination of Robert Bork to the Supreme Court as focal points.

28. Lawrence B. Solum, *District of Columbia v. Heller and Originalism* 5 (Illinois Public Law Research Paper No. 08-14, 2008), available at <http://ssrn.com/abstract=1241655>.

29. See generally Antonin Scalia, Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C. (June 14, 1986), in ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK, *supra* note 22, at 101 (1987). This is a long-standing criticism. Cf. Howard Jay Graham, *The ‘Conspiracy Theory’ of the Fourteenth Amendment*, 48 YALE L.J. 171 (1938) (discussing a related problem more than seventy years ago).

30. Scalia, *supra* note 29, at 103. Justice Scalia’s account of his changed outlook is as follows: As he was contemplating his 1986 address to the Attorney General’s Conference, he heard “the sound of a voice—loud, though it was in a whisper—which seemed to be coming from the picture of Mount Sinai that we have hanging in the D.C. Circuit’s Conference Room . . . . It said: CRITICIZE THE DOCTRINE OF ORIGINAL INTENT.” *Id.* at 102.

31. “If ever a theory had a stake driven through its heart,” writes Randy Barnett of the state of affairs after Brest, Powell, et al., “it seems to be originalism.” Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999).

he announced.<sup>32</sup> Two decades later in 2007, when scholars assessed the impact of Attorney General Edwin Meese's 1985 speech to the American Bar Association calling for "a jurisprudence of original intention,"<sup>33</sup> Scalia avoided that term and pointedly celebrated two Supreme Court decisions as victories for "originalism"<sup>34</sup> instead.

The next year, Scalia wrote the majority opinion in *Heller*. Scholars on both the left and the right have commented on the decision's significance: Cass Sunstein calls it "the most explicitly and self-consciously originalist opinion in the history of the Supreme Court"<sup>35</sup> and Lawrence Solum ranks it as "the clearest and most prominent example of originalism in contemporary Supreme Court jurisprudence."<sup>36</sup> Although Justice Scalia never actually employed the term in his *Heller* opinion, scholars identified his use of history as serving the interpretive scheme of "original public meaning." "Well over two hundred years since the Framing," wrote Sunstein a few months after the decision, "the Court has, essentially for the first time, interpreted a constitutional provision with explicit, careful, and detailed reference to its original public meaning."<sup>37</sup>

Ironically demonstrating an interpretive flexibility he would deny to nonoriginalists, Scalia had steadily moved from "original intent" to "original meaning" and now to "original public meaning." Though seemingly a small step, the latest adjustment actually represented a very significant change reflecting the ascendancy of a "new originalism."<sup>38</sup> Responding to and building on major advances in originalist jurisprudence, Scalia found in the new term interpretive opportunities that could redefine the debate and gain the upper hand for his preferred outcome. "As I often tell my law clerks," he had said in 1986, "terminology is destiny."<sup>39</sup> By imposing his chosen phrasing

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32. Scalia, *supra* note 29, at 106.

33. Edwin Meese III, Attorney General, Speech Before the American Bar Association (July 9, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 1, 9 (Paul G. Cassel ed., 1986). Meese had stated, "[t]he text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution." *Id.* at 1.

34. Scalia, *supra* note 26, at 44 (citing *Crawford v. Washington*, 541 U.S. 36, 61 (2004) as "a thoroughly originalist opinion" and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) as applying "fidelity to the original meaning"). In *Apprendi*, 530 U.S. at 501 and in *Crawford*, 541 U.S. at 49, Scalia also used the term "original understanding."

35. Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 272 (2008).

36. Solum, *supra* note 28, at 50.

37. Sunstein, *supra* note 35, at 246.

38. For a discussion of this term and the concept behind it, see Solum, *supra* note 28 *passim*.

39. Scalia, *supra* note 29, at 106.

as the standard by which “the right of the people to keep and bear Arms” would be interpreted, he was able to put terminology firmly in the service of destiny:

In interpreting this text, we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.<sup>40</sup>

In his steady movement toward original public meaning, Justice Scalia had admitted in 1989 that “originalism . . . is also not without its warts. Its greatest defect, in my view, is the difficulty of applying it correctly.”<sup>41</sup> Among its many demands is that of mastering historical inquiry—of

immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer.<sup>42</sup>

Indeed, most of *Heller*—at least in the number of pages—is devoted to historical debate, dominating both Scalia’s majority opinion and the dissents of Justices Stevens and Breyer. Even so, such efforts are themselves problematic. Cass Sunstein, commenting on the historical writing in *Heller*, writes:

The *Heller* court itself relied on numerous academic writings by law professors, as did Justice Breyer’s dissenting opinion. But few members of that group are trained historians. More commonly, they are advocates with a rooting interest in one or another position. There is a marked difference (in my view) between the care, sensitivity to context, and relative neutrality generally shown by historians and the advocacy-oriented, conclusion-driven, and often tendentious treatments characteristic of academic lawyers on both sides of the Second Amendment debate.<sup>43</sup>

The term “meaning” appears numerous times throughout Justice Scalia’s opinion, and its use is quite intentional as an alternative to the declining interpretive utility of original intent.<sup>44</sup> Scalia’s search for an original public meaning implicitly acknowledges, but does not apply, the more highly abstract

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40. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008) (citations omitted).

41. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989).

42. *Id.* at 856–57.

43. Sunstein, *supra* note 35, at 256.

44. For a cogent critique of this shift, see Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1188–91.

scholarship of linguistic and semantic analysis of meaning.<sup>45</sup> Rather, Scalia claims to present a meaning held by the public—by voters rather than the Framers or ratifiers (whose intent is so problematic), and to well understood usages of the time. His opinion seeks to establish what the public understood as “familiar meaning,” “18th-century meaning,” “normal meaning,” “ordinary meaning,” “normal and ordinary . . . meaning,” “original meaning,” “true meaning,” “basic meaning,” “central meaning,” and (most frequently) “natural meaning.”<sup>46</sup> In so doing, Scalia has effected a major shift. As explained by Randy Barnett,

[T]he shift from original intention to original meaning is akin to the shift from a will theory to a consent theory of contract. It is a subtle shift to be sure since, in contract law, both parties seek to respect and protect the ‘intentions of the parties’ in some sense. However, whereas a will theory of contract invites an inquiry into the subjective mental state of the promisor, a consent theory seeks the objective meaning that would be understood by a reasonable person in the relevant community of discourse. In constitutional interpretation, the shift is from the original intentions or will of the lawmakers, to the objective original meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.<sup>47</sup>

A focus on the public offers several interpretive opportunities, not the least of which is that legal scholarship of the past decade on both the left and the right has converged in their efforts to shift the center of constitutional gravity at the American Revolution to the people and away from the judiciary—usually to their legislatures, but also to their instantiation as individuals acting outside the formal institutions of law and government—in many cases, literally as “the people out-of-doors.”<sup>48</sup> Distrust of the judiciary has been a feature of American political and constitutional history since the Founding,<sup>49</sup> but the appearance of “Impeach Earl Warren” signs dotting the American countryside marked a new era of open challenge. This Article cannot examine that long history in detail, but for our present purposes, two

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45. As epitomized by Solum, *supra* note 28 *passim*.

46. *District of Columbia v. Heller*, 128 S. Ct. 2783 *passim* (2008).

47. Barnett, *supra* note 31, at 621.

48. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 319–28 (1969), explains this term fully.

49. This was surveyed systematically in JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). For Ely’s own application of this formulation to criticize a contemporary use of judicial review by the Supreme Court, see John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973).

prominent poles of criticism are pertinent in their extensive reliance on historical inquiry, and will serve as epitomizing the goals and methods of such distrust.

From the left, dissatisfaction with the conservative jurisprudence of the Reagan era loomed over Bruce Ackerman's extensive study of the process of constitutional change in American history, from the Founding onwards. Ackerman writes:

It is not the special province of the judges to lead the People onward and upward to new and higher values. . . . What the judges are especially equipped to do is preserve the achievements of popular sovereignty during the long periods of our public existence when the citizenry is not mobilized for great constitutional achievements.<sup>50</sup>

With many Americans outraged by the Supreme Court's role in deciding the election of 2000,<sup>51</sup> other scholars produced extensive historical studies arguing that the place and importance of judicial review among the founding generation were problematic and "bore little resemblance to judicial review today."<sup>52</sup> The public, scholars argued, looked instead to other means of popular "constitutionalism" to guarantee their liberties.<sup>53</sup>

Representing scholars at the other end of the political spectrum is Keith Whittington, who has given extensive attention to "[t]he [p]olitics of [c]onstitutional [m]eaning" in his own questioning of the original meaning of judicial review.<sup>54</sup> "In the context of the time," he writes of the *Marbury v. Madison*<sup>55</sup> era, "it was clear that other political institutions had been actively engaged in interpreting the Constitution and that those interpretations were broadly accepted as authoritative."<sup>56</sup>

In explaining the shift to original public meaning as it would be used by Justice Scalia in *Heller*,<sup>57</sup> Randy Barnett sets out and circumscribes the role of historical analysis:

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50. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 139 (1991).

51. See *Bush v. Gore*, 531 U.S. 98 (2000). For an example of the many treatments of this case and its impact, see generally CHARLES L. ZELDEN, *BUSH V. GORE: EXPLORING THE HIDDEN CRISIS IN AMERICAN DEMOCRACY* (2008).

52. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 7 (2004).

53. *Id.* at 7–8.

54. KEITH WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY I* (2007).

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

56. WHITTINGTON, *supra* note 54, at 2 ("The Constitution, Marshall recognized, was not in the hands of the judges alone."). See generally KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999).

57. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2795 (2008). In his opinion, Justice Scalia makes use of the article by Randy E. Barnett, which states:

This shift obviates some, but not all, of the most telling practical objections to originalism and can be very disappointing for critics of originalism—and especially for historians—when they read original meaning analysis. They expect to see a richly detailed legislative history only to find references to dictionaries, common contemporary meanings, and logical inferences from the structure and general purposes of the text. That is the way the objective approach to contract interpretation proceeds, and that is how the new originalism based on original meaning proceeds as well. Nowadays it is often critics of those advocating a particular original “objective” meaning who offer detailed historical examination of the true “subjective” original intentions of the framers.<sup>58</sup>

It is not the purpose or the method of the present Article to search for “‘subjective’ original intentions of the framers.” Rather, this Article accepts the claims of textualists and original public meaning originalists on the importance of “writtleness” and agrees with Barnett that “the impetus behind original meaning is the same as that which lies behind the statute of frauds, the parol evidence rule, and the objective theory of contractual interpretation.”<sup>59</sup> Scalia’s announced method is to search for plain meaning, commonly used, and his method is as straightforward as those “ordinary citizens” whose “normal” or “ordinary” (or “normal and ordinary”) or “natural” meaning he invokes. Originalist scholarship that has offered semantic and linguistic models of interpretation at high levels of abstraction do not truly aid in determining public meaning at the Founding.<sup>60</sup> Instead, the main influence of such scholarship on Scalia’s opinion is to infect it with the

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Discerning the original public meaning of the text requires an examination of linguistic usage among those who wrote and ratified the text as well as the general public to whom the Constitution was addressed. Evidence of specialized meaning or intent by framers or ratifiers is only relevant if it is shown that such specialized meaning would have been known and assumed by a member of the general public. Where more than one contemporary meaning is identified, it becomes necessary to establish which meaning was dominant. Any such historical claim is an empirical one that requires actual evidence of usage to substantiate. If possible, one should undertake a quantitative assessment to distinguish normal from abnormal usage.

Randy E. Barnett, *Was the Right to Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 239–40 (2004). Despite his criticism of the work of certain nonoriginalists, Barnett’s own offered methodologies are decontextualized and removed from the purposes to which such usages were being put. For a more extensive critique of the gap between stated goals and actual product, especially “its lack of historicism, [and] its dependence on historical evidence without acknowledging the historical context of that evidence,” see Griffin, *supra* note 44, at 1185.

58. Barnett, *supra* note 31, at 621.

59. *Id.* at 629–30. Barnett explains that “the Constitution of the United States is a *written* document and it is its *writtleness* that makes relevant contract law theory pertaining to those contracts that are also in writing.” *Id.* at 629.

60. See generally Solum, *supra* note 28.

weakness of nineteenth-century decontextualized history of ideas, rightly criticized for “its nonproblematic assumption concerning language’s capacity for the self-evident transmission of ideas across time.”<sup>61</sup> More seriously, this scholarship ignores the wealth of studies of Revolutionary language, which was itself contested and feared for the dangerous ambiguities that might lend themselves to constitutionally sanctioned tyranny.<sup>62</sup>

It is worth revisiting the analytical framework of public meaning originalism because it acknowledges the need for a deep immersion in historical context in order to recapture it. At the risk of muddying the waters of definition by introducing yet another refinement of original public meaning, it is useful to conclude this Part by following the advice of scholars who refer

to the original, non-idiosyncratic meaning of the words and phrases in the Constitution: how the words and phrases, and structure (and sometimes even the punctuation marks!) would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted, and within the political and linguistic community in which they were adopted.<sup>63</sup>

## II. DEFINING AND PROTECTING RIGHTS IN THE NEW STATES: PROBLEMS OF LANGUAGE AND MEANING IN REVOLUTIONARY POLITICAL CULTURE

This Part examines the written constitutional provisions of the American Founding, especially those in the constitutions of the states, where direct political participation brings us much closer to the meanings understood by ordinary citizens at the time of the Founding. It accepts the originalists’ shift toward examining the “public” because that emphasis parallels what is now the ascendant framework in scholarship by scholars of politics and print

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61. JOHN HOWE, LANGUAGE AND POLITICAL MEANING IN REVOLUTIONARY AMERICA 3 (2004).

62. The absence of such studies speaks loudly. For works essential to any examination of original public meaning, see generally ROBERT A. FERGUSON, READING THE EARLY REPUBLIC (2004); JAY FLIEGELMAN, DECLARING INDEPENDENCE: JEFFERSON, NATURAL LANGUAGE, AND THE CULTURE OF PERFORMANCE (1993); THOMAS GUSTAFSON, REPRESENTATIVE WORDS: POLITICS, LITERATURE, AND THE AMERICAN LANGUAGE, 1776–1865 (1992); HOWE, *supra* note 61; CATHERINE O’DONNELL KAPLAN, MEN OF LETTERS IN THE EARLY REPUBLIC: CULTIVATING FORUMS OF CITIZENSHIP (2008); MICHAEL WARNER, LETTERS OF THE REPUBLIC: PUBLICATION AND THE PUBLIC SPHERE IN EIGHTEENTH-CENTURY AMERICA (1990).

63. Vasav Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1132 (2003) (citation omitted). The authors “call this approach *original, objective-public-meaning-textualism* . . . For short [they] simply call it ‘original public meaning textualism’ or (shorter and pithier, but sacrificing some clarity and nuance) originalist textualism.” *Id.* at 1132–33.

culture in the early American Republic. If the concept of public meaning dominates new originalism, scholars staking their claims on that principle should consult “the newest political history,”<sup>64</sup> which now provides the dominant paradigm among historians studying the half century after 1776. The shift to the ordinary citizens of original public meaning, that is, converges with a powerful trend in historical writing about the Early Republic, which also has shifted its focus toward the political and constitutional assumptions and behaviors of ordinary Americans.

Like public meaning originalists, historians practicing in this new field demonstrate an “interest in constituents as well as leaders.”<sup>65</sup> Recognizing that “biographies of leading political figures contribute little to a comprehensive understanding of the early republic” and, in fact, “tend to aggravate the incoherence of the period,”<sup>66</sup> these scholars have reoriented scholarship. As explained by the editors of a recent collection of leading essays on the subject, these scholars prefer to examine “[p]olitical culture—defined most commonly as the set of assumptions (and less commonly as the set of methods and practices) that people brought with them into the political realm.”<sup>67</sup> By deemphasizing the “great men” and shifting focus from high politics to “a larger and richer political landscape,” which includes mass mobilization and activities out of doors,<sup>68</sup> these historians have established common ground with the public meaning originalists: both groups have questioned the ascendancy of an appointed oracular judiciary claiming to possess the final, authoritative word on matters of national policy.

These findings by students of politics at the Founding are paralleled by scholars examining the massive output of printed political matter addressed to political meaning in the period 1750 through 1783. By one scholar’s account these publications amount to “[o]ver 1,500 pamphlets . . . in addition to thousands of single-sheet broadsides, hundreds of political sermons, scores of books, and countless newspapers filled with political commentary.”<sup>69</sup> Altogether, observed a Presbyterian minister in 1803 surveying the century that had just ended, this constituted

a spectacle never before displayed among man [sic], and even yet  
without a parallel on earth. It is the spectacle, not of the learned and

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64. Jeffrey L. Pasley, Andrew W. Robertson, & David Waldstreicher, *Introduction* to BEYOND THE FOUNDERS: NEW APPROACHES TO THE POLITICAL HISTORY OF THE EARLY AMERICAN REPUBLIC 3 (Jeffrey L. Pasley, Andrew W. Robertson, & David Waldstreicher eds., 2004).

65. *Id.* at 6.

66. Gordon S. Wood, *The Significance of the Early Republic*, 8 J. EARLY REPUBLIC 4 (1988).

67. Pasley et al., *supra* note 64, at 6.

68. *Id.* at 2.

69. HOWE, *supra* note 61, at 2.

the wealthy only, but of the great body of the people; even a large portion of that class of the community which is destined to daily labor, having free and constant access to public prints, receiving regular information of every occurrence, attending to the course of political affairs, discussing public measures, and having thus presented to them constant excitement [sic] to the acquisition of knowledge, and continual means of obtaining it.”<sup>70</sup>

The public discourse of what ordinary Americans meant by politics does not exclude their formal creation of constitutional mechanisms. Debate over political thought and behavior came together in the creation of constitutions, which were, in the words of Michael Warner, “a way of literalizing the doctrine of popular sovereignty.”<sup>71</sup> In fact, the process embraced exactly the kind of consent and contractualism of constitutional creation that Randy Barnett has found in public meaning originalism. Compare Barnett’s formulation<sup>72</sup> with that of history professor John Brooke, whose work has helped to give clarity and a theoretical framework to the field. Brooke uses the term “deliberation,” because it describes the deliberative, contractual process that led to the creation of the formal institutional arrangements—such as constitutions—of the new polity and gave them meaning. Brooke defines the term as “the structured and privileged assessment of alternatives among legal equals leading to a binding outcome, perhaps as law, perhaps as contract or covenant, in the wider sense.”<sup>73</sup> Brooke continues, “Citizens engage in that introspection, criticism, and renewal, and their participation in these processes of deliberation conveys their grant of *express* consent to that government.”<sup>74</sup>

The originalists’ turn to meaning, and especially public meaning, thus invites historians into the discussion, notwithstanding their dismissal by public meaning originalists such as Justice Scalia.<sup>75</sup> It is simply not possible to

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70. *Id.* at 3 (citing 2 SAMUEL MILLER, *A BRIEF RETROSPECT OF THE EIGHTEENTH CENTURY* 253 (New York, T. and J. Swords 1803)).

71. Michael Warner, *Textuality and Legitimacy in the Printed Constitution*, 97 *PROC. AM. ANTIQUARIAN SOC’Y* 59 (1987).

72. Barnett, *supra* note 31, at 620–23.

73. John L. Brooke, *Consent, Civil Society, and the Public Sphere in the Age of Revolution and the Early American Republic*, in *BEYOND THE FOUNDERS: NEW APPROACHES TO THE POLITICAL HISTORY OF THE EARLY AMERICAN REPUBLIC*, *supra* note 64, at 207, 209.

74. *Id.* at 211.

75. A note of disclosure is necessary here: The author of this Article joined with other historians to write “Brief of Amici Curiae Jack N. Rakove, Saul Cornell, David T. Konig, William J. Novak, Lois G. Schworer et al. in Support of Petitioners” in the *Heller* case. See Brief of Amici Curiae Jack N. Rakove et al. in Support of Petitioners, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290). The present Article, though consistent with the conclusions of that brief, presents different arguments, in particular an assessment of the assets and flaws of original public meaning originalism, and greater attention to the preamble.

understand what the Second Amendment meant to citizens of the Founding generation when they wrote, ratified, or read the amendment without taking into account the best historical methods available. In fact, whether intentional or not, by insisting on the “ordinary” or “common” or “natural” nature of constitutional meaning at the Founding, Scalia and other public meaning originalists have made it necessary to solicit historical assistance in understanding the political culture of the era. As noted earlier, even a leading public meaning originalist calls for reference to “context” and “general purposes.”<sup>76</sup> If a proper evaluation of the “right of the people to keep and bear Arms” is to be true to the method of original public meaning as stated by Scalia, we must return to the past on its own terms. This question brings our inquiry to the eighteenth century and its own search for reliable expression and meaning, a search made all the more pressing by the high stakes of constitutional struggle.

It was a truism among the Founding generation that power and liberty were forever at odds. This conflict is so well known among students of the Founding and remains so deeply ingrained in our national political culture that it requires no revisiting here.<sup>77</sup> Its solution still eludes us, as history brings new challenges and contingencies that defy the best efforts of past generations. The general problem nevertheless remains the same as it was when succinctly stated by John Trenchard, the English polemicist whose collaboration with Thomas Gordon produced a series of 144 letters to the London press under the pseudonym “Cato” between 1720 and 1723. Sovereigns had the power to command obedience, wrote Trenchard, but when “positive conditions were annexed to their power, they were certainly bound by those conditions.”<sup>78</sup> The question would be famously restated by James Madison in 1787 when he asked:

In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself.<sup>79</sup>

To Madison, the problem was compounded by the uncertainties and inadequacies of language to convey meaning. A month earlier Madison had

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76. Barnett, *supra* note 31, at 613.

77. Any introduction to the subject must begin, however, with BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (rev. ed. 1992) and the many works of John Philip Reid. See, e.g., JOHN PHILIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* (1986).

78. John Trenchard, *Inquiry Into the Doctrine of Hereditary Right* (Saturday, June 8, 1723, No. 123), in 4 *CATO'S LETTERS: OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS* 196, 201 (Berwick, R. Taylor, 1754).

79. *THE FEDERALIST* NO. 51, at 281 (James Madison) (J. R. Pole ed., 2005).

written about the problems arising from “the complexity of objects, and the imperfection of the human faculties”<sup>80</sup> in an equally famous passage. Madison explained:

Hence, it must happen, that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful, by the cloudy medium through which it is communicated.<sup>81</sup>

Even God’s meaning, that is, might elude human understanding.

The problem, then, was two-fold: how to enforce constitutional provisions, and how to state them so that their meaning was clearly understood by the republican citizens who had the responsibility for enforcing them. This Part examines the latter question, which bedeviled a generation aware of its pivotal position in history and of the stakes for future generations.<sup>82</sup>

What language could adequately describe and clarify the extent and limitation of state power? In confronting this question, the citizens of the newly independent united states were not engaging a hitherto unopened question. It was, after all, the irreconcilable disagreements over the language of British rights that had led first to resistance and then to revolution. A decade before Independence, American fear of Parliamentary omnipotence had led them to fear the claims to plenary power that the metropolis had asserted in its 1766 Declaratory Act, passed in the wake of its reluctant repeal of the Stamp Act: the King-in-Parliament, it asserted, “had, hath, and ought to have, full Power and Authority to make Laws and Statutes of sufficient Validity to bind the Colonies and People of America, Subjects of the Crown of Great Britain, in all Cases whatsoever.”<sup>83</sup>

Scholars of history and language have provided new insights into this problem. “The defense of American liberties against English attack required that those liberties be exactly defined and the limits of Parliament’s authority be clearly established,”<sup>84</sup> observes John Howe. Once Independence had been

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80. THE FEDERALIST NO. 37, at 196 (James Madison) (J. R. Pole ed., 2005).

81. *Id.*

82. The former issue is the subject of Part IV.

83. Declaratory Act, 1766, 6 Geo. 3, c. 12, reprinted in C. GRANT ROBERTSON, SELECTED STATUTES, CASES, AND DOCUMENTS TO ILLUSTRATE ENGLISH CONSTITUTIONAL HISTORY, 1660–1832, at 244, 245 (4th ed. 1923).

84. HOWE, *supra* note 61, at 38.

declared and the authority of King-in-Parliament had been replaced by the popular sovereignty represented by state legislatures, the danger was not over. “Conflict between Parliament and the colonies was attributable not to justifiable disagreement over such constitutive terms as ‘rights’ and ‘dependence,’ but to the ‘artful’ manipulation of language by a Parliament intent on destroying American liberties,” continues Howe.<sup>85</sup> “As the imperial crisis unfolded, however, it became increasingly evident that while the words used by both sides in the conflict were often the same, they were invested with profoundly different meanings.”<sup>86</sup>

It was more hope than reality that led Thomas Tudor Tucker of South Carolina to predict in 1784 that after “the most mature deliberation” the state constitutional convention could submit its product to “the people at large,” who, he asserted confidently,

may also have an opportunity to consider the matter duly, and to give, if they think proper, fresh instructions with respect to any or every article. The whole being again debated in convention, must at length be determined by a majority of voices, and notice given when the new form is to have effect. Thus may every grievance be removed, and peace, freedom and happiness lastingly established in the Commonwealth.<sup>87</sup>

Others were not as optimistic and recognized the difficulty. James Madison, who was an eyewitness to the process when he served in the Virginia assembly that drafted a declaration of rights and a constitution, would identify the problem in “The Federalist”—namely, the “complexity and novelty” of the task.<sup>88</sup> The novel nature of the problem was matched by the complexity of the issues. This is why Maryland, which was one of the earliest states to draft a bill of rights, not coincidentally produced the longest one, with forty-nine substantive provisions. Two states (Rhode Island and Connecticut) avoided the problem entirely by continuing their colonial charter forms of government, which at least postponed the wrangling that beset New Hampshire, where a congress hastily drafted a brief document in barely two weeks but had to resume work for a more comprehensive constitution two years later. The contentious process took six years,<sup>89</sup> illustrating Marc

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85. *Id.* at 39.

86. *Id.* at 64.

87. THOMAS TUDOR TUCKER, CONCILIATORY HINTS, ATTEMPTING, BY A FAIR STATE OF MATTERS, TO REMOVE PARTY-PREJUDICES 22 (Charleston, A. Timothy 1784).

88. THE FEDERALIST NO. 37 (James Madison), *supra* note 80, at 196.

89. On these difficulties, see FRANCIS NEWTON THORPE, 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2453 (1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

Kruman's general observation that "revolutionary republicans often treated legislators as mistrusted delegates to a potentially tyrannical government" and sought every means they knew to control them.<sup>90</sup>

To what sources might the drafters of constitutions turn for guidance? Although Sir William Blackstone is the legal figure conventionally cited when we seek to know the settled law and rules in eighteenth-century America, he is a strange choice for that honor, and he must be used with great caution.<sup>91</sup> To be sure, Blackstone's *Commentaries* had broad appeal; compared to the crabbed and intricate *Institutes* of Sir Edward Coke, *Commentaries* was accessible, and was clearly and coherently organized. In the *Commentaries*, Blackstone presented English law as embodying the natural principles of justice that assured liberty and property. For the elite of England, the *Commentaries* protected property and the arrangements made to guarantee it.<sup>92</sup> For Americans it had a more practical attraction: aspiring lawyers could present themselves for admission to the bar with little more education than having read and mastered its four volumes, and they could carry its four volumes with them as they rode circuit. Although critics challenged his complacent defense of the status quo, even they were willing to give Blackstone his due, acknowledging that the *Commentaries* came close to satisfying their demands for a "natural" framework for jurisprudence. Blackstone's harshest critic, Jeremy Bentham, conceded that he found in Blackstone's 1756 *Analysis of the Laws of England* "several fragments of a sort of method which is, or at least comes near to, what may be termed a natural one."<sup>93</sup> The *Analysis*, along with Blackstone's lectures as Vinerian professor at Oxford, developed into the basis for the *Commentaries*, which appeared in eight editions before his death in 1780, becoming the most influential source for the basics of English law on both sides of the Atlantic. Edmund Burke was exaggerating only somewhat when he claimed that as many copies of the *Commentaries* had been purchased in America as in England.<sup>94</sup>

But it was precisely this popularity that made Blackstone a target of reformers. In identifying the accessibility of Blackstone, his critics saw the danger of the seductive force of the *Commentaries* for creating attorneys who

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90. MARC W. KRUMAN, *BETWEEN AUTHORITY AND LIBERTY, STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* ix (1997).

91. Blackstone's influence is aptly and concisely summarized by WILFRID PREST, *WILLIAM BLACKSTONE: LAW AND LETTERS IN THE EIGHTEENTH CENTURY* 1-2 (2008).

92. WILLIAM BLACKSTONE, *2 COMMENTARIES*.

93. JEREMY BENTHAM, *A COMMENTARY ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT* 418 (J.H. Burns & H.L.A. Hart eds., 1977).

94. Edmund Burke, Speech on Conciliation with the Colonies, March 22, 1775, in *1 WORKS* 222, 230 (New York, Harper & Brothers, 1860).

would serve to protect privilege through the mystifications of the law. Indeed, beneath the veneer of its author's praise for the principles of natural justice and the consistency and surety of the common law lurked an agenda of empowering a conservative judiciary and mystifying the public.<sup>95</sup> Bentham attacked "our Author's oracular authority" by which "the ear is soothed . . . and the heart is warmed."<sup>96</sup> Thomas Jefferson, himself a practicing attorney for eight years, wished that he could

uncanonize Blackstone, whose book, although the most elegant and best digested of our law catalogue, has been perverted, more than all others, to the degeneracy of legal science. A student finds there a smattering of everything, and his indolence easily persuades him that if he understands that book, he is master of the whole body of the law. The distinction between these, and those who have drawn their stores from the deep and rich mines of Coke on Littleton, seems well understood even by the unlettered common people, who apply the appellation of Blackstone lawyers to these ephemeral insects of the law.<sup>97</sup>

Decades of experience with royal judges had created among the founding generation a suspicion of the judiciary as an unelected barrier to justice, and judicially pronounced common law as a bulwark of privilege and inertia against representative government. In that sentiment, the founding generation internalized English criticisms of Blackstonian jurisprudence as confirming its own goals of legal reform.<sup>98</sup>

For reasons such as these, any understanding of the language and meaning of enacted law in Revolutionary America must look to reformers such as Jeremy Bentham, whose critique of Blackstone resonated with the efforts of Americans like Jefferson. Bentham began his law studies at Oxford in 1760, and after a hiatus of a few months at Lincoln's Inn in early 1763 he returned to Oxford in time to attend Blackstone's last series of lectures there. These lectures would be the basis for the *Commentaries*, but the sixteen-year-old Bentham had trouble taking notes, listening in "no small part of them with

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95. This reputation endured into the twentieth century. For an example of that reputation, see generally DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES SHOWING HOW BLACKSTONE, EMPLOYING EIGHTEENTH-CENTURY IDEAS OF SCIENCE, RELIGION, HISTORY, AESTHETICS, AND PHILOSOPHY, MADE OF THE LAW AT ONCE A CONSERVATIVE AND MYSTERIOUS SCIENCE* (1941).

96. BENTHAM, *supra* note 93, at 500.

97. THOMAS JEFFERSON, To Judge John Tyler, Monticello, June 17, 1812, in 13 *THE WRITINGS OF THOMAS JEFFERSON* 165, 166–67 (Andrew A. Lipscomb ed., 1905).

98. For an insightful examination of this "important contemporary discussion of the rival claims of common law and legislation," see DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN* 2 (1989).

rebel ears” and fuming at the “fallacy” of Blackstone’s reasoning.<sup>99</sup> The slyness of Blackstone’s method and his “miserable sophistry in speaking of the Common Law”<sup>100</sup> provoked Bentham. To Bentham, it was a bait-and-switch strategy. Blackstone claimed to be using “the nature of things” to understand the “general and popular use” of words, but in reality was choosing his own meaning; as young as he was, Bentham could not escape his “doubt whether the general and popular use is so explicitly decisive in favour of his sense as [Blackstone] supposes.”<sup>101</sup> Bentham’s critique of Blackstone paralleled what would become the basis of Jefferson’s criticism of John Marshall, with its insistence on strict construction and fidelity to the purposes of the law.

Bentham is worth quoting in full, because his critique of Blackstone’s *Interpretation of Laws* epitomized the clash of meaning and subterfuge that was criticized by legal reformers on both sides of the Atlantic. Bentham’s critique also applies to Justice Scalia’s misadventure of seeking and claiming to have found an original meaning—or a “natural meaning”<sup>102</sup>—as understood by the public:

As to “the *nature of things*” so glibly spoken of, he must be more than a “*rational civilian*” who can tell what sort of “constitutions” those are of, that in contradistinction to others, have *that* only for their guide . . . but what sort of a “guide” “the nature of *things*” is to make for “a constitution”, or what meaning the phrase, smooth as it is, has here, is what I must confess myself unable to conceive. When he speaks of “general constitutions”, he speaks to be understood; I am apt to suppose I understand him: but when he goes on and talks of “the nature of things”, I see him wrapped in clouds, and I am sure he does not understand himself.<sup>103</sup>

Warming to his task, Bentham offered a withering evaluation of Blackstone’s manner of defining terms as he wished:

His nomenclature [is] like a weathercock: you never meet with the same term twice together in the same place. In the midst of all this darkness, here and there a position makes its appearance that is intelligible: and as sure almost as it is intelligible it will be found false.<sup>104</sup>

Blackstone had complacently written his lectures “to illustrate the excellence of our present establishment, by looking back to former times,”<sup>105</sup> a

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99. J.H. Burns & H.L.A. Hart, *Introduction* to BENTHAM, *supra* note 89, at xix, xix–xxi.

100. BENTHAM, *supra* note 93, at 201.

101. *Id.* at 95, 98.

102. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2793 (2008).

103. BENTHAM, *supra* note 93, at 95–96.

104. *Id.* at 349.

105. WILLIAM BLACKSTONE, 4 COMMENTARIES \*49.

project that Bentham called the “Romance of our Jurisprudence, rather than the History.”<sup>106</sup> Bentham assailed the British war against American independence (a challenge to Parliament that both Blackstone and Mansfield opposed) as a “war of misgovernment, against the only possible good government,” and he praised the American federal Constitution.<sup>107</sup> Bentham admired what he perceived as the realization of his goals of reforming government.<sup>108</sup> It is more than coincidence that Bentham published his *Fragment on Government* in 1776, while he was also working on his *Comment on the Commentaries*, which would become Bentham’s scathing attack on Blackstone.

Both Britain and the newly independent and united states were witnessing an explosion of legislation at this time, and both were giving careful attention to proper statutory construction. While many authorities existed in Britain, no American source existed. Thomas Jefferson was carefully compiling rules in his Legal Commonplace Book but would not publish his *Manual* providing guidance on drafting until 1801.<sup>109</sup> Although there was no shortage of efforts to reform legal and constitutional language,<sup>110</sup> no consensus existed on how to allay concerns about the capacity of language to convey meaning. The range of proposals, in fact, was one reason why the quest for discovering any original meaning, public or otherwise, has been rightly criticized for failing to acknowledge the plurality of theories and interpretive modes in this period. This lack of any interpretive consensus has been remarked upon, and has contributed a powerful critique of any search for a commonly accepted public meaning. Caleb Nelson has examined closely the way that the Framers themselves were working within a context that lacked any uniformly understood conventions of interpretation—a climate beset by indeterminacies. “Because of its unprecedented nature,” Nelson writes, “the Constitution was adopted in an unusually unsettled interpretive background.”<sup>111</sup> Although studies emphasize the interpretive pluralism of the era, they stop short of concluding that this pluralism was itself a source of conflict and a stimulus to greater efforts at linguistic precision and the

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106. BENTHAM, *supra* note 93, at 124.

107. *Id.* at 502–03 (constitution), 532 (“misgovernment”).

108. On this process, see David Thomas Konig, *Jurisprudence and Social Policy in the New Republic*, in *DEVISING LIBERTY: PRESERVING AND CREATING FREEDOM IN THE NEW AMERICAN REPUBLIC 178*, 178–216 (David Thomas Konig ed., 1995).

109. See THOMAS JEFFERSON, *A Manual of Parliamentary Practice*, in *JEFFERSON’S PARLIAMENTARY WRITINGS 383* (Wilbur Samuel Howell ed., Princeton University Press 1988) (1801).

110. See LIEBERMAN, *supra* note 98, at 3.

111. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 560–61 (2003); see also Griffin, *supra* note 44 *passim*.

establishment of institutions to protect hard-won American liberties from any reappearance of arbitrary government.

### III. THE ENFORCEMENT OF MEANING: REPUBLICAN CONSTITUTIONAL MECHANISMS

The limits and uncertainties of language as a guarantor of liberty reminded Americans of the dissatisfaction they shared with like-minded legal reformers in England. Parliament paid little heed “even when confronted by its unconstitutional acts,”<sup>112</sup> and institutional checks were necessary. This need for the precise specification of the powers and limits of government was especially acute when power was being vested in a body politic far more democratic and inclusive than any yet tested. Our understanding or appreciation of this fear, which began at the state level, has benefited from the work of our best historians, led by Gordon S. Wood, who drew attention to the abuses of power by state legislatures and connected them to the efforts of political leaders simultaneously to constrain and protect popular rule.<sup>113</sup> A veteran of state legislative politics, James Madison in 1787 addressed the *Vices of the Political System of the United States*. American liberties, he warned, were being endangered by “the multiplicity and mutability of laws,” which revealed “a defect still more alarming: more alarming not merely because it is a greater evil in itself, but because it brings more into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights.”<sup>114</sup>

This Part examines the institutional mechanisms created in the first years of Independence and argues that they represented efforts to resort to the ultimate source of sovereignty—the people—as a collective source of protecting liberty from power. Close examination reveals that these new state constitutions gave meaning to words by linking them to implementation through popular participation and mobilization. Whether or not these constitutions did so with formally articulated declarations of principles and rights, in every case they sought to guarantee them by creating avenues for the expression and exercise of popular will, rather than relying solely on judicial enforcement.

To approach the problem of ideas and action one must begin at the beginning—that is, with the opening paragraphs of the new state constitutions,

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112. KRUMAN, *supra* note 90, at 157.

113. See, for example, WOOD, *supra* note 48, at 393–442, for a discussion of legislative abuses.

114. JAMES MADISON, *Vices of the Political System of the United States* (1787), reprinted in 9 THE PAPERS OF JAMES MADISON 345, 354 (Robert A. Rutland & William M. E. Rachal eds., 1975). Wood's Chapter X echoes Madison and is entitled “Vices of the System.” WOOD, *supra* note 113, at 393.

where framers proclaimed what appear to twenty-first century eyes to be idealistic but unenforceable principles and rights. These pronouncements are among the most misunderstood and unappreciated features of the republicanism of the revolution. It is certainly the case that the first state constitutions made idealistic statements about the purposes of republican government. Seven of them included declarations or bills of rights, with grandiloquent announcements of abstract or natural rights as well as demands for the preservation of republican institutions.<sup>115</sup> Because these provisions were not judicially enforceable, it is easy to dismiss them as mere verbiage. Today's conventional wisdom, that the "hortatory language" of state declarations had no "judicial application,"<sup>116</sup> echoes a large literature that fails to ask why such statements were included at all, or, more fundamentally, how the revolutionaries who wrote them hoped to implement in practice their ability to resist tyranny. Typical was that of Massachusetts, whose Declaration of Rights announced:

A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty and to maintain a free government. The people ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives; and they have a right to require of their lawgivers and magistrates an exact and constant observation of them, in the formation and execution of the laws necessary for the good administration of the commonwealth.<sup>117</sup>

How were citizens to enforce the exercise of "of piety, justice, moderation, temperance, industry, and frugality"? Or, for that matter, how was New Hampshire to enforce its requirement of "justice, moderation, temperance, industry, frugality, and all the social virtues"?<sup>118</sup>

To stop at noting their lack of judicial enforceability and dismissing their significance, however, is to miss the point and to misunderstand not only the nature and meaning of rights, but also the mechanisms of preserving them. Our modern notion of a judiciary that might review and void statutory law existed only in incipient form at the Founding, challenged by lingering

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115. The seven were Delaware, Maryland, Massachusetts, North Carolina, Pennsylvania, Vermont, and Virginia. KRUMAN, *supra* note 90, at 37.

116. A.E. Dick Howard, *From Mason to Modern Times*, in *THE LEGACY OF GEORGE MASON* 95, 102 (Josephine F. Pacheco ed., 1983).

117. MASS. CONST. of 1780, pt. 1, art. XVIII, *reprinted in* 3 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 89, at 1892; *see also* N.H. CONST. of 1784, art. XXXVIII, *reprinted in* 4 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 89, at 2457.

118. N.H. CONST. of 1784, art. XXXVIII, *reprinted in* 4 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 89, at 2457.

colonial suspicions of royal judiciary and by the unprecedented nature of what it involved. Only three state constitutions gave the judiciary the power to review legislation, and in two of these states (Massachusetts and New Hampshire) that power was limited to nonbinding advisory opinions.<sup>119</sup> Fundamentally, the hortatory appeals of declarations of rights or similar language embedded in the text of state constitutions were not meant to establish judicially protected rights to be enforced by courts. The judiciary was not expected to play the major role of enforcing individual rights that it has grown to assume; it was but one of many mechanisms foreseen as guarantors of liberty. Such appeals, rather, were to rouse the citizenry to their exercise of republican citizenship—what Robert Palmer has described as “establishing a liberty-enhancing republican government” characterized by collective popular institutions that could preserve individual liberties.<sup>120</sup> “Participation in eighteenth-century America,” writes Donald Lutz, “rested much more on a ‘civic culture’ than on a legalistic set of protected rights.”<sup>121</sup> Christian Fritz moves us closer still to the meaning of such provisions—and especially the relationship between “the people” and their “rights”—observing that state bills of rights “had fulsome provisions not only setting out the powers of the sovereign but also expressing how the people as the ruler of the state, or as citizens of the state, could exercise collective rights.”<sup>122</sup>

To question the authority of the judiciary to annul laws and check arbitrary government, however, does not deny the role of the jury—the collective voice of the vicinage—to do so. As representatives of the community, jurors were to apply the law and give it meaning in actual situations. Because the new state courts continued the colonial form of judicial presence with groups of judges sitting together and delivering instructions that might contradict one another,<sup>123</sup> jurors found themselves possessing choices as to interpreting the meaning of

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119. See *supra* text accompanying notes 49–56. On the problematic nature of state judicial review, see G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 72–73 (1998). Gordon Wood describes how only five states were moving even “gingerly and often ambiguously” toward this in the 1780’s. WOOD, *supra* note 48, at 454–55. For an example of popular protest when such a power was exercised in Rhode Island see JAMES M. VARNUM, *THE CASE, TREVETT AGAINST WEEDEN* (Providence, John Carter 1787). See also SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 22 (1990).

120. Robert C. Palmer, *Liberties as Constitutional Provisions 1776–1791*, in *LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC* 55, 114 (William E. Nelson & Robert C. Palmer eds., 1987).

121. Donald S. Lutz, *Political Participation in Eighteenth-Century America*, in *TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS* 19, 31 (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

122. CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* 145 (2008).

123. See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 26 (1975).

the law, and they gave it the meaning that they, as the collective voice of the public, would enforce. Even where instructions were clear, jurors might—and did—give their own meaning to the law and “judge law and fact ‘complicatedly,’” as Akhil Amar points out.<sup>124</sup> If a judge were to instruct contrary to “fundamental Principles,” wrote John Adams, it was “not only [a Juror’s] right but his Duty in that Case to find the Verdict according to his own best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court.”<sup>125</sup> An anonymous writer in 1776, referring to the near-total authority conferred through parliamentary omnipotence and complaisant royal judges, praised trial by jury as the only remaining shred of constitutional government: “[I]t is easy to see that the English have no Constitution because they have given up every thing; their legislative power being unlimited without condition or controul, except in a single instance of trial by Juries.” Only the jury could say, “Thus far shalt thou go, and no farther.”<sup>126</sup> The communal force of the jury was a major Antifederalist cause. The pseudonymous “Federal Farmer” (probably Melancton Smith)<sup>127</sup> expressed his views as “the opinions of the honest and substantial part of the community.”<sup>128</sup> Another Antifederalist, under the pseudonym “A Plebeian,” “claimed to be a spokesman for ‘the common people, the yeomanry of the country.’”<sup>129</sup> In praising the jury, Federal Farmer made a powerful case for the authority of the “body of the people”: “The body of the people, principally, bear the burdens of the community; they of right ought to have a controul in its important concerns, both in making and executing the laws, otherwise they may, in a short time, be ruined.”<sup>130</sup> Through the legislature

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124. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 238 (2005) [hereinafter AMAR, *AMERICA’S CONSTITUTION*]. For a more thorough examination of jurors and their use of jury instructions, see AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 104–08 (1998) [hereinafter AMAR, *THE BILL OF RIGHTS*].

125. Adams’ Diary Notes on the Right of Juries, in 1 *LEGAL PAPERS OF JOHN ADAMS* 228, 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

126. FOUR LETTERS ON INTERESTING SUBJECTS 18, 19 (1776), reprinted in 1 *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805*, at 368, 385 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

127. Robert H. Webking, *Melancton Smith and the Letters From the Federal Farmer*, 44 *WM. & MARY Q.* 510 (1987).

128. SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828*, at 38 (1999).

129. *Id.* at 39. Cornell speculates that “Federal Farmer” and “Plebeian” were one and the same person, Melancton Smith. *Id.*

130. FEDERAL FARMER: AN ADDITIONAL NUMBER OF LETTERS TO THE REPUBLICAN, LETTER XV (1788), reprinted in 17 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE* 265, 339 (John P. Kaminski et al. eds., 1995) [hereinafter, LETTER XV].

and the jury “the people . . . are enabled to stand as the guardians of each others rights.”<sup>131</sup> Because the community understood what its rights meant, it should decide the meaning of the law: “I hold it is the established right of the jury by the common law, and the fundamental laws of this country,” Federal Farmer wrote of the civil jury, “to give a general verdict in all cases when they chuse to do it, to decide both as to law and fact, whenever blended together in the issue put to them.”<sup>132</sup> The reason was that juries might check judges: “If the conduct of judges shall be severe and arbitrary, and tend to subvert the laws, and change the forms of government, the jury may check them, by deciding against their opinions and determinations, in similar cases.”<sup>133</sup>

Robert Palmer, who brings a distinguished record as a historian of local government in England to the study of American constitutionalism, provides the context for understanding these institutions. The New York constitution, he observes, had no declaration of rights, because:

Seeming individual liberties in the body of the constitution, stated in mandatory form, were concerned primarily not with individuals, but with the structure of government. Not only did the New York Constitution not have a declaration of rights, its concern was so thoroughly consumed with establishing a liberty-enhancing republican government that nowhere did the constitution explicitly address the protection of individual rights.<sup>134</sup>

Guarantees of rights embedded in the text of the document, such as trial by jury, were thus guarantees of the public institutions and mechanisms that would protect the republican form of government necessary to individual freedom. Even an apparently individual right, such as the state’s ban on attainder, was based on civic, republican principles, not individual ones: “The prohibition of that procedure was thus a structural measure to prevent a decay in republican government, once a republican government had been firmly established.”<sup>135</sup>

Rights were thus to be guaranteed by the people, constituted in republican institutions or acting through republican mechanisms. Marc Kruman, exhaustively studying the state constitutions of this era, makes it clear that “to speak of ‘the people’ in late eighteenth century America was not to speak of an undifferentiated mass, but, in fact, to speak of towns and counties, for

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131. *Id.*

132. *Id.* at 338.

133. *Id.* at 339.

134. Palmer, *supra* note 120, at 79.

135. *Id.*

that was how the people spoke.”<sup>136</sup> Such a view accords with the prevailing view of scholars of state government in the early republic: namely, that citizens believed in “an identifiable and obtainable public good different from the aggregated interests of individuals.”<sup>137</sup>

The meaning of “equality” and “the people,” therefore, was well known in the 1780s, but its reliance on a principle of collective equality differed from our own individualistic notion. Political scientist Daniel Elazar has studied this early concept and has explained that the new states saw themselves as “*unions* of their civil communities.”<sup>138</sup> Connecticut retained its identity as the product of the union of four towns in 1639, Delaware as the three lower counties that separated from Pennsylvania. Rhode Island and New Jersey had similar historical backgrounds that conditioned the way they understood the constituting of political bodies.<sup>139</sup>

The protection of the right to bear arms in the militia in the context presented here thus takes on the civic model argued by Saul Cornell and other historians,<sup>140</sup> as well as (more importantly) the political community at the Founding. “Demophilus” (George Bryan, a radical Pennsylvania Whig and drafter of its state constitution) wrote, “The Militia is the natural support of a government, *founded on the authority of the people only*.”<sup>141</sup> Standing alone, this may make “the people” an ambiguous term arguably a collection of individuals. But Bryan made the alternative, collective meaning clear when he set out an institutional framework for the choice of officers, with “associators” of each company choosing “all officers immediately commanding them,” “deputations” from companies selecting “field officers,” and the colony legislature appointing “every general officer.”<sup>142</sup> Vermont’s 1777 constitution illustrates this connection explicitly, following Bryan’s hierarchy of groups:

The freemen of this Commonwealth, and their sons, shall be trained and armed for its defence, under such regulations, restrictions and exceptions, as the general assembly shall, by law, direct; preserving always to the people, the right of choosing their colonels of militia, and all

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136. KRUMAN, *supra* note 90, at 77.

137. *Id.* at 155.

138. Daniel J. Elazar, *State-Local Relations: Reviving Old Theory for New Practice*, in TOWARD PARTNERSHIP WITHIN THE STATES: LOCAL SELF-GOVERNMENT IN THE FEDERAL SYSTEM 29, 38 (Stephanie Cole ed., 1976).

139. *Id.* at 38–39.

140. CORNELL, *supra* note 16, at 13–25 (2006).

141. Demophilus (George Bryan), *The Genuine Principles of the Ancient Saxon, or English, Constitution* (1776), reprinted in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760–1805, *supra* note 126, at 340, 353.

142. *Id.*

commissioned officers under that rank, in such manner, and as often, as by the said laws shall be directed.<sup>143</sup>

Notable in this wording (similar to that used by “Demophilus”) is the insistence on local, or communal, choice of officers—a right acknowledged and written into the federal Constitution’s Article I, Section 8, Clause 16.<sup>144</sup>

Federal Farmer reveals the civic rights impetus behind the Second Amendment. Echoing the concerns of the states at losing control over their own militias under the proposed Constitution in 1788, he zeroed in on Article I, Section 8, Clause 16, on arming and organizing the militia, and attacked them as too vague to protect the right to keep and bear arms:

Stipulations in the constitution to this effect, are perhaps, too general to be of much service, except merely to impress on the minds of the people and the soldiery, that the military ought ever to be subject to the civil authority, etc. But particular attention, and many more definite stipulations, are highly necessary to render the military safe, and yet useful in a free government . . . .

Federal Farmer urged, “A militia, when properly formed, are in fact the people themselves, and render regular troops in a great measure unnecessary”<sup>145</sup> and argued emphatically for a universal militia. In language that foreshadows that of the Second Amendment (even including a prefatory clause), Federal Farmer argued, “whereas, to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them.”<sup>146</sup> He continued, demonstrating the civic right involved, by emphasizing that by “the people” in this instance meant a well-regulated universal militia constituted by the state. Such a universal well-regulated militia, he explained,

places the sword in the hands of the solid interest of the community, and not in the hands of men destitute of property, of principle, or of attachment to the society and government, who often form the select corps of peace or ordinary establishments: by it the militia are the people, immediately under the management of the state governments, but on a uniform federal plan, and called into the service, command,

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143. VT. CONST. of 1777, ch. II, § V, *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 89, at 3742.

144. “[R]eserving to the States respectively, the Appointment of the Officers . . . .” U.S. CONST. art. I, § 8, cl. 16.

145. LETTER XV, *supra* note 130, at 362.

146. *Id.* at 363.

and government of the union, when necessary for the common defence and general tranquility.<sup>147</sup>

It is clear that for Federal Farmer, the meaning of the “right” had to be the positive civic right of a citizen of a republic to take part in defending the system of republican government that guaranteed his individual rights as a member of the militia. The bearing of arms in the militia, it is important to note, was to be “in the hands of solid interest of the community,” explicitly excluding “men destitute of property, of principle, or of attachment to the society and government.”

#### IV. ASSURING THE WILL OF THE PEOPLE: THE IMPORTANCE OF THE PREAMBLE

The electoral process provided the primary republican bulwark against tyranny, which is why so many state constitutions provided express guarantees of the right to vote and the need for “frequent recurrence to the fundamental principles of the constitution.”<sup>148</sup> These clauses were not mere abstractions, justifications, or the hopeful expressions of aspiration, but rather were obligations placed on citizenship. They were, insisted “Demophilus,” the necessary means for “effectually holding the supreme power in its *only* safe repository *the hands of THE PEOPLE.*”<sup>149</sup> Part of the electoral process was the widespread instruction of representatives, a holdover from colonial practice. Royal governors, it was feared, would use their patronage powers to corrupt representatives in the same manner that the Whig oligarchy had so successfully corrupted Parliament and reduced the actual representation of popular will to a virtual representation that allowed a member of Parliament to place his own judgment over that of his constituents.<sup>150</sup> This practice was such an accepted manner of assuring the democratic process that six states made express provisions for legislative instructions,<sup>151</sup> “and the practice was widespread even in states that did not expressly recognize it in their constitutions.”<sup>152</sup>

147. FEDERAL FARMER: AN ADDITIONAL NUMBER OF LETTERS TO THE REPUBLICAN, LETTER XVIII (1788), *reprinted in* 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE, *supra* note 130, at 265, 362–63.

148. *E.g.*, MASS. CONST. of 1780, pt. 1, art. XVIII, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 89, at 1892.

149. Demophilus, *supra* note 141, at 363.

150. For the best description of this colonial background, see generally BERNARD BAILYN, THE ORIGINS OF AMERICAN POLITICS (1968).

151. *See, e.g.*, MASS. CONST. of 1780, art. XIX, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 89, at 1892; N.C. CONST. of 1776, art. XVIII, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 89, at 2788; PA. CONST. of 1776, art. XVI, *reprinted in* 5

State representatives, therefore, aptly fit their description as “dependent actor[s]”<sup>153</sup> who must take their cues from the people; the instructions they received served as ad hoc versions of the permanently inscribed preambles of written constitutions. If it was true, as Thomas Paine had stated, “that in America THE LAW IS KING,” that king needed strict limitations.<sup>154</sup> Paine later explained, “The American constitutions were to liberty, what a grammar is to language: they define its parts of speech, and practically construct them into syntax.”<sup>155</sup> In the grammar of American constitutionalism, preambles were an essential feature of the syntax of rights. As this Part argues, the operative clause of the Second Amendment cannot be separated from its preamble, “A well regulated Militia, being necessary to the security of a free state.”

Preambles had long existed in English lawmaking. Daines Barrington, whom Bentham praised as an “antidote to our Author’s [i.e., Blackstone’s] poisons,”<sup>156</sup> examined English statutes over the centuries, and preambles were among the matters that he discussed. Barrington found numerous examples of how preambles had served to clarify legislative purpose, and he explicitly cited Coke by acknowledging, “It is frequently said, indeed, that the preamble to a statute is the ‘best key’ to its construction . . . .”<sup>157</sup> In more recent years, however, preambles had corrupted the process of lawmaking. Barrington decried the many instances in which drafters of statutes had inserted preambles where “the proposer had very different views in contemplation,” thereby expanding the meaning of a law. A preamble was supposed to narrow and clarify, not widen, a law.<sup>158</sup> These tactics had led Barrington to distrust preambles, but his many ancient examples revealed their proper purpose. Of such preambles that he cited, one example informs us of the intent of one law,<sup>159</sup> another defines the

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FEDERAL AND STATE CONSTITUTIONS, *supra* note 89, at 3084; VT. CONST. of 1777, art. XVIII, reprinted in 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 89, at 3741–42; see also TARR, *supra* note 119, at 84. The other states adopting declarations of rights were Delaware, Maryland, and Virginia. On the power of this impulse, see Kenneth Bresler, *Rediscovering the Right to Instruct Legislators*, 26 NEW ENG. L. REV. 355, 362–65 (1991).

152. TARR, *supra* note 119, at 84.

153. KRUMAN, *supra* note 90, at 76–78.

154. 1 THOMAS PAINE, COMMON SENSE (1776), reprinted in THE COMPLETE WRITINGS OF THOMAS PAINE 3, 29 (Philip S. Foner, ed., 1945).

155. THOMAS PAINE, THE RIGHTS OF MAN 117 (Henry Collins ed., Penguin Books 1969) (1791).

156. BENTHAM, *supra* note 93, at 420 n.ii.

157. BARRINGTON, *supra* note 3, at 353.

158. *Id.* This impulse accords with Bentham’s impulse “to narrow the occasion” for dubious interpretation. BENTHAM, *supra* note 93, at 95.

159. See BARRINGTON, *supra* note 3, at 112–13.

extent of an act<sup>160</sup> or explains why colonial claims to autonomy are misplaced,<sup>161</sup> and yet another provides “the sole reason” for a particular statute.<sup>162</sup>

Because the historical meaning of preambles figures so prominently in Justice Scalia’s opinion, it is important at this point to examine directly eighteenth-century preambles, which provide the correct context for the text in the beginning of the Second Amendment. The meaning of the Amendment’s preamble had been taken for granted until 1989, when Sanford Levinson presented it as somewhat of a mystery—it is a clause, he writes, that “seems to set out its purpose” but whose uniqueness “presents unexpected difficulties in interpretation.”<sup>163</sup> Levinson’s article, appropriately entitled *The Embarrassing Second Amendment*, remains perhaps the most provocative challenge to a collective rights interpretation of the amendment, in that it posits not only an individual right to bear arms, but also an obligation to do so.<sup>164</sup>

Eugene Volokh, however, has pointed out that the Second Amendment is hardly unique in beginning with a preamble: to the contrary, he finds numerous examples of such wording in revolutionary bills of rights, although he prefers to label them “justification clause[s]” rather than “purpose clause[s],” explaining his preference for the former “because the only thing it indicates on its face is the drafters’ justification for the right. The drafters’ purpose might be inferred from the justification, but that’s a more complicated endeavor.”<sup>165</sup> The distinction is useful to Justice Scalia because, as Volokh explains, the “operative clauses” that follow preambles “are often broader and narrower than their justification clauses, thus casting doubts on the argument that the right exists only when (in the courts’ judgment) it furthers the goals identified in the justification clause.”<sup>166</sup>

Volokh’s attention to preambles is a very serious and perceptive contribution to the debate—perhaps the most compelling, and certainly the most provocative, challenge since Levinson’s to the collective rights interpretation of the amendment, which depends on the force of the preamble to limit the meaning of “the right of the people to keep and bear Arms” to participation in a militia. Indeed, Volokh quite rightfully notes that the preamble offers great interpretive insight precisely because it was so commonplace in the states. It was in the states that the newly independent American public first

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160. See *id.* at 131–32.

161. See *id.* at 146.

162. *Id.* at 155.

163. Levinson, *supra* note 7, at 644, 645.

164. See *id.*

165. Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 795 n.8 (1998).

166. *Id.* at 795. Justice Scalia references this article in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789 (2008).

confronted the problems of how the collective sovereignty of the people would be expressed and implemented—and limited.

A proper appreciation of the role of constitutional preambles demands close and careful examination of the many different issues posed when the states reserved and enumerated specific powers beyond federal control. To treat preambles or prefatory statements indiscriminately as a single category does not do justice to the broad variety of purposes they served. An accurate understanding of their meaning requires, rather, a disaggregation of the undifferentiated mass, with a much closer look at the varied purposes of constitutional preambles. It is true that many preambles served only to justify the reasons for the assumption and exercise of sovereign power. One might better describe those that do so, however, as authorization clauses, because they refer to the reasons that led to their declaring independence. New York's 1777 constitution (drafted by John Jay) begins with a series of "Whereas" statements, naming, for example, "the many tyrannical and oppressive usurpations of the King and Parliament of Great Britain on the rights and liberties of the people of the American colonies," and including the entire Declaration of Independence.<sup>167</sup> New Jersey's expresses the same purpose by stating that British actions justified declaring that "all civil authority" under the crown was "necessarily at an end, and a dissolution of government in each colony has consequently taken place."<sup>168</sup> In response, delegates assembled in Burlington, after

the honorable the continental congress, the supreme council of the American colonies, has advised such of the colonies as have not yet gone into measures, to adopt for themselves, respectively, such government as shall best conduce to their known happiness and safety, and the well-being of America in general.<sup>169</sup>

For American lawmakers, the preamble provided the wording necessary to serve the former colonists' purposes of justifying their break with Great Britain and their assumption of sovereign power, as New York had done by quoting the Declaration of Independence. But other preambles were more than merely the justification clauses of Volokh's argument. More importantly, preambles were explicit statements of purpose. The language of preambles was necessary to restrain the operative clauses

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167. N.Y. CONST. of 1777, pmb., *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 89, at 2623, 2623–28.

168. N.J. CONST. of 1776, pmb., *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 89, 2594, 2594–95.

169. *Id.*

that followed because the broad grant of state powers required the express definition and delimitation of those powers being conferred.

Even Sir William Blackstone accepted the need to resort to preambles to determine the meaning of a law. In his *Commentaries*, Blackstone writes:

The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law.<sup>170</sup>

Blackstone knew the problems of imprecision despite such aids, and therefore explained:

If words happen to be still dubious, we may establish their meaning from the *context*; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament.<sup>171</sup>

It might be argued that purpose alone does not necessarily serve to narrow or otherwise control the following clauses to the stated purpose of the preamble. But the expression of purpose alone was not the meaning of these preambles, which the founding generation knew to be one of controlling the law.

No better example exists of this function than the attention that Thomas Jefferson gave to the issue. Because Jefferson placed such a high value on the will of the people as expressed in their legislatures, he understood the need to limit that same authority through strict statutory construction. A stickler for precision of language, Jefferson coined numerous neologisms to convey exact meaning.<sup>172</sup> A passionate advocate of the Enlightenment project of rationalizing the law, Jefferson shared the legal reformist impulses of men such as Jeremy Bentham and Daines Barrington. "The new circumstances under which we are placed," he wrote at the onset of the new revolutionary era, "call for new words, new phrases and for the transfer of old words to new objects."<sup>173</sup> His overhaul followed the same reformist impulse behind the Benthamite project of codification to bring certainty and purpose to enacted law. It was necessary, Jefferson wrote, for

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170. 1 BLACKSTONE, *supra* note 105, at \*59.

171. *Id.* at \*60.

172. See Rebecca Bowman, *Jefferson, Neology, and Jurisprudence*, SPRING DINNER AT MONTICELLO, Apr. 12, 1998, at 1, 2 (counting eighty-five words first used in writing by Jefferson).

173. Letter From Thomas Jefferson to John Waldo (Aug. 13, 1813), *quoted in* H.L. MENCKEN, *THE AMERICAN LANGUAGE* (2d ed. 1921), available at <http://www.bartleby.com/185/1.html>.

our whole code [to] be reviewed, adapted to our republican form of government; and, now that we had no negatives of Councils, Governors, and Kings to restrain us from doing right, it should be corrected, in all its parts, with a single eye to reason, and the good of those for whose government it was framed.<sup>174</sup>

Laws, he insisted,

are made for men of ordinary understanding, and should, therefore, be construed by the ordinary rules of common sense. Their meaning is not to be sought for in metaphysical subtleties, which may make anything mean everything or nothing, at pleasure.<sup>175</sup>

Jefferson regarded the two greatest British jurists of the age with suspicion for their ability to manipulate legal meaning for their own purposes. The more dangerous of these, William Murray, Lord Mansfield, he complained, had spread his “sly poison” throughout the British legal system, and had been “admirably seconded by the celebrated Dr. Blackstone,” the other culprit, in his *Commentaries*.<sup>176</sup> As a student of law, Jefferson turned to the force of preambles at several times in his efforts to contain law within the bounds of its republican purpose and to prevent its distortion. During his legal practice, Jefferson had commonplacated an English case that discussed the linkage between the preamble and the operative clause, where one justice of King’s Bench argued that the wording “couples the body of the Act with the preamble, and makes it of equal extent.”<sup>177</sup> It was in response to this understanding of the effect of preambles that Jefferson worked to oppose the insertion of “Jesus Christ” into the preamble of the Virginia Statute for

174. 1 THOMAS JEFFERSON, AUTOBIOGRAPHY, reprinted in THE WRITINGS OF THOMAS JEFFERSON 1, 62 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).

175. Letter From Thomas Jefferson to William Johnson (June 12, 1823), in 12 THE WORKS OF THOMAS JEFFERSON 252 n.1, 258 n.1 (Paul Leicester Ford ed., 1905).

176. Letter From Thomas Jefferson to John Brown Cutting (Oct. 2, 1788), in 7 THE WRITINGS OF THOMAS JEFFERSON 155, 155 (Albert Ellery Bergh, ed. 1907) (referencing this “sly poison”); Letter From Thomas Jefferson to Phillip Mazzei (Nov. 1785), in 4 THE WORKS OF THOMAS JEFFERSON, *supra* note 175, at 473, 479 (noting the “celebrated Dr. Blackstone”). James Wilson also warned of the harm done by Blackstone, whom he regarded as no “zealous friend of republicanism.” 1 JAMES WILSON, *Lectures on Law: Of the Study of the Law in the United States*, in THE WORKS OF JAMES WILSON 69, 79 (Robert Green McCloskey ed., 1967). St. George Tucker feared that Blackstonian jurisprudence invited the revival of the monarchical “union of the sovereignty with the government.” He therefore produced his own republicanized edition of ST. GEORGE TUCKER, BLACKSTONES’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 10 (Lawbook Exchange, Ltd. 1996) (1803).

177. R v. Whistler, (1702) 92 Eng. Rep. 63, 63 (K.B.). This case is cited by Thomas Jefferson, Legal Commonplace Book, No. 469 (unpublished manuscript dated 1762–1767), available at [http://memory.loc.gov/cgi-bin/query/P?mtj:1:./temp/~ammem\\_yQOg::](http://memory.loc.gov/cgi-bin/query/P?mtj:1:./temp/~ammem_yQOg::)

Religious Freedom. Such language, he knew, would narrow the protections of the bill to Christians alone. Its rejection “by a great majority,” Jefferson later proudly noted, was “proof that they meant to comprehend, within the mantle of its protection,” non-Christians, too.<sup>178</sup>

As Vice-President in the Adams administration, and thus president of the Senate, Jefferson turned his attention to the proper drafting of statutes and compiled a *Manual of Parliamentary Practice*.<sup>179</sup> Although the conventional procedure was to write a bill in its “natural order” and to begin with its preamble, Jefferson suggested that legislators write and vote on preambles last, because the preamble defined the purpose of the bill and the operative clause must be consistent with it.<sup>180</sup> In this, Jefferson was following the same line of reasoning that had led Daines Barrington to make an exception to his general approval of preambles as useful controls on meaning—namely, that a legislator might insert in the preamble wording that had nothing to do with the operative clause, in order to expand rather than limit its reach.<sup>181</sup> Acknowledging the force of a preamble made this procedure all the more necessary; if the preamble were not controlling, then the precaution would be unnecessary. Translating his suspicions of state legislators onto the federal government, Jefferson was seeking to strengthen what political scientist Alan Gibson describes as one of the “short-leash features” of government in the Revolutionary era.<sup>182</sup>

Understanding the force of preambles, the authorities that Jefferson used, and the climate in which he wrote, will bring us much closer what legislators meant than relying on authorities who wrote long after the period we must concern ourselves with. Jefferson’s caution reflected the fevered partisan battles that raged while he served as Vice-President, and he produced his *Manual* for the U.S. Senate, a body he distrusted as less representative of the voice of the people than he wished. Jefferson’s sources—that is, those current for his time and place—support the necessary link between preamble and operative clause.<sup>183</sup> Later authorities had other

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178. JEFFERSON, *supra* note 174, at 67.

179. THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE: FOR THE USE OF THE SENATE OF THE UNITED STATES (2d ed. 1812), *reprinted in* JEFFERSON’S PARLIAMENTARY WRITINGS: “PARLIAMENTARY POCKET-BOOK” AND A MANUAL OF PARLIAMENTARY PRACTICE 383–84 (Wilbur Samuel Howell ed., 1988).

180. *Id.*

181. See *supra* text accompanying note 158.

182. ALAN GIBSON, UNDERSTANDING THE FOUNDING: THE CRUCIAL QUESTIONS 75 (2007).

183. See JEFFERSON, *supra* note 179, at 384 (citing 7 ANCHITELL GREY, DEBATES OF THE HOUSE OF COMMONS, FROM THE YEAR 1667 TO THE YEAR 1694, at 431 (London, D. Henry & R. Cave, J. Emonson 1763); HENRY SCOBELL, MEMORIALS OF THE METHOD AND MANNER OF PROCEEDINGS IN PARLIAMENT IN PASSING BILLS, TOGETHER WITH SEVERAL RULES & CUSTOMS,

agendas, but it is on these nineteenth-century commentators that Justice Scalia anachronistically relies to deny such a construction. Scalia writes, “Logic demands that there be a link between the stated purpose and the command.”<sup>184</sup> Using an exaggerated example of an obvious variance between the stated purpose of a preamble and the operative clause, he asserts:

But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. See F. Darris, *A General Treatise on Statutes* 268–269 (P. Potter ed. 1871) (hereinafter *Darris*); T. Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 42–45 (2d ed. 1874).<sup>3</sup> “It is nothing unusual in acts . . . for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.” J. Bishop, *Commentaries on Written Laws and Their Interpretation* § 51, p. 49 (1882) (quoting *Rex v. Marks*, 3 East, 157, 165 (K. B. 1802)).<sup>185</sup>

Scalia adds, “[I]n America ‘the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms.’”<sup>186</sup> Though it may be correct to follow what the law has been since the mid-nineteenth century, a justice can not retroactively apply the rule to the eighteenth. John Jay, riding circuit in the 1790s, provides a far more reliable contemporary opinion: “A preamble cannot annul enacting clauses; but when it evinces the intention of the legislature and the design of the act, it enables us, in cases of two constructions, to adopt the one most consonant to their intention and design.”<sup>187</sup> In view of such differences, we would do well to heed Daines Barrington’s warning, that we should be “cautious of taking it at once for granted, that what is now most clearly established and settled law, might have been so understood in this country some centuries ago.”<sup>188</sup>

Justice’s Scalia’s ahistorical reliance on present-day settled rules of construction disqualifies his dismissal of the controlling force of the preamble. Between the ratification of the Bill of Rights and the writing of the treatises

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WHICH BY LONG AND CONSTANT PRACTICE HAVE OBTAINED THE NAME OF ORDERS OF THE HOUSE, GATHERED BY OBSERVATION, AND OUT OF THE JOURNAL BOOKS FROM THE TIME OF EDWARD 6, at 50 (London, 1670)).

184. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789 (2008).

185. *Id.*

186. *Id.* at 2789 n.3 (quoting J.G. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 47.04 (Norman J. Singer, ed., 5th ed. 1992)).

187. *Jones v. Walker*, 13 F. Cas. 1059, 1065 (C.C.D. Va. n.d.) (No. 7507).

188. BARRINGTON, *supra* note 3, at 160.

cited by Scalia,<sup>189</sup> the movement for codification had effected major changes in American law.<sup>190</sup> The author of one of these treatises cited by Scalia, Theodore Sedgwick, was a conservative who wrote his *Interpretation and Construction of Statutory and Constitutional Law* in 1857 in reaction to the codification movement that had diminished the authority of judges to interpret law. Sedgwick undertook his project, he admitted, as a response to “the extent to which written law is making inroads upon the field of unwritten, customary, or common law.”<sup>191</sup> Sedgwick is an ironic source, indeed, for a justice seeking to protect written law from excessive interpretation because Sedgwick’s aim was to elevate rules that enhanced judicial authority at the expense of legislative or constitutional statements. Diminishing the import of preambles served that goal. Sedgwick’s bias is clear, notwithstanding his claim that he had “intended carefully to avoid the discussion of a political nature, or the expression of opinions having, directly or indirectly, any political bearing.”<sup>192</sup> Sedgwick was writing in a climate of legal change to which he objected: “Statutes, codes, and constitutions succeed each other, and in our time, with greatly increased rapidity, threaten finally to absorb every topic of jurisprudence.”<sup>193</sup> Bemoaning a democratizing trend that he saw spreading in England and throughout Europe, Sedgwick saw this tendency as particularly worrisome in the United States, which lacked “the State machinery and the social and religious organizations of the Old World.”<sup>194</sup>

Justice Scalia rests his rejection of the preamble as controlling, however, most heavily on J.G. Sutherland’s treatise:<sup>195</sup>

As Sutherland explains, the key 18th-century English case on the effect of preambles, *Copeman v. Gallant*, stated that the preamble could not be used to restrict the effect of the words of the purview. This rule was modified in England in an 1826 case to give more importance to the preamble, but in America “the settled principle of law is that the

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189. THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW vii (2nd ed., New York, Baker, Voorhis & Co., 1874). Sedgwick wrote this Preface to the first edition (1857), but the two editions are the same regarding preambles. Justice Scalia has also used the second edition.

190. See, for example, Alison Reppy, *The Field Codification Concept*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS CELEBRATING ONE HUNDRED YEARS OF LEGAL REFORM 36–42 (ed. Alison Reppy, 1949).

191. SEDGWICK, *supra* note 189, at vii.

192. *Id.* at viii.

193. *Id.* at vii.

194. *Id.*

195. Justice Scalia observes of this authority, “there is . . . only one treatise on statutory interpretation that purports to treat the subject in a systematic and comprehensive fashion.” See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 15 (Amy Gutmann ed., 1997).

preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms.”<sup>196</sup>

Sutherland’s construction may have been the case in 1891, when he published his treatise, but it was not unchallenged or settled when the Second Amendment was drafted and ratified. In any case, Sutherland’s historical grounding is defective: He badly misused his primary English source in reaching the conclusion denying the force of preambles. *Copeman v. Gallant*,<sup>197</sup> the case cited as precedent, was a chancery case in which the preamble to a bankruptcy act was argued as restraining the reach of the act and narrowing its application. It is true that the chancellor, William Cowper, first Earl Cowper, did not allow the preamble to control the application of the statute in this case, in which the preamble set out the act’s purpose—to prevent fraud in bankruptcy. Cowper did so, however, against the strenuous arguments of plaintiff’s counsel, who happened to be William Peere Williams himself, the reporter of the case.<sup>198</sup>

Peere Williams made several telling points, such as the fact that it was only owing to a printer’s error “in *dividing*” the preamble from the operative clause that had led to “this clause being read to the court, without the preamble, and as a substantive clause, had the greater weight against us.”<sup>199</sup> Cowper, as chancellor, had ignored the preamble, but “it being a very hard case” he had allowed further argument to consider “this point only.”<sup>200</sup> Peere Williams made it clear that the preamble expressed “the chief end of the statute” and gave it “meaning.”<sup>201</sup> He emphasized “that according to the common rule of construing acts of parliament, and the reason of this case, the generality of the enacting clause shall be qualified by the preamble . . . .”<sup>202</sup> Peere Williams continued, “The preamble of the act has been always thought material in the construction of it; and by Lord *Coke* it is called the key of the act of parliament, to open and explain the meaning thereof.”<sup>203</sup>

Cowper nevertheless remained unwilling to accept this argument, explaining, “I can by no means allow the notion, that the preamble shall restrain the operation of the enacting clause.”<sup>204</sup> Sutherland’s stature notwithstanding, Cowper’s opinion is of dubious value: Sutherland and other

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196. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789 n.3 (2008) (internal citations omitted).

197. *Copeman v. Gallant*, (1716) 24 Eng. Rep. 404 (Ch.).

198. *Id.* at 405.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

authorities—including, of course, Justice Scalia—fail to note that Cowper’s opinion denying the controlling force of a preamble was “expressly disapproved” in 1749. Sutherland and Justice Scalia thus err badly in overlooking the following comment appended to the *English Reports* edition of *Copeman*:

But this opinion of Lord Cowper’s with respect to the operation of the preamble, is expressly disapproved by Lord Chief Baron Parker and Lord Hardwicke in *Ryall v. Rowles*, 1 Atk. 175, 182 and 1 Vez. 365, 371, S. C. [same case], and they held the present case of *Copeman v. Gallant*, to be well decided on the construction of the act as restrained by the preamble.<sup>205</sup>

As Lord Chancellor Hardwicke held on a clause in question in *Ryall*, the 1749 case that disputed the rule in *Copeman*, he had to “differ from Lord Cowper” and agree with Sir John Holt “that this clause must be restrained by the preamble.”<sup>206</sup> William Lee, Chief Justice of King’s Bench, agreed, citing the purpose of the preamble and holding “that it should be taken most beneficially for that purpose. Every word of the statute must be considered both of the preamble and enacting clause.”<sup>207</sup>

Justice Scalia also addresses the commonplace nature of preambles: “Although this structure of the Second Amendment is unique in our Constitution, other legal documents of the founding era, particularly individual-rights provisions of state constitutions, commonly included a prefatory statement of purpose.”<sup>208</sup> Indeed those constitutions did, and such statements of purpose were deemed controlling, as necessary to assure the faithful carrying out of the will of the Framers. This is why, for example, New Hampshire’s 1784 constitution is replete with preambles. A convention had drafted a constitution in 1781 and sent it to the voters for ratification. However, because of its vagueness, the constitution was sent back with so many amendments that it required redrafting. A second version was then submitted in early 1783, but it too did not satisfy the voting public, who forced the drafting of a third version, which was finally ratified in 1783 and took effect the next year.<sup>209</sup>

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205. *Id.* at 407. The headnote to this case also directs the reader to *Ryall* “[o]n point as to construction.” *Id.* at 404.

206. *Ryall v. Rowles*, (1794) 27 Eng. Rep. 1074, 1088 (K.B.).

207. *Id.* at 1086. Lord Chief Baron Thomas Parker noted of Cowper’s decree, “[T]hough I approve of his decree, I cannot agree to the reason . . .” *Id.* at 1084.

208. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789 (2008) (citing *Volokh*, *supra* note 165, at 814–21).

209. See 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 89, at 2453 n.b (describing these difficulties in ratifying the New Hampshire Constitution).

Significantly, the 1784 constitution satisfied the voters with its numerous preambles or prefatory statements, which presumed to control the government they had established. If even these provisions did not serve to protect voters' liberties, the constitution included a right of revolution, which began with a preamble:

Government being instituted for the common benefit, protection, and security of the whole community, and not for the private interest or emolument of any one man, family or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old, or establish a new government. The doctrine of non-resistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.<sup>210</sup>

The right of revolution was not to be exercised lightly, nor did it sanction individual resistance: The preamble was to be read as controlling when—and only when—resistance was to be exercised. It specified when “the people” were to act to protect “public liberty” and expressly distinguished its purpose from that of serving “the private interest or emolument of any one man, family, or class of men.” Whether we label this a justification or a purpose, it is surely a limitation.

When delegates completed their work in Philadelphia in 1787 and presented to the states for ratification what became the federal Constitution, the suspicion of corrupted or miscarried popular will had not abated. Indeed, the idea of granting away certain sovereign powers to a distant and untried form of government placed a heavy burden on the drafting of the federal Constitution. Doubters demanded amendments to express precise limitations on the new federal government, but even provisions such as these left some dissatisfied. Richard Henry Lee wrote to Patrick Henry in September 1789:

[L]ittle is to be expected from Congress that shall be any ways satisfactory on the subject of Amendments. Your observation is perfectly just, that right without power to protect it, is of little avail. Yet small as it is, how wonderfully scrupulous they have been in stating Rights? The english language has been carefully culled to find words feeble in their Nature or doubtful in their meaning!<sup>211</sup>

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210. N.H. CONST. of 1784, art. X, reprinted in 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 89, at 2455.

211. Letter From Richard Henry Lee to Patrick Henry (Sept. 27, 1789), in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 298, 298–99 (Helen E. Veit et al. eds., 1991).

Long periods of accepted usage of terms had helped to reflect a public “consent” to language, much as the common law had established meaning over time. The hurried effort to draft constitutions, however, had not allowed such a process, and the states were revising their own constitutions even as the concept and reality of a new federal one was before them.

The text of the fourth amendment submitted to the states<sup>212</sup> did not include a preamble when it made its first appearance before the U.S. House of Representatives on June 8, 1789. It did, however, include a militia clause. The text began with what became the operative clause:

The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.<sup>213</sup>

The House Committee of Eleven, however, made two significant changes before it reported the amendment to the House of Representatives for consideration on July 28. Most importantly, it made sure that the amendment’s purpose and meaning were clear by rearranging its clauses to place the militia clause first, as a preamble. The import of this change cannot be overemphasized, as it elevated protection of militia service to controlling language; otherwise it would have been left where it had been before. The committee also specified the term “composed of the body of the people” to describe the militia.<sup>214</sup>

Further support for the civic rights militia interpretation emerges from the next step in drafting the amendment. When the House Committee of the Whole addressed the amendment on August 17, Elbridge Gerry rose to reemphasize that “This declaration of rights, I take it, is intended to secure the people against the mal-administration of the government,”<sup>215</sup> and on that basis he challenged the “uncertainty” of the preamble. Gerry agreed with the statement, “A well-regulated militia being the best security of a free state,” but he preferred changing the language “to read ‘a well regulated militia trained to arms.’”<sup>216</sup> The motion was not even seconded, but not because the committee believed that omitting “trained to arms” would guarantee an individual right removed from militia service. Rather, as Gerry expressly addressed this issue, the changed wording would have diminished the importance of

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212. Which became, finally, the Second Amendment after the two first listed were not ratified.

213. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 169 (Neil H. Cogan ed., 1997).

214. *Id.* at 169–70.

215. Statement of Elbridge Gerry (August 17, 1789), in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, *supra* note 211, at 179, 182.

216. *Id.* at 184.

keeping and bearing arms for militia service by having the government provide arms. For Gerry, a standing army was a “secondary” security, and requiring a “well-regulated militia trained to arms” would make it “the duty of the government to provide this security, and furnish a greater certainty of its being done.”<sup>217</sup> After two months of House debate, the amendment went to the Senate, which took only two weeks to delete the term “the body of the people” and the exemption to religious objections to service. It was in this form that the amendment went to the states, its preamble firmly in place to give meaning to the right protected.<sup>218</sup>

## V. CONCLUSION: THE EVOLUTION OF MEANING AND THE TRANSFORMATION OF A RIGHT

Few scholars have been as influential as Akhil Amar in demonstrating the impact of historical change on the Constitution, and especially on the Bill of Rights, whose meaning, he has persuasively shown, was transformed by the Fourteenth Amendment.<sup>219</sup> His scholarship has been rightly praised for shifting our focus from the Founders to the Reconstruction Congress, and it continues to be cited by constitutional scholars seeking to move beyond a “commitment to a desiccated version of originalism” that stops its “historical clock” in 1787, producing “superb history” but “dubious constitutional and political theory.”<sup>220</sup> This Article has set out a new way of entering and understanding that Founding period. I conclude by demonstrating that this way also affords a better understanding of constitutional change, and provides for scholars seeking a use for that past. Historians do this all the time; their goal is to understand change over time, to pose the still useful cliché of compare and contrast in order to sharpen our understanding of difference. For our present purposes, the recapture of an “original public meaning” of the Second Amendment is served by noting how different “the right of the people to

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217. *Id.*

218. The U.S. House of Representatives version also involved two minor stylistic changes. For the process of drafting, see THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 213, at 169–76. See also Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 126, 128–29, 157–59 (2000) (explaining the rejection of “body of the people” from the final draft).

219. Amar’s extensive writings are ably presented in two monographs. See generally AMAR, AMERICA’S CONSTITUTION, *supra* note 124; AMAR, THE BILL OF RIGHTS, *supra* note 124. For a challenge to Amar’s interpretive method, see generally William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights*, 106 MICH. L. REV. 487 (2007).

220. Sanford Levinson, *Superb History, Dubious Constitutional and Political Theory: Comments on Uviller and Merkel, The Militia and the Right to Arms*, 12 WM. & MARY BILL RTS. J. 315, 316, 325 (2004).

keep and bear Arms” became in the nineteenth century.<sup>221</sup> The need felt by nineteenth-century Americans to articulate what that right had become—an individual right—proves what that right had not been when ratified in 1791. Amar and Levinson, that is, are correct to note the changed conception of that right after Reconstruction, and Saul Cornell has moved that change back several decades to the years after the War of 1812. “Although much modern scholarship on the right to bear arms has treated this right in static terms,” he observes,

a profound transformation in the history of the right to bear arms occurred in the early Jacksonian era, when several state constitutions abandoned the distinctive eighteenth-century formulation, “the right of the people to keep and bear arms in defense of themselves,” in favor of a much more unambiguously individual right, “every citizen has a right to bear arms, in defence of himself and the State.”<sup>222</sup>

Cornell provides numerous examples of altered constitutional language and offers them as examples of diversity of meaning and a warning against too static a view of the conception of rights.<sup>223</sup> This Article suggests that we move that transformative process a few more years back in order to discover what that new language tells us.

Turning our interest to the 1780s and 1790s reveals how rapidly this change took place. The constituting of popular sovereignty through state constitutions in the 1780s legitimized republican institutions such as the jury and the well regulated militia: “[T]he people themselves,” that is, were now embodied in constitutionally protected mechanisms of government whose existence called into question the legitimacy of the Revolution’s broader *ad hoc* mobilization of “the people out of doors” of the 1770s. Even so, the notion of popular mobilization died hard, and disturbing uprisings in the 1780s revealed that invoking the right of resistance had opened a Pandora’s box. The rebellion led by Daniel Shays in Massachusetts in 1786 is the best known, but events in that state were not unique, leading George Washington to decry the existence of “combustibles in every state.”<sup>224</sup> The Shaysites’ claim to be, like the Sons of Liberty a decade earlier, the legitimate embodiment of the

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221. For the articulation of this right as an individual one in the nineteenth century, see the provisions listed by Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 209–14 (2006–07).

222. Saul Cornell, *Beyond the Myth of Consensus: The Struggle to Define the Right to Bear Arms in the Early Republic*, in BEYOND THE FOUNDERS: NEW APPROACHES TO THE POLITICAL HISTORY OF THE EARLY AMERICAN REPUBLIC, *supra* note 65, at 265; see also *id.* at 251–73.

223. *Id.*

224. Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WM. & MARY Q. 39, 43–44 (1998).

people affronted their opponents, who regarded them instead as “Sons of Fraud and Violence” and “Sons of Licentiousness.”<sup>225</sup>

Although many citizens in Massachusetts had taken literally that commonwealth’s right-to-resist clause,<sup>226</sup> the Shaysite challenge prompted a serious rethinking of what that clause actually meant. Thomas Jefferson illustrates the sharpness of this change. On hearing of the Shaysites in 1786, Jefferson, in Paris, responded by famously remarking of popular uprisings, “I like a little rebellion now and then. It is like a storm in the Atmosphere.”<sup>227</sup> Back in the United States in 1799, however, he had changed his attitude. The threat that opposition to the Alien and Sedition Acts would turn violent alarmed him. Watching the gathering storm of resistance, he wrote to Edmund Pendleton:

Even the German counties of York and Lancaster [Pennsylvania], hitherto the most devoted, have come about, and by petitions with four thousand signers remonstrate against the alien and sedition laws, standing armies, and discretionary powers in the President. New York and Jersey are also getting into great agitation. In this State, we fear that the ill-designing may produce insurrection. Nothing could be so fatal. Anything like force would check the progress of the public opinion and rally them round the government. This is not the kind of opposition the American people will permit. But keep away all show of force, and they will bear down the evil propensities of the government, by the constitutional means of election and petition. If we can keep quiet, therefore, the tide now turning will take a steady and proper direction.<sup>228</sup>

Jefferson, we should note, here had used the pejorative term “insurrection” to describe the plans of such “ill-designing men.” He had done so because he recognized that the better course of constitutional resistance was organized political action on a national scale. Such a movement would, with his victory and that of his party in the election of 1800, channel the power of the

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225. See William Pencak, “The Fine Theoretic Government of Massachusetts Is Prostrated to the Earth”: *The Response to Shay’s Rebellion Reconsidered*, in *IN DEBT TO SHAYS: THE BICENTENNIAL OF AN AGRARIAN REBELLION* 121, 124, 128–32, 142 (Robert A. Gross ed., 1993).

226. See MASS. CONST. of 1780, pt. I, art. VII, in 3 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 89, at 1888, 1890.

227. Letter From Thomas Jefferson to Mrs. John (Abigail) Adams (Feb. 22, 1787), in 4 *THE WORKS OF THOMAS JEFFERSON* *supra* note 175, at 369, 370. Jefferson made this same comment, in slightly different forms, several times in 1787. See *id.* at 362, 370, 467.

228. Letter from Thomas Jefferson to Edmund Pendleton (Feb. 14, 1799), in 10 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 176, at 104, 105.

people into effective opposition to any diminution of their rights and effect political change worthy of the term “revolution.”<sup>229</sup> Larry Kramer describes this:

Preserving the people’s active control of their government and their Constitution remained paramount. But new devices were emerging to secure that control without violence, particularly as political parties formed and introduced novel practices to make the people’s voice effective.<sup>230</sup>

Nothing less than a major transformation of political culture had overtaken the reliance on militias and forcible resistance to government. This is a well documented change, and the details of its scope do not need revisiting here.<sup>231</sup> In its shorthand form, this change addresses the “transformative” impact of national partisan politics in the 1790s, “unofficially but effectively rewriting the Constitution to incorporate organized competition for popular majorities”<sup>232</sup> and replacing the republican concept of “the people” as communal by one of “atomized sovereignty.”<sup>233</sup> Along with an enhanced role for the judiciary in reviewing legislation<sup>234</sup> appeared the conferring of greater powers of veto by governors, now more commonly elected by the people.<sup>235</sup>

The meaning of preambles also changed. As state constitutions “sorted out powers and defined jurisdictions,” explains William Nelson, a new conception of political language emerged.<sup>236</sup> Examining legislation in this period, Nelson finds a diminishing reliance on preambles: The two Massachusetts legislatures sitting before the state’s 1780 constitution took effect had enacted

229. The most recent demonstration of these changes is *THE REVOLUTION OF 1800: DEMOCRACY, RACE, AND THE NEW REPUBLIC* (James Horn, Jan Ellen Lewis, & Peter S. Onuf eds., 2002).

230. KRAMER, *supra* note 52, at 111. Kramer cites the broad scholarly consensus on this transformation. See *Id.* at 108–09, 297 n.106, (citing Michael Lienesch, *Reinterpreting Rebellion: The Influence of Shays’s Rebellion on American Political Thought*, in *IN DEBT TO SHAYS: THE BICENTENNIAL OF AN AGRARIAN REBELLION* *supra* note 225, at 161, 161; LEONARD L. RICHARDS, *SHAYS’S REBELLION: THE AMERICAN REVOLUTION’S FINAL BATTLE* (2002); JAMES ROGER SHARP, *AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS* 117–37, 187–225 (1993) (writing on Jay’s treaty and the Alien and Sedition Acts); Robert H. Churchill, *Popular Nullification, Fries’ Rebellion, and the Waning of Radical Republicanism, 1798–1801*, 67 *PA. HIST.* 105, 129 (2000); Paul A. Gilje, *The Baltimore Riots of 1812 and the Breakdown of the Anglo-American Mob Tradition*, 13 *J. SOC. HIST.* 547 (1980); Suzette Hemberger, *A Government Based on Representation*, 10 *STUD. AM. POL. DEV.* 289 (1996) (writing about the Whiskey Rebellion)).

231. For the most comprehensive and persuasive account, see generally GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992).

232. Jeffrey L. Pasley, *The Cheese and the Worms: Popular Political Culture in the Early American Republic*, in *BEYOND THE FOUNDERS: NEW APPROACHES TO THE POLITICAL HISTORY OF THE EARLY AMERICAN REPUBLIC*, *supra* note 64, at 31, 41–45.

233. ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* 28 (1995).

234. See KRAMER, *supra* note 52, at 51.

235. See James A. Henretta, *Rethinking the State Constitutional Tradition*, 22 *RUTGERS L.J.* 819, 822 (1991); see also JOEL H. SILBEY, *THE PARTISAN IMPERATIVE: THE DYNAMICS OF AMERICAN POLITICS BEFORE THE CIVIL WAR* (1985).

236. NELSON, *supra* note 123, at 90.

sixty-five laws, and only two of them lacked preambles.<sup>237</sup> By contrast, in 1788–89, almost half omitted them.<sup>238</sup> “Legislation was coming to rest solely on a ‘be it enacted’ clause—a naked assertion of sovereign legislative power.”<sup>239</sup> New York reveals a similar trend in its constitutions of 1777 and 1821: The former included twenty-two preambles or prefatory statements;<sup>240</sup> the latter,<sup>241</sup> only one—directly quoted from the earlier document.<sup>242</sup>

The “people” had taken on a more inclusive meaning—a process aided by the exclusion of African Americans—and white males without property were able to claim membership in the voting body politic. Religious affiliation, once determined by residence or directed by the designation of favored sectarian groups, became a matter of individual choice through self-identification and the creation of new denominations. Epitomized by the Second Great Awakening in the early years of the century, competition and individualism had shattered older institutional conventions in religion in the same manner as those forces had done in so many other areas of American life.<sup>243</sup>

It was perfectly natural, therefore, that the right to bear arms would be transformed as well, as militias evolved from the constituted public to self-constituted fraternal organizations. By the 1850s, the right to bear arms had come to be seen as belonging to individuals who might or might not choose to affiliate in the exercise of that right. One study of this transformation comments that at the Revolution “the major political conflict was between governors and governed rather than among competing groups within the population.”<sup>244</sup> Now it was the latter, and Americans would come to turn their guns against one another. With the acquisition of firearms in record numbers in that decade, violence over slavery was shedding blood across Kansas, leading even men such as Senator Charles Sumner to respond to the exigencies of the situation by championing the right to bear arms. But such statements were the fevered response to a disintegration of the social and political fabric, and it attracted adherents who articulated that right within a radical philosophy outside the mainstream of the times and certainly alien

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237. *Id.* at 91.

238. *Id.*

239. *Id.*

240. N.Y. CONST. of 1777 pmb., reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 89, at 2623–37.

241. N.Y. CONST. of 1821 pmb., reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 89, at 2639.

242. *Id.* at 2637, 2648 (barring clergy from civil or military office).

243. See generally NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY (1989) (on religious revolt as emphasizing the dictates of individual conscience).

244. TARR, *supra* note 152, at 73.

to the America of the eighteenth century. Lysander Spooner, for example, another figure approvingly cited by Justice Scalia for his assertion of arms for “personal defence,” was actually a nineteenth-century “anarcho-capitalist” whose extremism stands as an exception in the American tradition.<sup>245</sup> Figures such as Spooner are scarcely to be exhibited as revealing the public meaning of the Constitution in 1791.

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245. Justice Scalia references Charles Sumner and Lysander Spooner in the *Heller* opinion. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2807 (2008) (citing LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY* 116 (Boston, Bela Marsh 1845) and Charles Sumner, *The Crime Against Kansas, May 19–20, 1856*, in *AMERICAN SPEECHES: POLITICAL ORATORY FROM THE REVOLUTION TO THE CIVIL WAR* 553, 606–07 (2006)). *But see* *EXTREMISM IN AMERICA: A READER* 11 (Lyman Tower Sargent ed., 1995) (discussing Lysander Spooner’s radicalism as an anarcho-capitalist).