

*Bring Constitution into the 21st Century* (op-ed, Register Guard, June 26, 2008).  
by Ofer Raban

Last Thursday the U.S. Supreme Court made a historic decision interpreting the Second Amendment as bestowing an individual right to keep and bear arms – a reading that contradicted what had been the conventional wisdom of legislators and courts for many decades. This was a divided 5-4 decision, but the split among the justices went far beyond their disagreement on the constitutionality of D.C.’s gun laws: their dispute also concerned starkly different visions of constitutional interpretation. The majority opinion in the case – which held D.C.’s gun laws to be unconstitutional – explicitly refused to consider the impact of gun control laws on today’s society. “Constitutional rights,” said the majority, “are enshrined with the scope they were understood to have when the people adopted them.” In other words, what the Second Amendment requires is strictly what it was understood to require by “the people who adopted” it. It did not matter that those people lived in the 18<sup>th</sup> Century, or that their purpose in adopting the Amendment was “to secure...a citizen militia, which [would] oppose an oppressive military force if the constitutional order broke down” – a concern that is wholly alien to 21<sup>st</sup> Century Americans. Nor did it matter that America’s inner cities suffer from growing gun violence, or that many consider gun-possession essential for their self defense: the question of whether D.C.’s gun laws were in violation of the Second Amendment was answered exclusively by what those 18<sup>th</sup> Century people supposedly understood the Amendment to mean. Accordingly, the opinion consisted of citations from 18<sup>th</sup> century dictionaries, discussions of pre-revolutionary debates in the English House of Lords, and references to various interpretations of the historical record, while questions regarding the significance of gun regulations in 21<sup>st</sup> Century America were “off the table” – to use the Court’s own words.

The four dissenting justices had a different take on the matter: they, too, discussed the understanding of those who adopted the Second Amendment (though their conclusions were diametrically opposed to those of the majority); but they also asserted that those original understandings were not the end of the matter: the scope of the Second Amendment’s right to keep and bear arms, they said, need be determined by considering these 18<sup>th</sup> Century understandings in light of the Amendment’s purpose and our current conditions – including the impact of the availability of guns on murder rates, the importance of gun ownership for self defense, or the interests of recreational gun-users. Constitutional interpretation, said the dissenting justices, cannot simply ignore what is at stake with today’s gun laws.

Most Americans would be appalled to learn that constitutional decisions having grave consequences to our society can turn *solely* on 18<sup>th</sup> Century dictionaries and other historical records – to the exclusion of any engagement with current concerns, needs, policies, or circumstances. But such a fundamentalist vision of constitutional interpretation is precisely the “originalism” so enthusiastically championed by Justice Scalia, and followed – at least in Thursday’s opinion – by four other justices of the Supreme Court. This judicial philosophy – with its deep distrust of judicial power, and its ostensible willingness to curb that power at the price of reason and rationality – should be denounced by all those who believe that constitutional decisions must be defended and justified by reference to the world they govern. The American Constitution is the great instrument that it is because its principles have been applied rationally

and reflectively by astute and creative judges— not by wooden automatons worshiping at the altar of mindless textualism and blind tradition.