

SODOMY AND GUNS: TRADITION AS DEMOCRATIC DELIBERATION AND CONSTITUTIONAL INTERPRETATION

WILLIAM N. ESKRIDGE, JR.*

| | |
|--|-----|
| INTRODUCTION | 193 |
| I. TRADITION KNOWN TO THE FRAMERS AS EVIDENCE OF ORIGINAL MEANING | 195 |
| A. Anachronism: The Changed Circumstances Problem..... | 197 |
| B. Cherry-Picking Problems: How Is Tradition Interrogated and Weighed?..... | 199 |
| 1. Multiple Traditions and the Level of Generality Problem..... | 199 |
| 2. What Counts as Tradition? | 200 |
| 3. Burden of Proof? | 201 |
| C. Illegitimacy Problems | 201 |
| II. POST-ADOPTION TRADITION AS CONSTITUTIONAL ADVERSE POSSESSION | 203 |
| A. Anachronism..... | 206 |
| B. Cherry-Picking..... | 207 |
| C. Illegitimacy..... | 209 |
| III. TRADITION AS DEMOCRATIC DELIBERATION | 209 |
| CONCLUSION..... | 218 |

INTRODUCTION

The Rehnquist and Roberts Courts have inaugurated a golden age for tradition-based arguments in constitutional law. All of the Justices consider such arguments, and several are amateur historians who have centered their jurisprudence on what constitutional traditions require of us today. Such arguments are the primary legal basis for whole areas of constitutional law, includ-

* John A. Graver Professor of Jurisprudence, Yale Law School.

ing presidential powers, state immunity, anti-commandeering limits on congressional authority, and the rights to privacy, to keep and bear arms, to habeas corpus, and to be free of cruel and unusual punishment. Other areas of constitutional law, such as equal protection and free speech, are not dominated by these arguments today but might be in the future.

Arguments from tradition raise a central conundrum. Lawyers and judges tend to interpret "tradition" statically and instrumentally, to mean legal practices or norms that have persevered over a long period of time *and* that provide stable meaning that can be used to resolve a legal issue. The static understanding is related to the instrumental use, because lawyers and judges prefer simplicity to complexity. In contrast, historians approach tradition dynamically and non-instrumentally, to mean legal practices or norms that as a general principle have persevered in some ways and evolved in others. Tradition is rarely simple and univocal; it is multifarious, evolving, and complicated. This understanding creates problems for the judge wielding tradition instrumentally. That tradition is evolving creates risks of anachronism, where the interpreter reads his own values and viewpoint back into the past. That tradition is multifarious creates risks of cherry-picking, where the interpreter (unconsciously) manipulates tradition by focusing on features she finds congenial and ignoring the rest and by interrogating that fragmentary tradition with loaded questions. That tradition is complicated creates risks of illegitimacy, where the interpreter's misinterpretation or manipulation imposes duties or creates rights that obstruct the needed projects and experiments of current legislatures.

This Essay uses case studies of sodomy and gun litigation to explore three values that lawyers and judges find in tradition, and also to understand those values critically, from a historian's point of view. Tradition shall be examined as evidence of original meaning, constitutional adverse possession, and precepts conformed by democratic deliberation. Each of these deployments of tradition is subject to the anachronism, cherry-picking, and illegitimacy problems identified above. In my view, the most problematic use of tradition is the first, tradition as evidence of original meaning. The best legal theory for tradition in constitutional law is the third, tradition as democratic deliberation. The third theory is the one that most respects the historian's dynamic point of view; it can enlighten the inter-

preter and alter his views about contested matters. This theory provides plausible defenses not only for a laudable Supreme Court decision, but also for two other decisions whose outcomes are questionable.

I. TRADITION KNOWN TO THE FRAMERS AS EVIDENCE OF ORIGINAL MEANING

The Supreme Court and many commentators believe that a constitutional provision's original meaning is determinative of or relevant to its modern interpretation. If the Constitution is a social contract among Us the People, whose terms dictate the governance structure and some fundamental untrumpable values of our polity, then the shared understanding of what those terms meant is relevant when we are later called upon to apply and interpret the Constitution.¹ Traditions that can be traced back to the framing eras can be a valuable aid in that process of interpretation. Take the Bill of Rights (1791) and the Fourteenth Amendment (1868). The original meaning of their terms can be usefully understood by reference to traditions that would have been known to the Framers, the ratifying legislatures, and the citizens of those eras.

Assume, as the Court has long assumed, that the liberty protection of the Due Process Clauses of the Fifth and Fourteenth Amendments includes a substantive element: There are some liberties for which the state must provide a compelling justification for the deprivation not to be arbitrary (the ultimate "due process" protection).² Almost every state action deprives some persons of liberty in the abstract, yet it would be absurd to agonize over all of these liberty deprivations; thus, only the most serious deprivations trigger constitutional concerns. Which liberty deprivations trigger such concerns is a matter of importance. Liberties long understood as important when a constitutional provision was adopted are potentially important clues as to original meaning. There are, however, huge epistemic diffi-

1. *See, e.g.*, ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143–45, 154–55 (1990).

2. Some early sources include *Meyer v. Nebraska*, 262 U.S. 390 (1923), and THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (Victor H. Lane ed., Little, Brown 1903) (1868).

culties in coming up with the proper list of liberties. First, the Framers and ratifiers debated issues at a high level of generality and did not say much about specific liberty issues. Second, even when a Framers or ratifier said something specific and relevant to the issue, it is hard to generalize that person's stated (and sincere?) views to the population of ratifiers and citizenry. And, third, discussions so long ago (1791 and 1868) operated under very different assumptions about human needs, social policy, science, and so on, and might not be easily transferred to issues today without some interpolation.³

Consider Justice White's opinion for the Court in *Bowers v. Hardwick*.⁴ The issue was whether Georgia's sodomy law could be applied to oral sex in a private apartment between consenting adults—here, two men—without violating the Fourteenth Amendment's liberty protection. Sodomy never came up in the congressional or state ratifying debates, but Justice White and those Justices who wrote concurring opinions got around this difficulty by reference to tradition: Because Anglo-American law at the time of the Fourteenth Amendment (1868) had long prohibited the "crime against nature,"⁵ and because these laws and their moral foundations would have been well-known to the Framers and ratifiers, the *Bowers* majority presumed that homosexual sodomy cannot be a "liberty" given extra protection by the Due Process Clause.⁶ That the anti-homosexual tradition embedded in Anglo-American law and society had flourished during the twentieth century also enabled the majority Justices to conclude, without any evidence in the record, that citizens of Georgia intended their gender-neutral sodomy law to reflect an anti-homosexual morality, which was a rational basis to sustain the law.⁷ At each stage of analysis, his-

3. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214–21, 229–31 (1980); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1073–75, 1087–93 (1990); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793–804 (1983).

4. 478 U.S. 186 (1986).

5. *Id.* at 197 (Burger, C.J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *215).

6. *Id.* at 192–94 (majority opinion).

7. *Id.* at 196 (affirming as a rational basis for the state law "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable"). It should be noted that Georgia *never* had a sodomy law that focused on "homosexual conduct."

torical tradition enabled the Court to resolve matters of uncertainty about language, public intentions, and constitutional purpose.

Tradition also provided a limiting principle for the case-by-case elaboration of the constitutional privacy right that the Court had creatively teased out of the Due Process Clause. Justice White emphasized this, too, in his opinion. Because the specification of due process liberty to provide special protections for people's privacy against state invasion did not have concrete support in the constitutional text or framing discussions, an expansive view of privacy would imperil the Court's legitimacy as the enforcer of a strict rule of law.⁸

Unfortunately, *Bowers*, the exemplar of a tradition-based jurisprudence of original meaning, also illustrates the limitations or pitfalls of such a jurisprudence in the hands of lawyers and judges.⁹ Because originalist scholars and judges seek stability and closure from history and tradition, they easily fall prey to criticism that their enterprise is anachronistic, ahistorical "law office history"¹⁰ rather than a genuine historical exploration of the norms, vocabulary, and world of the Framers.¹¹ "Tradition" is both dynamic and plastic, and that means that its deployment requires a high level of expertise and historicity, scrupulousness, and prudence. *Bowers* is a case where the Justices flunked this standard rather dramatically.

A. *Anachronism: The Changed Circumstances Problem*

One problem with using tradition to figure out original meaning is changed circumstances: The practices, laws, and even vocabulary familiar to the Framers often reflect a worldview very different from our own. Has the interpreter under-

8. *Id.* at 194-95; accord *Washington v. Glucksberg*, 521 U.S. 702 (1997) (upholding assisted suicide ban upon a similar tradition-based theory).

9. Justice White's account is hardly idiosyncratic to that Justice, for it draws heavily from the Brief of Petitioner at 21-26, *Bowers*, 478 U.S. 186 (No. 85-140), and from Judge Bork's opinion in *Dronenburg v. Zech*, 741 F.2d 1388, 1396 (D.C. Cir. 1984) (refusing "to protect from regulation a form of behavior never before protected, and indeed traditionally condemned").

10. Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2098 (1999).

11. See, e.g., Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

stood the circumstances of the past and applied its lessons defensibly to a modern problem?

The majority opinion in *Bowers v. Hardwick* was a clumsy effort in this respect. Hardwick and another man were arrested for engaging in oral sex, which Justice White treated as the kind of “homosexual sodomy” that the Framers of the Fourteenth Amendment would have understood as a longstanding and notorious crime in 1868. Yet an actual American lawyer in 1868 would have had no idea what “homosexual” meant; the word was not coined until the end of the nineteenth century,¹² and no American sodomy law homed in on “homosexual sodomy” until 1969, fully a century after the Fourteenth Amendment was ratified.¹³ If Justice White had explained that homosexual sodomy simply meant oral sex between two persons of the same sex, the 1868 lawyer would have remained somewhat baffled, for sodomy laws did not cover oral sex, another term Justice White might have been required to explain. Not a single American jurisdiction in 1868 identified oral sex as sodomy or a crime against nature, and the English authorities and American treatises all explicitly excluded oral sex from criminal prohibitions.¹⁴ A learned lawyer could have told Justice White what “sodomy” was: It was anal rape by a man against another man, a boy, a woman, a girl, or an animal.¹⁵ Except for a 1656 law in the New Haven Colony, sex of any kind between two women was *never* sodomy or a crime against nature in the pre-1868 Anglo-American tradition.¹⁶

In the late nineteenth and early twentieth century, sodomy laws were updated in most states to include oral sex (though

12. See *Lawrence v. Texas*, 539 U.S. 558, 568 (2003).

13. For a survey of state sodomy laws, see WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003*, at 387–407 (2008). The first state law limited to same-sex (homosexual) activities was 1969 Kan. Laws ch. 180, § 21-3505.

14. William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 655–56, 667 (collecting references to treatises and English case law as to the ambit of sodomy and crime against nature laws); see also ESKRIDGE, *supra* note 13, at 387–407 (appendix identifying when each state expanded its sodomy law to include oral sex).

15. See *R v. Jacobs*, (1817) 168 Eng. Rep. 830 (K.B.); *R v. Wiseman*, (1716) 92 Eng. Rep. 774, 774–75 (K.B.); see also EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES* 59 (London, E. & R. Brooke 1797) (1644).

16. See ESKRIDGE, *supra* note 13, at 16–23.

usually *not* oral sex between two women), and enforcement of new oral sex bans in the twentieth century was overwhelmingly against men seeking or having sex with other men.¹⁷ In a century when huge majorities of heterosexual married couples engaged in oral (and many in anal) sex to spice up their marriages, Americans culturally erased the generalized wording of sodomy laws and assumed that the real targets were homosexuals, people whose characteristic (rather than episodic) sexual activity was “unnatural” (that is, not procreative penile-vaginal sex).¹⁸ Justice White had so thoroughly assimilated this cultural understanding that he assumed it is transhistorical and universal. It is not.

B. *Cherry-Picking Problems: How Is Tradition Interrogated and Weighed?*

Bowers v. Hardwick also illustrates the richness and the potential plasticity of tradition. Even if a modern interpreter can truly understand the traditions of the past, “using” them to create constitutional lines raises cherry-picking problems for any but the most scrupulous interpreter. Where a constitutional case raises issues that go to the heart of people’s emotional or cognitive commitments, as homosexuality did in 1986, no interpreter is capable of being entirely scrupulous. With so much richness and detail, using tradition in *Bowers* was like looking out over a crowd and picking out your friends (to borrow from Judge Harold Leventhal).¹⁹

1. *Multiple Traditions and the Level of Generality Problem*

Tradition is multifarious: Our country enjoys many different traditions, and more than one tradition might be relevant to a constitutional inquiry. Tradition is also amorphous and can be identified and characterized at various levels of generality. To justify protection for Hardwick’s activities as protected “liberty,” Justice White demanded that Hardwick establish a long-standing tradition protecting “homosexual sodomy.”²⁰ As Jus-

17. See *id.* at 49–59, 85–99.

18. See *id.* at 76–84.

19. The Leventhal quip was made in connection with the use of legislative history. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 36 (1997).

20. See *Bowers v. Hardwick*, 478 U.S. 186, 191–95 (1986).

tice Blackmun pointed out, that was an unfairly specific inquiry.²¹ Does the Fourth Amendment's protection against state wiretaps require the citizen to show a longstanding tradition protecting telephone use? But Justice Blackmun was slanted in the other direction: All Hardwick had to establish was longstanding tradition protecting intimate relations within the home, and his own private activities were protected.²² Does the right to privacy protect the man who has intimate relations with a female minor, simply because such relations are important to each of those persons and occurred within the home?

2. What Counts as Tradition?

In constructing an account of tradition, all the *Bowers* Justices focused just on legal sources. Because there are a lot of sources for guidance on the legal tradition, judgment about what should be consulted and what should be counted is often subjective. And that creates additional cherry-picking problems. For example, Justice White treated crime-against-nature laws as a tradition of illegality for *consensual, private* sodomy; he assumed that generally phrased laws applied to consensual activities.²³ Because such a broad reading cut against the public justification for such laws, I examined their pattern of enforcement during the nineteenth century and found a focus on *non-consensual* or *public* activities, and sometimes both.²⁴

This is a more thorough methodology, but is it a better one? That really depends on how the interpreter defines tradition. If it is only the announced, *public* understandings of our society's governing norms, then some of my evidence is irrelevant. If tradition *also* includes the practical application and day-to-day operation of announced norms, then my evidence is relevant but should be supplemented.²⁵

21. *See id.* at 199–200 (Blackmun, J., dissenting).

22. *Id.* at 204–08.

23. *Id.* at 192–94 (majority opinion).

24. Brief of the Cato Institute as *Amicus Curiae* in Support of Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (with appendix listing all reported nineteenth-century American sodomy decisions); *see also* WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 156–66, 374–75 (1999).

25. Thus, one might examine municipal records describing the exact circumstances for every sodomy arrest in some major cities, to see if sodomy laws were *ever* applied to private relations between consenting adults. *Cf.* William E. Nelson, *Government by Judiciary: The Growth of Judicial Power in Colonial Pennsylvania*, 59

3. Burden of Proof?

In *Lawrence v. Texas*, which overruled *Bowers*, both Justice Kennedy and Justice Scalia relied on my examination of the practical application of sodomy laws to figure out what a tradition-based original meaning might be for “liberty.”²⁶ The Justices, however, asked different questions of tradition. Writing for the Court, Justice Kennedy asked whether there was a long-standing and well-known tradition excluding gay people’s private intimacies from the liberty assured all other Americans for their intimate relationships: There was not.²⁷ Writing for the dissenters, Justice Scalia posed a very different question, whether the homosexual defendants had demonstrated an *affirmative* protection for “homosexual sodomy” in nineteenth-century America: assuredly not.²⁸ Depending on how you phrase the question, the same evidence can support different conclusions.

Underlying Justice Scalia’s interrogation was strong skepticism toward the privacy precedents.²⁹ Underlying Justice Kennedy’s interrogation was an acceptance of the privacy cases, and a baseline assumption that gay people are decent, normal Americans. Justice Scalia: Have the homosexuals shown me that tradition affirmatively protects them? Justice Kennedy: Why shouldn’t lesbian and gay Americans enjoy the same privacy as straight ones?

C. Illegitimacy Problems

An early Supreme Court sexual relations precedent is *McLaughlin v. Florida*,³⁰ which invalidated a statute making it a crime for persons of different races to cohabit openly. Justice White’s opinion for the Court relied on the Equal Protection Clause rather than a due process privacy right to scuttle the

SMU L. REV. 3, 44 (2006) (finding no convictions for “sodomy” in colonial Pennsylvania’s courthouse records).

26. *Lawrence*, 539 U.S. at 567–72 (Kennedy, J., for the Court) (relying on Eskridge, *Hardwick and Historiography*, *supra* note 14, at 656, and the Cato Amicus Brief, *supra* note 24, at 16–17, and replicating chunks of the amicus brief’s analysis); *id.* at 597–98 (Scalia, J., dissenting) (relying on ESKRIDGE, *supra* note 24, at 159, 375).

27. *See id.* at 567–68, 571–72 (majority opinion).

28. *See id.* at 596–98 (Scalia, J., dissenting).

29. For a biting attack on the privacy right, see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 983–84 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

30. 379 U.S. 184 (1964).

law, but there were much better tradition-based arguments supporting the Florida cohabitation law than there were for applying Georgia's sodomy law to consensual activities in *Bowers* twenty-three years later. Not only did northern as well as southern states bar different-race marriages and relationships all over the country during Reconstruction, but the supporters of Reconstruction-era civil rights laws and the Fourteenth Amendment repeatedly disavowed any protection for interracial sexuality or marriage.³¹ *Pace v. Alabama*³² enshrined their understanding in binding precedent.

Justice White was aware of these tradition-based arguments, as were colleagues such as Justices Black and Harlan, both historicists guided by tradition in much of their constitutional jurisprudence. Nevertheless, Justice White ignored tradition almost entirely in his opinion interpreting the Equal Protection Clause.³³ No one dissented.³⁴ Even most strict constructionists have failed to quarrel with *McLaughlin*, because original historical meaning cannot be the end of the inquiry in the race cases. American traditions of race, including slavery and apartheid, were not only morally questionable, but also politically risky. "The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."³⁵

As the foregoing analysis suggests, the legitimacy of constitutional law, even as applied by judges, is not just the application of original meaning or other legal sources to announce a constitutional rule. It also involves the ongoing evolution of our pluralistic society. Notice that society's evolution will also affect tradition itself, which on matters of sexuality as well as race has been evolutive and not static.

31. See Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 656–57; see also Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224 (1966).

32. 106 U.S. 583 (1883).

33. *McLaughlin*, 379 U.S. at 188–90 (discussing *Pace* and dismissing it as "represent[ing] a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court").

34. Two Justices went further than Justice White in disapproving race-based classifications. *Id.* at 198 (Stewart, J., joined by Douglas, J., concurring in the judgment).

35. *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

II. POST-ADOPTION TRADITION AS CONSTITUTIONAL
ADVERSE POSSESSION

In *District of Columbia v. Heller*,³⁶ the Supreme Court for the first time in its history struck down a law as inconsistent with the Second Amendment, which states: “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.*”³⁷ *Heller* recognized and enforced a right for “law-abiding” citizens to possess and use handguns and perhaps other firearms within the home for self-defense.³⁸ This holding was in tension with the text of the Second Amendment and precedent. According to professional linguists and historians, in the eighteenth century “bear arms” almost always meant to use weapons in a military context; hence, the Second Amendment’s “original meaning” was to allow citizens to “keep” military weapons insofar as needed to “bear” them in military service.³⁹ Consistent with that reading of the operative clause’s words (italicized above), the prefatory clause’s emphasis on a citizen militia seems to limit the Second Amendment right “to keep and bear Arms.” The *Heller* Court’s broader construction of the operative clause leaves the prefatory clause as surplusage having no legal consequences, contrary to the canon presuming that *every clause* in the Constitution adds something to its interpretation. The broad reading is also contrary to the Court’s only significant Second Amendment precedent, *Miller v. United States*,⁴⁰ where a unanimous Court limited the Second Amendment right by tying it to militia service.⁴¹

Speaking for the Court, however, Justice Scalia read the Amendment more broadly than the text and precedent would

36. 128 S. Ct. 2783 (2008).

37. U.S. CONST. amend. II (emphasis added).

38. 128 S. Ct. at 2821–22.

39. Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., et al. in Support of Petitioners at 18–28, *Heller*, 128 S. Ct. 2783 (No. 07-290); Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 163–64 (2007) (survey of 115 late-eighteenth-century texts using term “bear arms”); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 618 (2000) (same result for Library of Congress database, 1774–1821). Justice Scalia responded that “keep and bear arms” has a broader meaning than “bear arms.” *Heller*, 128 S. Ct. at 2792–94. *But see id.* at 2827–31 (Stevens, J., dissenting) (responding to Justice Scalia).

40. 307 U.S. 174 (1939).

41. *Id.* at 178.

suggest, and to do so he relied heavily on tradition as evidence of original meaning.⁴² He started with England's Declaration of Rights: "That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law."⁴³ According to Justice Scalia, eighteenth-century Englishmen believed that an armed citizenry, whether presented as a militia or not, was a bulwark against tyranny; the monarchy would think twice before riling a citizenry that could shoot back.⁴⁴ The colonists insisted upon this right in the 1760s and 1770s, when George III sought "to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms. A New York article of April 1769 said that '[i]t is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence.'"⁴⁵

Tradition also helped Justice Scalia respond to the textual argument that "bear arms" had a military meaning in the eighteenth century and to the argument that the drafting history of the Second Amendment was focused only on militia service.⁴⁶ Justice Scalia used tradition to shift the burden of proof: Unless there is clear evidence otherwise, any text guaranteeing a right to keep and bear arms is presumptively connected to the traditional right. A decisive answer to the District's (and *Miller's*) view that the Second Amendment's right was limited to militia use was that it would "treat the Federal Second Amendment as an odd outlier, protecting a right unknown in state constitutions or at English common law."⁴⁷

42. *Heller*, 128 S. Ct. at 2788–802 (Scalia, J., for the Court) (original meaning of Second Amendment's text); *id.* at 2797–99 (tradition-based evidence confirming and deepening linguistic evidence of original meaning).

43. 1689, 1 W. & M. sess. 2, c. 2.

44. *Heller*, 128 S. Ct. at 2797–99; see also Brief of *Amicus Curiae* Academics for the Second Amendment in Support of the Respondent [Ratification and Original Public Meaning] at 14–17, *Heller*, 128 S. Ct. 2783 (No. 07-290) (developing this point in greater detail).

45. *Heller*, 128 S. Ct. at 2799. For many other examples, see Respondent's Brief at 9–14, *Heller*, 128 S. Ct. 2783 (No. 07-290); Brief of the Cato Institute and History Professor Joyce Lee Malcolm as *Amici Curiae* in Support of Respondent [The Right Inherited from England] at 12–16, *Heller*, 128 S. Ct. 2783 (No. 07-290).

46. See *Heller*, 128 S. Ct. at 2827–31 (Stevens, J., dissenting) (original linguistic meaning of "keep and bear arms"); *id.* at 2831–36 (drafting, debating, and ratification history of the Second Amendment).

47. *Id.* at 2803 (majority opinion).

Perhaps recognizing that his account of original meaning was highly controversial (and substantially rejected by professional linguists and historians), Justice Scalia added a discussion of public understanding of the right to keep and bear arms *after* 1791—a period the professional linguists and historians failed to cover in their submissions to the Court. Justice Scalia relied on lower-court interpretations of the Second Amendment, post-1791 state constitutions and their application by state courts, and treatises and commentaries to buttress his reading of the Second Amendment.⁴⁸ “[T]he 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” is, he says, “a critical tool of constitutional interpretation.”⁴⁹ This is an important point—but not because subsequent practice is evidence of “original” meaning.⁵⁰

There is a second constitutional value for tradition: It can be a pragmatic source for filling in details left unanswered by the open texture of the Constitution.⁵¹ Assume that the Second Amendment is ambiguous about whether it entails an individual right to possess guns in the home for self-defense. Post-adoption tradition can settle this ambiguity by coming down strongly on one side or the other. Although unpersuaded of the textual ambiguity, I agree with Justice Scalia that this material can have legal bite. Consider an analogy from contract law: If the parties’ practice supports a particular interpretation of an ambiguous contract provision, that practice is legally relevant and usually decisive in fixing the meaning of the contract.⁵² Or property law: If one party openly and notoriously occupies another’s property for a long period of time (the traditional rule is 20 years), the other party is deemed to have acquiesced in a formal shift in property rights.⁵³ These different doctrines point in the same direction for post-adoption constitutional consen-

48. *Id.* at 2805–12.

49. *Id.* at 2805.

50. *See id.* at 2809–11 (discussing Second Amendment rights of freed slaves in the 1860s, which were “instructive”).

51. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 678–88 (1981) (taking expansive view of Presidential power to suspend lawsuits against foreign states, based on executive practice to which Congress never objected).

52. *See generally* BLACK’S LAW DICTIONARY 378 (8th ed. 2004) (defining “course of performance”).

53. *See generally id.* at 59 (defining “adverse possession”).

sus: It can settle issues left ambiguous by the Framers, and allow citizens and institutions to plan their affairs with reliance on such settled understandings.

Tradition as constitutional adverse possession is subject to some of the same kinds of analytical pitfalls and normative qualms as tradition as evidence of original meaning. Justice Scalia's opinion in *Heller* is a classic example of the pitfalls as well as the appeal of tradition along these lines.

A. *Anachronism*

Although *Bowers* remains the champion of judicial anachronism, even the better-informed analysis in *Heller* is frequently anachronistic. Anachronism leaps off the early pages of Justice Scalia's opinion, when he relies on the broad meaning of "bear arms" today and imputes that meaning back to the eighteenth century.⁵⁴ That the anachronisms come in a well-researched opinion is evidence of the inherent trickiness of tradition as an interpretive source, as judges and lawyers tend to shoehorn complicated, shifting understandings into simpler categories and boxes. And when emotional public policy issues are at stake, normative precommitments drive the shoehorning.⁵⁵

A striking feature of Justice Scalia's opinion is obliviousness to the fact that the United States changed dramatically between 1791 and 2008. When the Second Amendment was adopted, ninety-six percent of Americans lived in small towns or rural areas, often on the frontier between European areas and Native American lands, and there were only six cities with more than 10,000 people.⁵⁶ In such an agrarian frontier culture, guns were typically needed for a family's economic success and often their survival against attack; the community protected itself through armed citizen militias. As our country urbanized, the memory of a citizen militia evanesced, and the notion of an

54. *Heller*, 128 S. Ct. at 2793–94 (citing *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). Justice Scalia was being playful, tweaking Justice Ginsburg for taking a narrower view of "bear arms" in *Heller* than she did in the earlier case. Very clever, but it is still an anachronism.

55. This is what a recent empirical analysis found when it examined the Justices' deployment of sources from the Founding era in constitutional federalism cases. Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 282–83 (2004).

56. THOMAS BENDER, TOWARD AN URBAN VISION: IDEAS AND INSTITUTIONS IN NINETEENTH CENTURY AMERICA 3 (1975) (data as of 1800).

armed citizenry as the best protection against tyranny became incomprehensible to some. Today, America is an urban society where guns are part of an escalating culture of violence; the community protects itself through armed police forces. There is a fierce public policy debate about the efficacy of gun control laws, especially for urban jurisdictions like the District that are surrounded by states where guns can be easily obtained. Was there consensus in the nineteenth century, as the United States was becoming more urban and industrialized, that the militia-based Second Amendment right ought to be expanded (and contracted) to become a right of self-defense in the home? Was this consensus carried over into the twentieth century? Justice Scalia ignores these questions, whose answers might be “yes” (and therefore supportive of his position), and instead treats the post-adoption materials as simply a continuation of what he thinks (based on slender evidence) all Americans believed during the Founding generation. Such a static understanding is the epitome of anachronism.⁵⁷

B. *Cherry-Picking*

Tradition is malleable in the hands of the *Heller* Justices, as suggested by the foregoing analysis, and that leads to cherry-picking charges by both sides of the debate. A big definitional problem for post-adoption tradition is what to do about the abandonment of an earlier tradition? Once the citizen-militia ideal died, the minority notion of an individual’s enforceable right to bear arms receded if not disappeared.⁵⁸ In 1927, Con-

57. See, e.g., Saul Cornell, “Don’t Know Much About History”: *The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 675 (2002). Justice Scalia’s majority opinion also contains smaller anachronisms that undermine his argument on its own terms. Observing that nine states adopted constitutional protections for the right to keep and bear arms between 1789 and 1820, he says this evidence confirms a broad original meaning for the Second Amendment: to protect guns for self-defense as well as militia use. *Heller*, 128 S. Ct. at 2803. But seven of the nine state constitutional provisions assured the right to “bear arms in defence of themselves [or himself] and the State,” broader language than the Second Amendment’s text. *Id.* If the Second Amendment were as broad as Justice Scalia says it is, why did these post-1791 state constitutions not just copy the Second Amendment? Possibly, the states in question wanted a broader protection than the militia-dependent protection of the Second Amendment. As a matter of textual plain meaning, one would expect the Second Amendment to be construed more narrowly than these broader provisions.

58. See *Heller*, 128 S. Ct. at 2842–46 (Stevens, J., dissenting).

gress prohibited mail delivery of “pistols, revolvers, and other firearms capable of being concealed on the person,”⁵⁹ and then, in 1934, restricted the possession of sawed-off shotguns and machine guns.⁶⁰ Congress “infringed” the individual right “to keep and bear arms” if the latter language is read broadly and unconnected to the militia setting of the prefatory clause. Municipal, state, and federal legislatures have also enacted increasingly-regulatory gun control measures.⁶¹ Under these circumstances, tradition as adverse possession cuts in favor of the *Heller* dissenters as much as the majority: even if nineteenth-century tradition supports a broad reading of the Second Amendment, twentieth-century tradition goes the other way.

An internal analysis of Justice Scalia’s opinion illustrates the malleability of tradition. What the “traditional” right to bear arms actually entailed varies dramatically from point to point in his opinion.⁶² And few if any of the sources of what the Court considered tradition understood the right in precisely the way the *Heller* Court did. Justice Scalia stated that his reading protected a law-abiding individual’s “right to possess and carry weapons in case of confrontation.”⁶³ That is much broader than the 1689 English Declaration of Rights, with its “as allowed by Law” check,⁶⁴ and it is *narrower* than the 1776 Pennsylvania Declaration of Rights, which protected “a right to bear arms for the defence of themselves and the state.”⁶⁵ Indeed, Justice Scalia’s announced right has no connection with the actual text of the Second Amendment, even if the prefatory clause is rendered legally irrelevant. Neither the lower court nor any party to the case had argued for the precise definition of the right rendered by Justice Scalia. This odd rendition suggests that the nation’s leading textualist and most ardent traditionalist had to compromise with his more evolutive Brethren in order to secure a Court majority. What was going on?

59. Act of Feb. 8, 1927, ch. 75, 44 Stat. 1059.

60. National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (codified as amended at 26 U.S.C. § 5861 (2000)).

61. *Amici Curiae* Brief of District Attorneys in Support of Petitioners at 7–9, *Heller*, 128 S. Ct. 2783 (No. 07-290) (discussing firearms-regulating ordinances and statutes in the United States).

62. See *Heller*, 128 S. Ct. at 2792–99.

63. *Id.* at 2797.

64. 1689, 1 W. & M. sess. 2, c. 2.

65. PA. CONST. of 1776, ch. I, § XIII.

C. Illegitimacy

A legitimacy problem with tradition as constitutional adverse possession is that it potentially clashes with more concrete legal sources—constitutional text and structure, drafting and ratifying history, and binding precedent. The plasticity of tradition in the hands of a skilled jurist or advocate (sometimes the same person) can be deployed not only in a result-oriented way, but also to destabilize what appear to be “harder” sources of law. Thus, Justice Scalia skillfully marginalizes the Second Amendment’s prefatory clause because taking it seriously would render the Second Amendment an “outlier” in that era. But the Second Amendment *was* an outlier if you take its text and drafting history seriously: It reflected the Virginia (George Mason and James Madison) approach to militia insurance.⁶⁶ Likewise, Justice Scalia’s deployment of tradition radically revises *Miller*, reducing its holding about the relationships of the prefatory clause to the operative clause to dictum and essentially limiting that precedent to its facts.⁶⁷ This is adverse possession with a cutting edge.

For those concerned about “judicial activism,” where judges read their own preferences into constitutional provisions in order to trump democratic regulation, Justice Scalia’s tradition-saturated opinion in *Heller* ought to be a matter of concern. *Heller* rewrote the Constitution. In *Heller*, the Second Amendment not only loses the prefatory clause, but gains new nontextual limitations on the right. The *Heller* Second Amendment effectively now reads: “The right of law-abiding people to keep Arms in their homes, for self-defense purposes, shall not be subjected to unreasonable regulation.”⁶⁸ Such a drastic revision requires a lot more explanation than the Court provides.

III. TRADITION AS DEMOCRATIC DELIBERATION

There is a third way of understanding “tradition” in constitutional interpretation that better reflects the learning of professional historians and engages the Supreme Court in a more productive dialogue with the democratic process. Many Su-

66. See *Heller*, 128 S. Ct. at 2835 (Stevens, J., dissenting).

67. See *id.* at 2845–46.

68. See *id.* at 2822 (majority opinion).

preme Court opinions explicitly or implicitly comprehend tradition the way historians do—as an evolving interaction among norms, institutions, and practices. The most famous expression is Justice Harlan’s dissent in *Poe v. Ullman*,⁶⁹ an early privacy case. He was guided by the “balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.”⁷⁰ Justice Harlan’s understanding of the living and evolving traditions of American law is inspired by the common law methodology itself, and perhaps also by the philosophy of Edmund Burke.⁷¹

An evolutive approach to tradition in constitutional law ameliorates the anachronism problems examined here but does not solve the cherry-picking or illegitimacy problems. Indeed, this kind of approach drives traditionalists like Justice Scalia absolutely crazy, because they do not see how an evolving or living tradition can have any coherence, and certainly cannot see how it could provide guidance for judges or attorneys. This is a fair point and can be illustrated by reference to both sodomy and guns. The *Lawrence* majority and the *Heller* dissenters would understand tradition as evolving away from old-fashioned agrarian values, the values held by most colonial and post-Independence Americans. The norms dominating early American public law included notions that sexual urges should be channeled into procreative marriages, that a man’s home is his castle governed by his directives, and that every man should have guns and other weapons to defend his home and family. That America is long gone, and the norms for a modern, urbanized America include notions that citizens have a wide array of sexual and relationship choices, that a man or woman’s condo is a presumptively private space, and that police are the primary source of protection against malefactors, who should be disarmed by the state if possible.

This is not, however, the only story that could be told about an evolving tradition. Another account supports *Bowers* and *Heller*. The United States has changed, and most Americans to-

69. 367 U.S. 497 (1961).

70. *Id.* at 542 (Harlan, J., dissenting); see also *Washington v. Glucksberg*, 521 U.S. 702, 765 (1997) (Souter, J., concurring in the judgment) (quoting Justice Harlan).

71. See Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

day do not follow any of those norms that dominated early American public law: They do not limit their sexual activities to procreative marital sex and they view guns in the home as dangers to children. This is a shift in practices and majority beliefs, but it has not obliterated the old traditions that made this country exceptional and great. For this reason, there has been a vigorous revival of *traditional values*—procreative marriage and guns as the citizen's first line of self-defense—in America.⁷² If this country enjoys an "evolving [living] tradition," then Reverend Jerry Falwell and the Moral Majority, Phyllis Schlafly and Stop ERA, and Charlton Heston and the NRA may be just as important leaders and institutions as Margaret Sanger and Planned Parenthood, the women's liberation of Betty Friedan, and the gun-control movement led by Sarah and James Brady.

In short, if academic and judicial critics of a stability-oriented tradition want to insist on a more complicated understanding of tradition as evolutive, they have to grapple with genuine complexity. Once tradition is understood critically and evolutive, cherry-picking problems become even more abundant than before, unfortunately. There is a third way of conceptualizing tradition that helps us answer this question in a more responsible way. This approach to tradition not only avoids most problems of anachronism, but also reduces the illegitimacy problems. The third approach is *tradition as ongoing democratic deliberation*. In our democratic constitutionalism the authoritative value of tradition is greatest when it is recognized and elaborated by legislatures after open and public deliberation. If the institutions of democratic governance, with popular feedback, reaffirm a tradition or rebuff efforts to reform it, that counts as evidence in favor of traditional understandings. If those institutions, on the other hand, question a tradition or reform it in part, then that reform counts as evidence against traditional understandings or (more typically) as evidence that traditional understandings should be recalibrated in some way.

Tradition as democratic deliberation might sound out of place in judicial decisions interpreting the Constitution, but consider

72. See, e.g., ESKRIDGE, *supra* note 13, at 194–228 (discussing the new "politics of preservation" responding to the freedom of choice and gay-rights social movements); Randy E. Barnett, *Foreword: Guns, Militias, and Oklahoma City*, 62 TENN. L. REV. 443 (1995) (discussing the rise of citizen militias and a new politics of guns responding to ever-expanding governmental regulation).

the following argument. Important institutions and practices of governance as well as many fundamental values in the United States are enshrined not in the Constitution's texts or precedents, but rather in state and federal statutes. Family law and voting rules are two examples. These regimes of governance and norms exist within the framework of the Constitution, of course, but it is not unusual for statutory pressures to influence the Supreme Court's understanding of the Constitution.⁷³ Should not legislative investigations, reports, statutes, and other actions contribute to the Court's constitutional common law?⁷⁴

Tradition as democratic deliberation helps us appreciate why the *Bowers* Justices were *not* willing to protect "homosexual sodomy" as a privacy right in 1986. Although nineteenth-century sodomy laws had nothing to say about oral sex between two men, between 1879 and 1935 legislatures all over America deliberated the matter and concluded that oral sex was *similar* to traditional sodomy—anal sex—because it was sex for pleasure alone and therefore was morally abominable for the same reason as anal sex.⁷⁵ Then, through the middle of the twentieth century, state legislatures and local police departments focused enforcement of updated sodomy laws on a highly disfavored minority, "homosexuals," men whose incapacity for procreative marriage raised suspicions of predatory natures and whose cruising in public places created concerns for nuisance and corruption.⁷⁶ Although half the states repealed their consensual sodomy laws between 1961 and 1986, most of the repeals were carried off by sneaking sodomy reform below public radar as part of the Model Penal Code's modernization of criminal

73. Compare *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53–54 (1959) (rejecting claim that state literacy tests unconstitutionally burden black people's right to vote), with *South Carolina v. Katzenbach*, 383 U.S. 301, 334, 337 (1966) (upholding Congress's authority to enforce the Fifteenth Amendment through suspension of literacy tests in the South).

74. This is the argument of WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES* (forthcoming 2009).

75. ESKRIDGE, *supra* note 13, at 50–55.

76. *Id.* at 73–108 (the anti-homosexual "Kulturkampf," or campaign of discipline and erasure); John D'Emilio, *The Homosexual Menace: The Politics of Sexuality in Cold War America*, in *PASSION & POWER: SEXUALITY IN HISTORY* 227 (Kathy Peiss & Christina Simmons eds., 1989). See generally DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (2004).

law.⁷⁷ Only in California did the legislature openly debate the pro-gay implications and still opt for sodomy reform (1975); two other states (Idaho, 1972, and Arkansas, 1977) reinstated their consensual sodomy laws when the media alerted them to the gay rights implications.⁷⁸ The District of Columbia repealed its consensual sodomy law in 1981, a move that was vetoed by the Democrat-controlled House of Representatives, 281 to 119.⁷⁹ AIDS-phobia after 1981 made homosexual sodomy even more indefensible for most Americans. Between the Stonewall riots of 1969 and the peak of the AIDS epidemic, around 1990, nine states revoked criminal sanctions for consensual heterosexual sodomy but left homosexual sodomy a crime, precisely the line that Justice White drew in *Bowers*.⁸⁰ In Reagan-era America, the democratic process had, decidedly, *not* embraced the idea that “homosexuals” deserve the same privacy protections as heterosexuals. And neither did the Supreme Court.

Tradition as democratic deliberation, moreover, provides a legal basis for distinguishing *Lawrence* from *Bowers*. Public opinion underwent a sea change between *Bowers* in 1986 and *Lawrence* in 2003, as the sense that AIDS was the homosexuals’ Trojan Horse receded and as many Americans came, instead, to understand lesbians and gay men as ordinary neighbors and coworkers, often with partners and families.⁸¹ Once it became clear that consensual sodomy, like penile-vaginal intercourse, could be the basis for committed family relationships, it was much harder to deny gay people the privacy rights accorded straight people in the contraception, abortion, and interracial-sexuality cases.⁸² Twelve states abandoned their consensual

77. ESKRIDGE, *supra* note 13, at 118–27 (during Illinois’s sodomy repeal, homosexuality was almost completely in the closet); *id.* at 144–47 (sodomy reform in the 1960s failed when legislators detected the pro-homosexual effect); *id.* at 176–84 (substantial progress in repeal of consensual sodomy laws, in large part because the repeal was enveloped in adoption of the Model Penal Code).

78. *See id.* at 197–201 (California repeal); *id.* at 182–84, 388–89 (Idaho and Arkansas reenact consensual sodomy laws after “mistaken” repeals were exposed).

79. *Id.* at 213–18.

80. Arkansas, Kansas, Maryland, Missouri, Montana, Nevada, Oklahoma, Tennessee, and Texas. *See id.* at 387–407 (appendix of state sodomy laws).

81. The most dramatic movement in opinion polls came between 1990 and 1995. *See* Patrick J. Egan et al., *Gay Rights*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 234, 236–37 (Nathaniel Persily et al. eds., 2008) (surveying public opinion polls); *see also* ESKRIDGE, *supra* note 13, at 267–68 (similar).

82. *See* ESKRIDGE, *supra* note 13, at 269–78.

sodomy laws between 1986 and 2003, as did the District of Columbia in 1994, with nary a peep out of Congress.⁸³ Although state legislatures and voters were rejecting same-sex marriage all over the country in statutes and some constitutional amendments, there was virtually no public interest in reviving consensual sodomy laws. By the time the issue returned to the Supreme Court, in *Lawrence*, it was all over but the shouting.

How about *Heller*? As Stephen Halbrook has demonstrated, congressional deliberation and action is surprisingly illuminating.⁸⁴ In 1892, Congress made it a crime in the District of Columbia (over which Congress has plenary jurisdiction) to carry a concealed pistol, except in one's business and "dwelling house."⁸⁵ Permits for carrying concealed weapons in public were available for "necessary self-defense."⁸⁶ A brief legislative discussion suggested that Senators were sensitive to citizens' "natural right to carry the arms which are necessary to secure their persons and their lives."⁸⁷ In 1906, Congress authorized the District itself to enact "all such usual and reasonable police regulations . . . as they may deem necessary for the regulation of firearms,"⁸⁸ but continued to enact its own measures.

In 1932, Congress enacted a comprehensive firearms law for the District.⁸⁹ Section 3 of the 1932 Act barred anyone convicted of a violent crime from possessing a pistol in the District.⁹⁰ Section 4 prohibited anyone in the District from carrying a concealed pistol without a license, "except in his dwelling house or

83. See *id.* at 269–74, 289–98 (state-by-state analysis of sodomy law repeal, 1992 to 2000); see also *id.* at 387–407 (appendix).

84. See generally Brief for Amici Curiae 55 Members of the United States Senate, the President of the United States Senate, and 250 Members of United States House of Representatives in Support of Respondent, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) (authored by Stephen P. Halbrook); Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597 (1995) [hereinafter Halbrook, *Congress Interprets the Second Amendment*].

85. Act of July 13, 1892, ch. 159, 27 Stat. 116.

86. Act of Mar. 3, 1901, ch. 854, § 855, 31 Stat. 1328.

87. 23 CONG. REC. 5788 (1892) (statement of Senator Mills, objecting to the proposed bill); *id.* at 5789 (statement of Senator Wolcott, defending the bill as consistent with "the constitutional right of any citizen who desires to obey the law").

88. Act of June 30, 1906, ch. 3932, § 4, Pub. L. No. 59-401, 34 Stat. 808, 809 (codified as amended at D.C. CODE § 1-303.43 (2001)).

89. Act of July 8, 1932, ch. 465, Pub. L. No. 72-275, 47 Stat. 650.

90. *Id.* § 3, 47 Stat. at 651.

place of business or on other land possessed by him.”⁹¹ Section 14 prohibited anyone in the District from possessing a “machine gun, sawed-off shotgun,” or other dangerous weapons; there was no dwelling-house exception for that rule.⁹² The 1932 Act remains in effect, as amended by Congress and later supplemented by laws enacted by the District of Columbia Council, such as the statutory restrictions invalidated in *Heller*.⁹³

Legislators also crafted national firearms legislation in response to a growing problem of dangerous use by criminals and malefactors. Congress in 1927 prohibited mail delivery of “pistols, revolvers, and other firearms capable of being concealed on the person,”⁹⁴ and in 1934 prohibited the possession of sawed-off shotguns and machine guns,⁹⁵ the law upheld in *Miller*.⁹⁶ The Second Amendment was not emphasized in these debates, but neither did Congress regulate possession of handguns for self-defense in the home. At the same time Americans were becoming accustomed to great amounts of government regulation, they were also becoming more jealous of retaining private spaces unregulated by the government. Following both tradition and practicality, the home was the natural situs for such a locational understanding of privacy.

This balance between public safety and private sanctuary was explicit in the Property Requisition Act of 1941,⁹⁷ enacted on the eve of Pearl Harbor. The Act authorized the President to requisition private property for national defense purposes, but Congress stipulated that the Act not be construed “to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport” or “to impair or infringe in any manner the right of any

91. *Id.* § 4, 47 Stat. at 651. A license could be granted to anyone showing “good reason to fear injury to his person or property.” *Id.* § 6. The committee reports briefly noted that “[t]he right of an individual to possess a pistol in his home, or on land belonging to him, is not dist[ur]bed by the bill.” S. REP. NO. 72-575, at 3 (1932); accord H.R. REP. NO. 72-767, at 2 (1932).

92. Act of July 8, 1932, ch. 465, § 14, 47 Stat. at 654.

93. Congressional amendments include Act of Nov. 4, 1943, ch. 296, Pub. L. No. 78-182, 57 Stat. 586, and Act of June 29, 1953, ch. 159, Pub. L. No. 83-85, 67 Stat. 90, 93-94.

94. Act of Feb. 8, 1927, ch. 75, Pub. L. No. 69-583, 44 Stat. 1059.

95. National Firearms Act of 1934, ch. 757, Pub. L. No. 73-474, 48 Stat. 1236 (codified as amended at 26 U.S.C. § 5861 (2000)).

96. 307 U.S. 174 (1939).

97. Act of Oct. 16, 1941, ch. 445, Pub. L. No. 77-274, 55 Stat. 742.

individual to keep and bear arms.”⁹⁸ There was a fair amount of debate over requisitioning or registration of firearms, and a number of Representatives and a few Senators from the more rural southern and border states insisted upon these caveats for Second Amendment reasons.⁹⁹ Although hunting was repeatedly mentioned, the primary justification was the one made by Representative Hall of New York: A hallmark of totalitarian regimes (Communist Russia and Nazi Germany) was disarming citizens; to distinguish our liberty-protecting constitutionalism from theirs, Congress ought to assure the individual’s right to “the private ownership of firearms and the right to use weapons in the protection of his home, and thereby his country.”¹⁰⁰

The Gun Control Act of 1968¹⁰¹ established what is now our primary national regime for firearm regulation. This is a broad and “infringing” regime, but Congress rejected proposals for nationwide registration of handguns, and the 1968 Act is notable for *not* regulating gun ownership by law-abiding citizens for self-defense. Section 101 of the statute says that “it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity.”¹⁰² Although this is the sort of cheap talk Congress often engages in for political purposes, it does explain the regulatory choices made in the statute Congress enacted. Indeed, in the Firearms Owners’ Protection Act of 1986,¹⁰³ Congress amended the 1968 Act in minor ways to further protect “the rights of citizens to keep and bear arms under the second amendment.”¹⁰⁴

None of these legislative materials was even cited by Justice Scalia in his *Heller* opinion for the Court, but it is apparent that the precise contours of the constitutional right Justice Scalia

98. *Id.* § 1, 55 Stat. at 742.

99. See Halbrook, *Congress Interprets the Second Amendment*, *supra* note 84, at 623–31 (collecting quotations from various legislators).

100. 87 CONG. REC. 6778 (1941).

101. Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified at 18 U.S.C. § 921 note).

102. *Id.* § 101, 82 Stat. at 1213–14.

103. Pub. L. No. 99-308, 100 Stat. 449 (1986).

104. *Id.* § 1(b)(1)(A), 100 Stat. at 449; see also *id.* § 107, 100 Stat. at 460 (codified at 18 U.S.C. § 926A) (preempting state laws barring interstate travel with lawful firearms).

says he “discovered” in the original meaning of the Second Amendment came instead from twentieth-century congressional and presidential consensus. Yet Justice Scalia kept these more recent sources in his constitutional closet, suggesting that he was not willing to make any kind of evolving-constitutional-meaning argument. But it is a superior argument to the original-meaning argument Justice Scalia tried to run. The twentieth-century materials suggest the possibility of a rough consensus in American law that Congress (and by extension the District of Columbia) may not bar law-abiding citizens from keeping handguns in their homes for self-defense purposes. This norm is one that Congress has repeatedly followed in legislation for the District and for the nation, that most recent Presidents have endorsed, and that the Supreme Court did not address in *Miller* or its earlier decisions.

In short, if I could be persuaded to read the Second Amendment dynamically to create a right independent of the militia context, I would end up with something very close to Justice Scalia’s limitations on that right. It is also worth noting that a dynamic approach to tradition also suggests a statutory solution to the problem addressed in *Heller*. A superior route to the *Heller* result, from a legal point of view, would be a statutory argument of the following sort: Congress has plenary authority over the District of Columbia. In a 1906 umbrella statute, Congress exercised that authority to allow the District to enact “all such usual and reasonable police regulations . . . as they may deem necessary for the regulation of firearms, projectiles, explosives, or weapons of any kind in the District of Columbia.”¹⁰⁵ In light of Congress’s 1932 Act and other statutes surveyed above, the District’s regulation of home use of firearms is neither “usual” nor “reasonable” under the 1906 statute.¹⁰⁶ This would have resolved the case in a more rigorous legal way, would have protected the norm, and would have respected precedent as well as original meaning.

105. Act of June 30, 1906, ch. 3932, § 4, Pub. L. No. 59-401, 34 Stat. 808, 809 (codified as amended at D.C. CODE § 1-303.43 (2001)).

106. The Supreme Court has authority to construe both congressional statutes relating to the District and the District’s own statutes.

CONCLUSION

I have argued that tradition itself has more than one meaning and several plausible methodologies in constitutional cases. My goal is to insist upon historiographical accuracy and nuance—an insistence that undermines the utility of tradition as evidence of original meaning. If tradition itself evolves and if multiple traditions bear on a constitutional issue, my notion of tradition as ongoing democratic deliberation best addresses concerns that unaccountable judges will cherry-pick “tradition” to impose their values onto the Constitution.