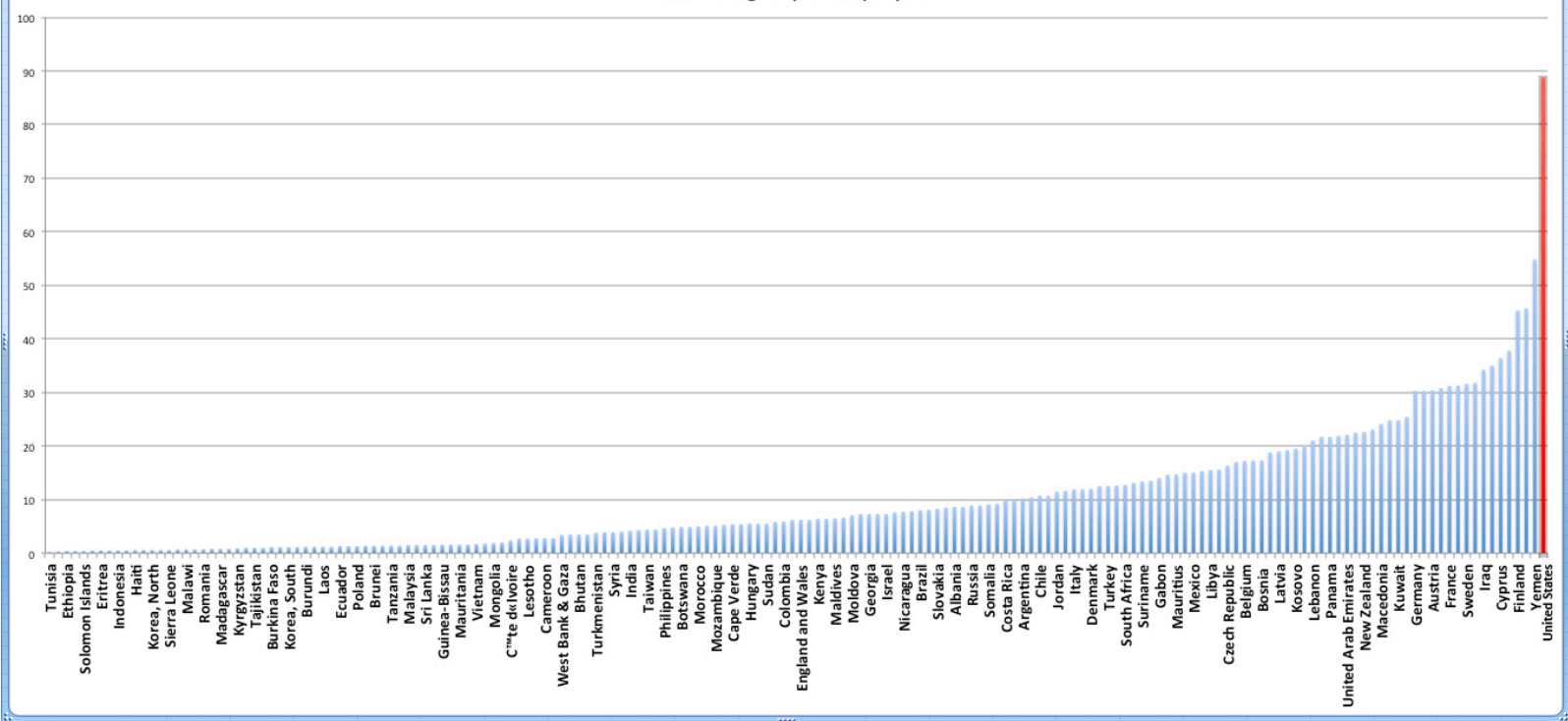


The Second Amendment Right to Redefine the Meaning of the Constitution

An analysis of the Supreme Court's Entrance into the "Culture War" Surrounding Gun Control and Gun Rights and its Ramifications through Heller and McDonald

Number of guns per 100 people



The above chart was published by the Washington Post on December 15, 2012, illustrating the unparalleled rate of individual gun ownership per capita in the United States versus that of every other country in the world¹. With more than 200-250 million privately-owned guns in circulation, the United States has more privately own guns than any other country². Not incidentally, they also have an inordinately high number of gun-related deaths and injuries – in a given day, an average of 276 people are shot. Of those shot, 84 will die as a result of their wounds.³ Since 1982, 62 mass murders have been committed via firearms, and over 75% of the 142 guns used in those 62 mass murders were obtained legally.⁴ The necessity for more stringent gun laws is at an all-time high. In the course of writing this paper, another mass shooting occurred wherein at least 28 people, many of whom were not yet it their first ten years of life and all of whom were shot multiple times, were killed at an elementary school in Connecticut⁵.

¹ From Max Fisher’s Article “What makes America’s gun culture totally unique in the world, in four charts,” published in *The Washington Post* on December 15, 2012. Accessible at http://www.washingtonpost.com/blogs/worldviews/wp/2012/12/15/what-makes-americas-gun-culture-totally-unique-in-the-world-as-demonstrated-in-four-charts/?tid=pm_pop

² From Philip J. Cook, Jens Ludwig, and Adam M. Samaha’s article “Gun Control After *Heller*: Threats and Sideshows from a Social Welfare Perspective,” published in the *University of California Law Review*, Vol. 56 (Feb. 2009) at pg. 5.

³ From Bernard Lagan’s article, “America’s gun outrage: 276 people killed or wounded a day,” published in *The Age* on November 9, 2009. Accessible at <http://www.theage.com.au/opinion/politics/americas-gun-outrage-276-people-killed-or-wounded-a-day-20091109-i4gj.html>

⁴From Mark Follman, Gavin Aronsen, and “Deanna Pan’s article A Guide to Mass Shootings in America,” published December 15, 2012 in *Mother Jones*. Accessible at <http://www.motherjones.com/politics/2012/07/mass-shootings-map>

⁵ On December 14, 2012, between the completion of the first draft of this paper on December 12th and its submission on December 21st, a 20-year old opened fire at Sandy Hook Elementary School to kill over 20 children and 8 adults and, the

Despite this pressing need to control the violence, the Supreme Court, in the 5-4 decision *District of Columbia v. Heller* (2008)⁶, struck down an ordinance restricting the ownership of handguns within the District of Columbia. The Supreme Court's ruling in *Heller*, codifying an individual's fundamental right to own a gun for the purpose of self-defense through a peculiar interpretation of the meaning of the Second Amendment to the United States Constitution, and in *McDonald v. City of Chicago*⁷, incorporating *Heller's* newly-determined Second Amendment Right through the Fourteenth Amendment to apply and "to some extent limit the legislative freedom of the States"⁸ display an appalling level of indifference to the "general welfare" and to the meaning of the Constitution that they are supposed to be expounding. These decisions curtailed the hotly contested debate surrounding Gun Control in the United States, giving a Constitutional justification to the proponents of one side. Instead of exercising judicial restraint concerning issues of national discourse or properly interpreting the Constitution, they ruled in accordance with their own agenda to give a Constitutional foundation to one side of a hotly contested social issue⁹.

In the direct aftermath of the Aurora, Colorado shooting, wherein James Holes entered a movie theater, armed with a 100-round drum magazine, a Smith & Wesson M&P15 assault rifle (the "civilian version of the Military's M-16) capable of firing 60 bullets per minute, a Remington shotgun, and a .40 caliber handgun,¹⁰ shot 71 people and killed 12, Colorado saw a 41% increase in background checks for hopeful gun owners that weekend, a response "not unusual" after a mass shooting.¹¹ Furthermore,

following day, three people were following a gun altercation at an Alabama hospital and man fired 50 rounds in a crowded mall parking lot in Newport Beach, California. Luckily, only one fatality arose from the two latter incidents.

On Connecticut: http://www.washingtonpost.com/national/gunman-kills-mother-then-26-in-grade-school-rampage-in-connecticut/2012/12/15/9017a784-46b6-11e2-8061-253bccfc7532_story.html?hpid=z1

On Alabama: <http://bigstory.ap.org/article/police-gunman-wounds-3-alabama-hospital#overlay-context=article/rockets-fired-airport-pakistan-2-killed>

On Newport Beach, CA: <http://articles.latimes.com/2012/dec/15/local/la-me-mall-shooting-20121216>

⁶ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁷ *McDonald v. Chicago*, 561 US 3025 (2010).

⁸ *McDonald*, opinion of Justice Alito, writing for the majority, 561 US at ____ (slip op., at 44).

⁹ As Judge J. Harvie Wilkinson III notes in his article "Of Guns, Abortions, and the Unraveling Rule of Law," published in the *Virginia Law Review*, Vol 95, No 2 (April 2009) at page 256, "Law's power to shape human conduct depends on its perceived legitimacy as much as on the threat of force that stands behind its commands." This illustrates the impact on the firearms debate that *Heller* and subsequently *McDonald* likely had: bestowing upon pro-gun arguments a legitimacy based in the text of the Constitution. (Hereafter revered to as Wilkinson, "Of Guns, Abortion")

¹⁰ From "Aurora, Colo., shooting spree: A day of tears for victims and of twists in case," published in the *Washington Post* on July 22, 2012. Accessible at http://www.washingtonpost.com/national/explosives-removed-from-james-holmess-apartment-and-destroyed-officials-say/2012/07/22/gJQAL9XN2W_story.html

¹¹ From Sara Burnett's article "Aurora theater shooting: Gun sales up since tragedy," published in the *Denver Post* on July

a survey of public opinion conducted after the shooting revealed 46% of the population believed that right of gun ownership should be more protected while 47% supported more restrictions via gun control laws.¹² Aurora and similar tragedies demonstrate why the debate surrounding gun control and gun protection is so fierce: incidences of mass violence either incite fear, causing one to support protection measures via gun ownership or via stricter gun legislation. The Supreme Court's decisions put the fate of the gun debate in the hands of the Justices, and, based on the decisions of both cases, the majority does not know how to shoot nearly as well as James Holmes does.

There are a plethora of reasons why *Heller* and, by proxy, *McDonald* were erroneously decided. This paper will focus primarily on *Heller* because Justice Scalia, writing for the *Heller* majority, created a new right that was simply expanded in scope by *McDonald*; therefore, much of the gun-as-fundamental-right reasoning in *McDonald* is a reiteration of the *Heller* decision¹³. *Heller* is considered a “landmark decision” because of this cavalier rendition of the meaning of the Second Amendment, a meaning largely uncontested since its adoption on December 15, 1791. But, in striking down an attempt by a legislature to make its citizens safer through passing a law restricting the ease with which one could obtain a handgun in the District of Columbia, the Court Acted politically, irrationally, and opened the floodgates for a further expansion of the new right that they discovered. If less guns means less violence, and less violence means less death¹⁴, the Supreme Court stripped states and cities of their ability to exercise their constitutional responsibility as delineated in the 10th Amendment to ensure the safety of their polity through police powers¹⁵.

25, 2012. Accessible at <http://www.denverpost.com/termsfuse> http://www.denverpost.com/news/ci_21142159/gun-sales-up-since-tragedy

¹² The *Pew Center for the People and the Press* public opinion poll on attitudes following the Aurora shooting were addressed in their article “Views on Gun Laws Unchanged After Aurora Shooting,” Published July 30, 2012. Accessible at <http://www.people-press.org/2012/07/30/views-on-gun-laws-unchanged-after-aurora-shooting/>

¹³ The *McDonald* decision is important in its own right. At the same time, it is less of a discussion of the Second Amendment and more of a symposium on the meaning of the Due Process Clause and Privileges and Immunities Clause of the Fourteenth Amendment and the process of incorporating the Bill of Rights to apply to the states through that Amendment. *Heller*, conversely, is a landmark decision wholly dedicated to redefining the meaning of the Second Amendment and the context of the gun debate.

¹⁴ “Where there are more guns, there is more homicide.” *Harvard Injury Control Research Center*. Accessible at <http://www.hsph.harvard.edu/research/hicrc/firearms-research/guns-and-death/index.html>

¹⁵ *Jacobson V. Massachusetts*, 197 US 11 (1905), Justice Harlan, writing for the 7-2 majority, remarked “But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.” As it was plainly established by the high incidence of gun violence in the US and by the randomness with which an attack can occur – whether it be at an

First, the paper will follow the style of the majority opinion of *Heller* by examining the text of the Second Amendment to decipher its meaning. Then, it will engage in a discussion of “originalism” within the *Heller* majority and dissenting opinions, questioning the methodology with which each side arrived at their decision. The third section deals explicitly with the concept of “popular constitutionalism” and the enshrinement of a new right. The final section surmises that, because gun ownership *must* be regulated for the benefit of the public at large, there must be an alternative legal strategy to circumvent the radical redefinition of the meaning of the Second Amendment without being struck down as an unconstitutional limitation on this new individual right to guns.

Part I A: The Second Amendment and its Clauses

*“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.”*¹⁶

As eloquently stated by Chief Justice John Marshall in *Marbury v. Madison*, “It cannot be presumed that any clause in the constitution is intended to be without effect.”¹⁷ The Second Amendment is composed of two separate clauses: the “adverbial clause” (“A well regulated Militia, being necessary to the security of a free State”) and the “main clause” (“the right of the people to keep and bear Arms, shall not be infringed.”) The “adverbial clause” functions as an “absolute construction” clause, functioning to link the separate clauses together to create one cohesive sentence by demonstrating causation between the first clause and the second clause.¹⁸ Thus, the Second Amendment can be reworded as a single sentence: “The people comprising the membership of their State’s well-regulated Militia cannot have their right to keep and bear Arms infringed upon to ensure the security of their free State.” To remove the adverbial clause is to distort the meaning of the sentence. According to an *amici curiae* brief filed by the “Professors of Linguistics” in support of the District in *Heller*, if the “absolute construction expresses the cause for the main clause’s prohibition,” then removal of the absolute

elementary school, movie theater, or a place known for facilitating drug exchanges – it is necessary to protect any and all potential victims, essentially the entire populace, from the loss of the most cherished right – the right of an individual to have their lives – at the hands of an “Arm.”

¹⁶ United States Constitution, Amendment II

¹⁷ *Marbury v. Madison*, 1 Cranch 137, 174 (1803).

¹⁸ “Brief for Professors of Linguistics and English. Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D. and Jeffrey P. Kaplan, Ph.D. in Support of Petitioners,” *District of Columbia v. Heller*, 128 S. Ct. 2783 (No. 07-290)

construction would remove the “cause” from the “cause and effect” chain, effectively asserting “the fact that a well regulated Militia is necessary to the security of a free State is not the reason that the right of the people to keep and bear Arms shall not be infringed.”¹⁹ Just as the Preamble to the Constitution informs the purpose and context of the Constitution, the “preamble” or “adverbial clause” of the Second Amendment informs the purpose and context of the main clause.

Eugene Volokh, on the other hand, argues against the normal reading of the Second Amendment by averring that the “justification” (Militia) clause is not a condition on the “operative clause” (Arms) because “all individual rights that belong to each person, not just to members of the militia – ‘the people’ seems to refer to people generally” in other Amendments within the Bill of Rights, specifically the First Amendment.²⁰ Nelson Lund asserts the justification clause reflects more of the Framers’ fear of intrusive Government action as a result of standing armies; consequently, the Militia clause was included as a “rhetorical respect” for the special place reserved for Militias in the “traditional republican” values of independence.²¹ Going even further than Volokh and Lund, William Van Alstyne maintains that “Militia” is a recommendation for the States and an encouragement for the people of a state to join its militia, but the express guarantee of the Second Amendment is the right of “the people” to Arms (“It is *this* right that is expressly identified as “*the* right” that is not to be (“*shall not be*”) infringed) and are protected against Congressional interference with the enjoyment *this* right.”²²

Justice Scalia, in his majority opinion in *Heller*, interprets the Second Amendment’s “prefatory” (Militia) clause as informing the “operative” clause (Arms) “but does not limit or expand the scope of the operative clause.”²³ While he muses that it is “entirely sensible” that the prefatory clause “announces the purpose for which the right was codified: to prevent elimination of the militia,”²⁴ he concludes that the Militia clause can be removed without disturbing the central component of the

¹⁹ “Brief for Professors of Linguistics” at page 11.

²⁰ From Eugene Volokh’s article “The Commonplace Second Amendment,” published in the *New York University Law Review*, Vol.793 (1998) at page 3. (Hereafter Volokh, “Commonplace”)

²¹ From Nelson Lund’s article “The Past and Future of the Individual’s Right to Arms,” *31 Ga. L. Rev.* 1, 35-36 (1996)

²² William W. Van Alstyne’s “The Second Amendment and the Personal Right to Arms,” *Duke Law Journal*, Vol 43, at page 1242. (Hereafter Van Alstyne “Personal Right”)

²³ *Heller*, slip op., at Majority 4.

²⁴ *Heller*, slip op., at Majority 26

Second Amendment – that the operative clause can stand alone and is unambiguous in meaning. To arrive at this conclusion, Scalia invokes Volokh’s aforementioned conception of the meaning of “the people” in his definition of the people as “unambiguously refer[ing] to all members of the political community, not an unspecified subset.”²⁵ From there, he determines that the Constitution usually (with the exception of three provisions) refers to “the people” in the context of granting an “individual” right. Thus, the Second Amendment does not endorse a “collective” right to arms through Militia service as reserved to those eligible to serve in a militia but, rather, an “individual” right to “keep and bear arms” for nonmilitary purposes.

From this division of the two clauses, Scalia asserts that the Second Amendment was codified to reiterate a preexisting, common-law right: the guarantee for all people to keep and bear arms for the purpose of self-defense without fear of disarmament by the Federal Government. The inclusion of the Militia clause, then, becomes suspect and superfluous in this new light. Returning to Chief Justice Marshall’s aforementioned statement about each clause in the Constitution sustaining a purpose, the Framers would not have included the Militia clause without a specific purpose. Scalia hypothesizes that this purpose was to “secure the ideal of a citizen militia.”²⁶ Logically, then, the “ideal of a citizen militia” informs the use of the phrase “the people.”

Since “the people” at the time of the Second Amendment’s ratification eligible to join a militia were usually white, able-bodied males, this would limit the scope of the Second Amendment’s right to “keep and bear arms” to a subset of the population if the Militia clause were given effect. Generally speaking, the modern day equivalent of the “militia” is the National Guard²⁷. Thus, applying “the people” to the National Guard would still lead to a select group eligible to bear arms: almost 87% male and 74% white.²⁸ If the definition of “the people” is independent of the Militia clause, a “Fourth Amendment” reading of the Second Amendment²⁹, the exercise of an individual’s Second Amendment

²⁵ *Heller*, slip op., at Majority 6

²⁶ *Heller*, slip op., at Majority 26

²⁷ Akhil Reed Amar’s “Heller, HLR, and Holistic Legal Reasoning,” published in the *Harvard Law Review*, Vol 122. (2008) at page 166. (Hereafter Amar, “Heller, HLR”)

²⁸ The Army’s self-described composition, available at

<http://www.armyg1.army.mil/hr/docs/demographics/FY03ArmyReserveGuard.pdf>

²⁹ Akhil, “*Heller*, HLR” at page 167: “A well regulated militia being necessary to the security of a free state, the right of

rights would the class of persons comprising “the political community;” however, this would be little improvement to the expanse of Second Amendment rights since most persons living in the United States at the time of the adoption were not considered “people,” like women or slaves.

Part I B: The Second Amendment and Preambles

Justice Stevens, in his dissenting opinion, decries Scalia’s interpretation of the Militia clause as erroneous in that it motivates the text using backwards induction: analysis begins with the operative clause, establishes the operative clause’s meaning, then proceeds to the preamble “to ensure that our reading of the operative clause is consistent with the announced purpose,”³⁰ a method that Stevens insists is “not how this Court ordinarily reads such texts, and it is not how the preamble would have been viewed at the time the Amendment was adopted.”³¹ Scalia backwards induction allows him to treat the preamble as superfluous by firmly establishing the operative first, ignoring the argument (and standard interpretation in the 18th century as well as today) that the preamble provides context for the operative clause. In what Saul Cornell refers to as the “Cheshire Cat Rule of Construction – now you see the preamble, now you don’t,”³² Scalia decrees that a preamble is a necessary to determine the meaning of the operative only when an ambiguity in the operative merits a resolution plausibly found in the preamble.³³ Eugene Volokh’s “modest discovery is that the Second Amendment belongs to a large family of similarly structured constitutional provisions: they command a certain thing while at the same time explaining their reasons”³⁴ is used to found Scalia’s conclusion that the preamble is merely a justification, not a purpose, for the individual right to bear arms.³⁵

Both Volokh and Scalia, however, cite Joseph Story’s treatise, “Commentaries on the Constitution of the United States” (1833), to assert the existence of an individual right to arms apart from militia

persons — most of whom are not in the militia, have never been in the militia, and can never be in the militia — to keep and bear arms shall not be infringed.”

³⁰ *Heller*, slip op., at Majority 5

³¹ *Heller*, slip op., at Stevens Dissent 8

³² Saul Cornell’s “*Heller*, New Originalism, and Law Office History: ‘Meet the New Boss, Same as the Old Boss,’” *56 UCLA Law Review* 1095 (2009) at page 1107 (hereafter referred to as Cornell, “Boss”)

³³ *Heller*, slip op., at Majority 5, footnote 4.

³⁴ Volokh “Commonplace” at page 6

³⁵ *Heller*, slip op., at Majority 3

service,³⁶ yet disregard the fact that Story contended that “the importance of examining the preamble, for the purposes of expounding the language of a statute, has long been felt, and universally conceded in all juridical discussions. It is an added maxim in the ordinary course of the administration of justice...”³⁷ Story’s view, however, would advance the Stevens interpretation of the preamble more than it would Scalia’s.³⁸ For example, Scalia would have the Preamble to the United States Constitution removed without consequence to meaning to the remainder of the document³⁹. Stevens, instead, would aver that the Preamble to the US Constitution informs and frames the purpose of the Constitution as a whole; if preambles had no meaning, they would not have been written.

Part I C: Federalism and the Second Amendment

Scalia acknowledges that “during the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric.”⁴⁰ The Bill of Rights was inserted into the Constitution to “limit federal power”⁴¹ through guarantee of certain rights and the maintenance of state sovereignty, attempting to assuage Antifederalist fears. The Second Amendment’s Militia provision served as one of the “devices to keep the Union together”⁴² by performing a balancing of military power between state and federal government, enshrining the doctrine of federalism. These federalist concerns are at the heart of the Second Amendment; resultantly, they cannot be discarded whilst still achieving a plausible interpretation of the Second Amendment’s meaning. In asserting state sovereignty through control of

³⁶ *Heller*, slip op., at Majority 20

³⁷ Joseph Story’s “Commentaries on the Constitution of the United States” at 459 (Da Capo Press 1970) (1833).

³⁸ Joseph Story was erroneously referenced in *Heller*’s “Post-Ratification Commentary” section to serve as evidentiary support for Second Amendment as a personal guarantee to arms unrelated to the militia. Using his Commentaries on the Constitution of the United States (1833), *Heller* Slip op. at Maj 35 the majority surmised that Story clearly showed that the Second Amendment, as informed by the English Bill of Rights, guaranteed and was intended to guarantee citizens a right independent of Militia. As William Merkel writes in “The District of Columbia v. Heller and Antonin Scalia’s Perverse Sense of Originalism” at page 362, “This is patently false and can only be explained on grounds of obstinate ignorance or deliberate falsehood. Story’s discussion of the Second Amendment in his Commentaries is focused exclusively on the militia dependency of the right, and the perils confronting the right on account of rising apathy respecting militia duty.” Thus, it becomes truly puzzling how the Court arrived at this conclusion.

³⁹ In *Cruikshank*, supra note 109, at 92 U.S. 550, the Court considers the preamble as a list of the purposes for which they “ordained and established the government of the United States, and defined its powers by a Constitution, which they adopted as its fundamental law, and made its rule of action.” Obviously, then, the Preamble informs the purpose of the remainder of the Constitution, making it essential to a correct understanding.

⁴⁰ *Heller*, slip op., at Majority 26

⁴¹ Richard A Epstein’s “A Structural Interpretation of the Second Amendment: Why Heller Is (Probably) Wrong on Originalist Grounds” 59 *Syracuse L Rev* 171 (2008) at page 4. (Hereafter Epstein, “Probably Wrong”)

⁴² Epstein, “A Structural Interpretation...” at page 174

state militias, the state retained the ability to adapt their militias “to local opinions and concerns” as a result of the Second Amendment’s federalist scheme “of decentralized decision making.”⁴³

Dissecting the method Scalia used to assert a wider range of “the people” than would be considered in 1791 as “the people” in the context of ability to serve in “the militia” illustrates a propensity to define the phrases in the Second Amendment by comparing them to other, similar phrases utilized throughout the Constitution but with a more general consensus concerning their meaning. His “Fourth Amendment Analysis” of the Second Amendment leads him to assert that, because the Fourth Amendment is structured similarly to the Second Amendment and employs the phrase “the people” in its text, “the people” referenced in the Fourth Amendment must be the same “people” of the Second Amendment.

Utilizing this logic, the ambiguity of “Militia” should first attempt to be resolved given the accepted connotation of “militia” in other parts of the Constitution, namely Article I, § VIII⁴⁴ and Article II, §2, Clause 1.⁴⁵ The Guaranty Clause⁴⁶ furthers a notion that effective and powerful state militias existed at the time of the Constitution’s framing, implying that “domestic violence,” resulting from an invasion of one state’s militia into the territory of another state, is first an issue to be dealt with by the States and, if the State fails, it is to be protected via government protection. In combination with the declaration in Article I, § X, Clause III,⁴⁷ which presumes state militias were able to efficaciously engage in war with other entities without the assistance of the government, “a well regulated militia” detailed in the Second Amendment can be presumed to have “a close relationship with constitutional structures”⁴⁸ of state militia detailed in the aforementioned clauses, indicating that militias were

⁴³ Wilkinson, “Of Guns, Abortion” at page 315

⁴⁴ United States Constitution; Article I, Section VIII: “The Congress shall have Power ... To provide for the calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”

⁴⁵ United States Constitution; Article II, Section II, Clause I: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States”

⁴⁶ United States Constitution; Article IV, Section 4: “The United States shall guarantee to every State in the Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”

⁴⁷ United States Constitution; Article I, Section X, Clause III: “No State shall, without the Consent of Congress ... engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”

⁴⁸ Epstein, “Probably Wrong” at pages 4-5

organized and relatively powerful.

The first of the aforementioned Constitutional clauses regarding state militias delineates “proper regulation of the militia” by endowing Congress with the power to oblige state militias to engage in active service if Congress perceives a difficulty in suppressing rebellions, invasions, or in executing federal law; additionally, it prescribes a “discipline” for militia training to be overseen by the state. The sum of this clause is to engender a semblance of uniformity in the construction and training of state militias in the event that their assistance is needed to bolster the federal government. The second militia clause allows the president to be Commander and Chief the “coherent force” as embodied by the aggregation of all state militias, each trained in accordance with the Congress’s prescribed “uniform discipline” per Article I, § VIII, for the purposes of National defense. A careful analysis of the aforementioned clauses elucidates a federal structure within control and utilization of the state militias. A federalist separation of state and local authority is delineated with Congress’s power to control state militias is limited to instances when the militia is needed for national defense and reserved to the states otherwise to limit federal power; Congress may determine the “discipline” but actual training of state militia members is a state power. A federalist separation of checks and balances between the branches is given through a limitation on Executive action, only allowing the Executive to command the state militias provided Congress first summons the militias.

Federalism generates limitations on federal power, and the Militia Clauses limit the degree with which the national government can limit state sovereignty in the realm of militia organization. The Second Amendment, Professor Richard Epstein argues, operates to congeal fundamental right of the States to provide for their own protection because the “militia is so important that the federal government is now under a duty to steer a wide berth from any actions that would involve its regulation”⁴⁹ through Second Amendment guarantees. Ergo, the authority of the state to construct and conduct its militia in a manner which best serves its interest its own self-defense is a byproduct of the federalist structure that defers to the state as sovereign and able operate and legislate in accordance to

⁴⁹ Epstein, “Probably Wrong” at pg. 6
Page | 10

the will of its people provided that they do not interfere with a right explicitly enumerated to another branch by the Constitution or a right explicitly forbidden to be in control of the states per the Constitution.

DC's legislature, in exercising its right to determine the best laws to suit the needs of its populace, passed a local law restricting the ease of access to handguns for the welfare of its populace that is exemplary of the federalist system's division of power - allowing states and local governments to engage in legislative experimentation and innovation to solve the unique problems facing their area.⁵⁰ However, in discarding the federalist origins of the Second Amendment, the Court also discards the structures implemented to maintain state sovereignty in the wake of a new, centralized government that incited a need for the Second Amendment at the United States' inception. In short, to abandon the federalist basis of the Second Amendment is to abandon the Amendment as a whole such that the main clause loses its meaning as well; therefore, the Court's catastrophic interpretation of the original meaning of the Second Amendment disfigures the constitutionally-mandated balance of power between State, Local, and Federal governments restricting the range of legislative action that a state or local government may take to protect its citizens from crime. *Heller* is demonstrative of the Court entering and tampering with the legislative arena, especially when they consciously acknowledge the true purpose of the Second Amendment yet render it irrelevant nonetheless.⁵¹

The Court also separates the phrase "to keep and bear arms" into "to keep arms" and "to bear arms" as a mechanism to justify a non-military meaning to the clause; they reason that, while "to bear arms" is military in connotation, "to keep arms" must refer to a private, individual right apart from the collective right to "bear arms" in the Militia.⁵² This is another perversion of the text of the Amendment.

⁵⁰ Wilkinson, "Of Guns, Abortion" at pg. 318

⁵¹ *Heller*, slip op., at Majority 24; "There are many reasons why the militia was thought to be 'necessary to the security of a free state... Third, when able bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.'" This recalls the federalist origin of the Second Amendment - to permit the States to have a Militia in order to protect themselves against any potential tyranny imposed by the standing army of the Federal government. In *Heller*, though, the Court is acting as a tyrant, usurping the will of the people and the original meaning of the Second Amendment such that their reformulated conception comports with a political agenda. It seems incredulous that the Court could admit a federalist origin to the Second Amendment but disregard it without stating any plausible rationale for such an action.

⁵² *Heller*, slip op., at Majority 9: "Keep arms' was simply a common way of referring to possessing arms for militiamen and everyone else."

Instead of interpreting the text as written, Scalia opts to interpret the text as it best fits his personal conception of a natural, inherent individual right to own a firearm outside the context of armed, well-regulated militia service. Accordingly, he conceives of the Second Amendment supporting a libertarian ideology encompassing an individual right to liberty (bear arms for protection of oneself) and property (the right to keep arms as a personal and private possession).⁵³ In a normal reading of the clause (re: wherein “keep” and “bear” are unitary), these assertions would be implausible to preserve.

Justice Stevens contests separating the clauses and determining the individual meaning of each clause, ironically, quoting a prior Scalia dissent: “The Court does not appear to grasp the distinction between how a word can be used and how it is ordinarily used.”⁵⁴ A preponderance of evidence from the colonial era to the period surrounding the ratification of the Constitution and the Nation’s early years supports the Stevens supposition (that “Arms” is military in meaning and the Second Amendment concerns militia, not private, weaponry usages), with over 90% of surviving recorded uses from that time span adhering to Stevens’ conception of the Amendment’s meaning.⁵⁵ Again, the Professors of Linguistics take issues with the Majority’s decision to dilute the phrase in to two expressions, remarking, after an exhaustive investigation regarding the “idiomatic usage” of “keep and bear arms” at the time of the drafting and passing of the Second Amendment, “Given the Second Amendment’s purpose and use of the idiom “bear Arms,” the natural meaning of the adjacent word “keep,” when used in reference to “arms,” is the personal possession or public control of arms (weapons of offence, or armour of defense) for service in a well regulated militia.”⁵⁶

To fault Scalia’s syntactical deconstruction of the Second Amendment as being wholly incorrect on its face (without considering his noticeably flawed employment of history, to be discussed later) is unfair: were the meaning of the Second Amendment wholly unambiguous, then *Heller* would not have survived long enough to be heard before the Supreme Court. But, since no one but the people alive in 1791 could articulate what the “public meaning” of the Amendment was at the time of its creation, and

⁵³ Amar, “Heller, HLR” at pg189

⁵⁴ *Heller*, slip op., at Majority.11 (quoting *Smith v. United States*, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting)).

⁵⁵ “*Heller* as Hubris, and how *McDonald v. City of Chicago* May Well Change the Constitutional World as We Know It” William Merkel, *Santa Clara Law Review* (2010) at page1229. (Hereafter Merkel, “Hubris”)

⁵⁶ Brief for Professors of Linguistics at pg. 27

it is assumed that all of the people alive in 1791 are, by now, dead, the meaning of the Second Amendment can always be contested. Thus, it cannot be definitively ruled out that Scalia's mangled interpretation is incorrect; there will always be a slight chance that the people of 1791 understood their language and idiomatic phrases as poorly as Scalia does in the present. Were the people of 1791 confronted the circumstances of the present – where military-grade weapons can be owned by the average citizen and some States' concealed-carry laws permit handguns to be carried at all times in all places – would they interpret the Second Amendment in the same manner as they would when the most palpable threat was the federal government's standing army instead of their neighbor? Mark Tushnet, to this effect, avers that “we cannot infer from what the term would have been understood to mean were the background facts different, as they inevitably are.”⁵⁷ Thus, to arrive at a better understanding of the Second Amendment, a new “Insurrectionist Theory” is devised to reconcile the past/present discord in the “public meaning” of “arms” in 1791 and its meaning in 2012.

Part I D: The Second Amendment and a New “Insurrectionist Theory”

This paper proffers the idea that the Second Amendment is most easily read as supporting a right to insurrection. The brand of “Insurrectionist Theory” advanced by this paper recognizes the Second Amendment, with respect to its historical context, was an attempt to assuage the Anti-Federalist “concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States.”⁵⁸ Concurrently, the “Insurrectionist Theory” forwarded by this paper departs from Justice Stevens' supposition of a purely “Statist” interpretation of a “militia” enunciated in his *Heller* dissent, averring that the militia's purpose, aside from providing the state and its citizens protection from a potentially despotic central government with a powerful army, was to quash insurrections within the state as well – to temper anti-Union ideas with violence for the purposes of aiding transition to the form of government as described in the (then newly-formed) Constitution. Thomas Jefferson, for

⁵⁷ Mark Tushnet's “Heller and the New Originalism,” published in *Ohio State Law Journal*, Vol 62:609 (2008) at page 622. (Hereafter, Tushnet “Originalism”)

⁵⁸ *Heller*, slip op., at Stevens Dissent 2831

example, found the Second Amendment to be both a right and responsibility of the people “to keep and bear arms collectively” through the militia structure “as a guarantor of a republican revolution.”⁵⁹ Furthermore, “Federalist 28” asserts a necessity for the National government to quash insurrection spurred by a whole State through violence, if required by the given circumstances, for the purposes of preserving the new form government and for the people of a state, in the event that “persons entrusted with supreme power” within their state “betray[ed] their constituents,” to “rush tumultuously to arms, without system, without resource; except in their courage and despair.”⁶⁰

Unlike Joshua Horwitz and Casey Anderson’s blanket classification of all “Insurrectionists” attempting to “legitimize values that are fundamentally hostile to the survival of democracy not only as we have known it but also as our founding fathers knew it” to enshrine a “virtually unlimited” right for all people to “keep and bear” any firearm they so desire for the purposes of “hold[ing] tyranny at bay.”⁶¹ As previously shown, the Founding Fathers, although not explicitly condoning violent government overthrow, advocated at least some degree of violent insurrection among the citizenry in the event of perceived tyranny of the government. This, however, does not preclude the existence of the citizenry in arms for the purposes of militia, especially when considering the role of militias in “the course of the late war” wherein “in times of insurrection, or invasion, would be natural and proper that the militia of a neighboring State should be marched into another, to resist a common enemy, or to guard the republic against the violence of faction or sedition.”⁶²

Expanding outwards from the dissenters in *Heller’s* restricted definition of the feasible or imaginable purposes for a militia during the time of the second Amendment’s framing, new potential meanings for “militia” and “the right to keep and bear arms” by the “people” begin to arise. This “Insurrectionist Theory” posits that a “well regulated militia” facilitated the right of the people to conduct a formalized insurrection through the militia’s structure, mandating that arms must be kept at all times by the “people,” able-bodied white males at the founding of the Constitution, to effectively

⁵⁹ Anderson, Casey and Horwitz, Joshua. *Guns, Democracy, and the Insurrectionist Idea*. The University of Michigan Press. Ann Arbor, Michigan. 2009. Pg. 105. (Hereafter Anderson, Horwitz, *Insurrectionist*)

⁶⁰ “Federalist 28,” Alexander Hamilton (page 162)

⁶¹ Anderson, Horwitz, *Insurrectionist* at pg. 80.

⁶² “Federalist 26,” Alexander Hamilton (170)

“revolt against tyranny, without condoning an open-ended right to engage in rebellion, civil war, or cop-killing.”⁶³ The latter is a right codified both with and without the confines of an official State militia and is a right to self-defense in terms of maintenance of a “free State,” with “free State” referring to both “security of a free polity”⁶⁴ and to the individual State.

It should not be assumed that this brand of “Insurrectionist Theory” supports any proposition that the Second Amendment meaning finds an individual “right of law-abiding, responsible citizens to use arms in defense of hearth and home.”⁶⁵ Moreover, because of the subjectivity with which a people can determine that a government is tyrannical, the (overwhelming consensus) that the people are not restricted in their ability to choose those that govern their locality, the current stability of the United States government and of State governments, the existence of a Militia in the form of the National Guard, and the lack of the term “self-defense” in the text of the Amendment, it can be inferred that the Amendment protects a means of self-defense (through the Militia) but not private acts of self-defense against other members of the population. The result of this analysis is that the Second Amendment, as a consequence of its historical grounding in a “republican vision of a militia prepared to defend against government tyranny,”⁶⁶ is “not dead, just comatose.”⁶⁷ Akin to the nonsensicality of an application of the Third Amendment in modern society⁶⁸, the Second Amendment is a relic of history and cannot be read as endorsing the Court’s interpretation of the “core right” to individual self-defense in the present day through its text. As Richard Posner bluntly states, “There are few more antiquated constitutional provisions than the Second Amendment.”⁶⁹ Bolstering this contention is Timothy McVeigh, famous for

⁶³ Darrell A.H. Miller’s “Guns as Smut: Defending the Home-bound Second Amendment,” published in the *Columbia Law Review*, Vol 109:1278 at page 1322. (Hereafter, Miller, “Smut”)

⁶⁴ *Heller*, slip op., at Majority 28.

⁶⁵ *Heller*, slip op., at Majority 53

⁶⁶ Reva Siegel’s “Dead or Alive: Originalism as Popular Constitutionalism in *Heller*,” published in the *Harvard Law Review* Vol 122:191 at page 239. (Hereafter Siegel, “Dead or Alive”)

⁶⁷ Miller, “Smut” at pg1313

⁶⁸ The Third Amendment to the United States Constitution reads, “No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.” Since the American Revolution, “quartering” has not been a matter of concern; therefore, it is ludicrous to point to an amendment that has no pertinent rationale given the conditions of modern society as the foundation of a “fundamental” right to own a handgun or any other weapon asynchronous with the “arms” in use at that time. Van Alstyn in “The Second Amendment and the Personal Right to Arms” (1994) argues that the deficit of “useful modern case law” for the Second Amendment is that “there has been no occasion to develop such law. So much is true only of the Third Amendment.” (1239) Perhaps this is because the Second Amendment has the same amount of relevance to modern society as does the Third.

⁶⁹ Judge Richard A Posner, “In Defense of Looseness,” published in *The New Republic* on August 27, 2008. Accessible at <http://www.tnr.com/article/books/defense-looseness> (hereafter Posner, “Looseness”)

the Oklahoma City Bombings, an adherent to a “Strong Insurrectionist Theory”⁷⁰ with a profound paranoia of Government and of Governmental usurpation of his “fundamental” rights.⁷¹

Part II A: Historical Perversion as a Conduit for Discretionary Judicial Interpretation

Given the same series of 27 words, three commas, and one period, it is almost incredulous that the Majority and the Dissent arrived at such starkly different conclusions about the “meaning” of the Second Amendment. This discrepancy stems, in part, from the judicial ideologies invoked in the opinions of the dissenters and the majority. To support their claimed meaning of the Second Amendment, each side consulted historical texts yet chose selectively among available texts in order to arrive at their decisions. Whether the Majority opinion methodology is considered “new originalism,”⁷² “result-oriented law office history,”⁷³ “constitutional lawmaking through constitutional politics,”⁷⁴ “triumph of originalism...[or] an exposé of original intent,”⁷⁵ “original public meaning,”⁷⁶ “plain-meaning originalism,”⁷⁷ “originalism stripped of the original understanding of how a constitutional provision should be interpreted,”⁷⁸ to “[amend] the constitution through judicial fiat,”⁷⁹ or as “the most explicitly and self-consciously originalist opinion in the history of the Supreme Court,”⁸⁰ it is clear that arriving at that their conclusion rested the supposition that “historical truth and historical meaning is ascertainable,”⁸¹ a supposition especially tenuous in cases where constitutional interpretation cannot

⁷⁰ Miller, “Smut” at pg1313; Discussing the lack of standardization of “Insurrectionist Theory,” Miller explains a discrepancy in “degree and analytical rigor” of various “Insurrectionist Theories” that roughly formulate a scale wherein the strongest “Insurrectionists” adhere to a Second Amendment reading sanctioning use of guns anywhere at any point in time (since the Government can be oppressive at a given moment) and the weakest contend “only a legally enforceable right to possess a *means* to resist tyrannical government; it says nothing about a legal right to deploy those means or the military efficacy of those means.” This paper’s version of the “Insurrectionist Theory” is closer to the latter on the “Insurrectionist” spectrum.

⁷¹ Anderson, Horwitz, *Insurrectionist* at pgs. 17, 2, 223

⁶⁸ Mark Tushnet’s “Heller and the Critique of Judgment” *The Supreme Court Review*, Vol. 2008, No. 1 (2008), pp. 61-87 at page 63. (Hereafter Tushnet “Critique”)

⁷³ Sanford Levinson to Balkinization, Some Preliminary Reflections on Heller, <http://balkin.blogspot.com/2008/06/some-preliminary-reflections-on-heller.html>

⁷⁴ Siegel, “Dead or Alive” at pg194

⁷⁵ Wilkinson, “Of Guns, Abortion” at pg. 256

⁷⁶ Lawrence B. Solum, “*District of Columbia v. Heller* and Originalism,” *Northwestern University Law Review* No. 2, 923 (2009) at page 947. (Hereafter Solum, “Originalism”)

⁷⁷ Saul Cornell, “Originalism on Trial: The Use and Abuse of History in *District of Columbia v. Heller*,” *Ohio State Law Journal*. (2008) at page 626. (Hereafter, Cornell, “Originalism on Trial”)

⁷⁸ Posner, “Looseness” at pg. 4

⁷⁹ Nelson Lund, “The Second Amendment, *Heller*, and Originalist Jurisprudence,” published in *UCLA Law Review*, Vol. 56, No. 5, June 2009, pp. 1343-1376 at page 1344. (Hereafter Lund, “Heller, and Originalist Jurisprudence”)

⁸⁰ Cass Sunstein, “Second Amendment Minimalism: *Heller* as *Griswold*,” *Harvard Law Review*. Vol 122 (2008) at page 246. (Hereafter: Sunstein, “Griswold”)

⁸¹ William Merkel, “The District of Columbia v. Heller and Antonin Scalia’s Perverse Sense of Originalism,” *Lewis & Clark* Page | 16

possibly result in a singular, conventional understanding of the historical record. If the historical record cannot be read neutrally (in that interpretation of the record can serve to support either side of an argument), then the Court is presented with a discretionary choice and should practice judicial restraint, deferring interpretation of the legislative body instead of rewriting law.⁸² Though Justice Stevens, employing “Old” Originalism, is viewed by most historians as employing a more correct understanding of the Second Amendment’s meaning⁸³, it is by no means a neutral interpretation of history.⁸⁴ *Heller*, on both sides, brilliantly illustrates judges dressing up like historians to justify their personal opinions.⁸⁵ Neither Justice meets the standards of historical scholarship mandated by any form of originalism.⁸⁶

Professor Lawrence Solum argues that there are three senses of meaning in language: 1) semantic (linguistic meaning), 2) applicative (implications, consequences), and 3) teleological (purpose/function). He determines that the discrepancy in Justice Scalia and Justice Stevens’ opinions arises from a fundamental difference in interpretation of language: Justice Scalia utilizes a “semantic sense” to arrive at a recovery of the Second Amendment’s meaning while Stevens prefers a “teleological sense” in his assertion that nonmilitary use was not part of the Amendment’s meaning.⁸⁷ These disagreements on linguistic meaning lead to clashing interpretation of the Amendment’s clauses and different interpretations of relationships between clauses in the Justices’ inquiries. Solum also hypothesizes that the discrepancy in understanding could be a ramification of the larger jurisprudential

Law Review (2009) at page 380. (Hereafter, Merkel, “Scalia Perverse”)

⁸² *Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837, 843–45 (1984) (explaining that, in cases of ambiguity, deference is given to the interpretation of the agency with whom Congress has entrusted enforcement of the statute) via Wilkinson, “Of Guns, Abortion” at pg. 272

⁸³ Sunstein, “Griswold” at pg. 256

⁸⁴ Nathan R. Kozuskanich, “Pennsylvania, the Militia, and the Second Amendment,” *The Pennsylvania Magazine of History and Biography*, Vol. 133, No. 2 (Apr., 2009) at page 122, regarding the use of Pennsylvania’s arms statute by both sides in *Heller* to selectively read the Constitution and Second Amendment for their individual, ideological aims. “In the *Heller* case, both the majority and minority opinions used Pennsylvania to make their point, and both sides had their history wrong.” This furthers the notion that the ambiguous historical record is pushed in such a way as to endorse one discretionary judicial interpretation over another, resulting in a decision that was 1) erroneously left to the discretionary devices of the Judges and 2) should have given deference to legislature and legislative ability under the federalist ability to pass local-issue-tailored laws.

⁸⁵ Sanford Levinson, “United States: Assessing *Heller*,” published in *I • CON*, Vol. 7 No. 2, pp. 316 – 328, at page 325 “Mark Tushnet once famously, and caustically, referred to the notion of the ‘lawyer as astrophysicist,’ by which he meant the tendency of very smart lawyers to believe that a weekend’s immersion in the relevant materials would enable them to hold their own as experts with any poor soul who had actually spent years earning, say, a Ph.D. in history (let alone astrophysics).” (Hereafter, Levinson, “Assessing *Heller*”)

⁸⁶ Cornell, “Originalism on Trial” at pg. 627

⁸⁷ Solum, “Originalism” at pg. 941

debate between formalists and instrumentalists.⁸⁸ Either way, a distillation of Solum’s argument reveals an overarching difference between the manners with which judicial methodology informs an opinion. With respect to *Heller*, this battle over the meaning of the Second Amendment pits Old Originalism/” “Original Intentions Originalism,” embodied by Stevens’ technique of analyzing the Framers’ intentions alongside other relevant historical documents, against New Originalism/”Original Meaning Originalism,” as elucidated by Justice Scalia’s approach to *Heller*⁸⁹.

Part II B: Scalia and Original Intent in *Heller*

Justice Stevens, employing “Old Originalism” is generally considered to have authored a more “originalist” opinion than Scalia: “Justice Scalia’s majority opinion employed original public meaning originalism, while Justice Stevens’ dissent used the more traditional method of originalism which focuses on the intent of the Founders.”⁹⁰ It seems as if Stevens employed originalism accidentally; since most of his opinion was dedicated to battling Scalia on the historical basis of his opinion and what a proper reading of the Second Amendment should be, he presented almost no arguments in support of the District or a need for a gun ban.⁹¹ Regardless of intent to proliferate originalist judicial ideology, the sum effect was a universal employment of originalism by the opinions yet divergent results.

As previously mentioned, the approach employed in *Heller* resolved to unearth the “original public meaning” of the Constitution as it was understood by the people that voted for its ratification through their state legislatures, public forum debates, and other documents that provided context for the drafting of the Second Amendment. In his analysis, Justice Scalia quotes state constitutions drafted prior to the U.S. Constitution, other provisions of the Constitution, dictionary definitions from that era,

⁸⁸ Solum, “Originalism” at pg. 958 (also defined as “textualists v.purposivists,” meaning that legal content is constrained by the words and phrases comprising a text versus the belief that the meaning of legal rules is derived from the function of that rule.)

⁸⁹ His interpretation of the text of the Second Amendment is “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.” *United States v. Sprague*, 282 U.S. 716, 731 (1931).” *Heller v. District of Columbia*, 554 U.S. 570, (2008). Slip of Majority at 3.

⁹⁰ Cornell, “Originalism on Trial” at pg. 625

⁹¹ Sunstein, “Griswold” at pg. 250 (Remarking that none of the Justices approached the Second Amendment from a moral perspective of the people at the time of the framing, Sunstein summarizes Scalia’s originalism as “distinctive” and “ascendant,” Stevens’ dissent as originalist but also with emphasis on precedent, traditions, and judicial deference to legislators, and Breyer’s dissent as a “plea for balancing” with pragmatic as well as originalist elements.)

and a myriad of sources from 19th Century discussing constitutional interpretation, an 1871 edition of an English treatise⁹² discussing statutory construction, the Blackstone Commentaries on the English Bill of rights, the English Bill of Rights, Eugene Volokh⁹³ an, and the notion of “natural right” to support his position. Problematic, however, is that he fails to cite Founding-era United States sources for much of his evidentiary support. Furthermore, no historical evidence is cited to support his claim that “original meaning” implies firearms “common at any given time.”⁹⁴

This lack of founding-era sources cannot be construed to bestow “original meaning” to the Second Amendment through non-founding era sources; Justice Scalia’s constructs his result-oriented majority opinion on a selective interpretation of history, favoring “atypical texts” like *Dissent of the Minority of Pennsylvania*⁹⁵ and declares them “influential” for their time while decreeing that text typically considered influential,” like Benjamin Oliver’s *Rights of an American Citizen*, as “unrepresentative.”⁹⁶ Since the majority of his evidentiary support stems from Civil-War era, Post-Civil War, international documents, and a selective reading of influential scholars, William Merkel contends that most of his objections to the Scalia’s *Heller* opinion stem from “the fact that his allegedly history-driven method depends on numerous false claims.”⁹⁷ Even historians that find face validity in original public meaning as a constitutional interpretation philosophy, like prominent legal and founding era historian David Konig, believe Scalia’s opinion to be disingenuous as a consequence of its use of the 19th century to support his preferred reading of an Amendment written and conceived in the 18th century.⁹⁸ The lack of historical basis for a historically-driven interpretation leads historian of the founding period Jack Cornell to remark, “Such an approach is intellectually dishonest and suggests that Justice Scalia’s

⁹² *Heller*, 128 S. Ct. at 2789.

⁹³ *Heller*, 128 S. Ct. at 2789

⁹⁴ Lund, “Heller, and Originalist Jurisprudence” at pg1364

⁹⁵ *Heller*, slip op., at Majority 34

⁹⁶ *Heller*, slip op., at Majority 37 “We have found only one early 19th-century commentator who clearly conditioned the right to keep and bear arms upon service in the militia—and he recognized that the prevailing view was to the contrary.”

⁹⁷ Merkel, “Hubris” at pg. 1225 (Merkel supports this allegation based on the Brief of Amici Curia Jack N. Rakove, et al. in support of Petitioners at 9-13, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), signed by over a dozen “leading eighteenth-century specialists” that criticize the “private rights” interpretation of the Second Amendment.

⁹⁸ David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 *UCLA Law Review*. 1295 (2009). (Konig accepts the “public meaning” perspective for the sake of argument, not indicative that it has actual validity).

brand of plain-meaning originalism is little more than a smoke screen for his own political agenda.”⁹⁹

Originalism, as defined by Justice Scalia in his work *A Matter of Interpretation* and first enunciated during a speech at The Catholic University of America, “treats the Constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated...I [as a textualist and originalist] take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words.”¹⁰⁰ Originalism, in theory, is an objective approach, limiting room for judicial interpretation resulting from personal beliefs, which allows a black-and-white criterion for review and invalidation of legislation: either a law fits with the original meaning or is in conflict with the original meaning. Justice Scalia, in *Heller* does not practice what he preaches (especially in other decisions¹⁰¹), instead “mak[ing] a great show of being committed to the Constitution’s original meaning, but fail[ing] to carry through on that commitment..”¹⁰² He throws neutrality and judicial restraint to the wind by “tak[ing] sides in the culture war” surrounding gun control through a perverse and unfounded reading of the Second Amendment that operates under the guise of “original meaning” yet serves to propagate only his own “original meaning” and panders to the public opinion of that time.

Since addressing the views of the Framers (who wrote the constitutional text that was voted on and eventually ratified by the “People” – the same homogeneous group of white, land-owning males Justice Scalia claims apprise “original meaning”) would involve addressing the debates surrounding the Constitution¹⁰³, signaling that “original meaning” may have been contested at the “original” time, Scalia instead cites the people that provided the structural and ideological basis for the U.S. Bill of Rights: the English Bill of Rights¹⁰⁴. Interpreting the English Bill of Rights while ignoring the fundamental

⁹⁹ Cornell, “Originalism on Trial” at pg. 630

¹⁰⁰ Justice Antonin Scalia, Remarks at The Catholic University of America Washington, D.C.: A Theory of Constitution Interpretation (Oct. 18, 1996).

¹⁰¹ *Lawrence v. Texas*, 530 U.S. 558, 602-603 (2003) (Scalia, J., dissenting). “the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer... [w]hat Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new ‘constitutional right’ by a Court that is impatient of democratic change.”

¹⁰² Lund, “Heller, and Originalist Jurisprudence” at pg1345

¹⁰³ Posner, “Looseness” at pg. 3: Judge Posner asserts that, without an acknowledgement of the Framers, Originalism is absent in a decision: “Originalism without the interpretive theory that the Framers and the ratifiers of the Constitution expected the courts to use in construing constitutional provisions is faux originalism”

¹⁰⁴ *Heller*, slip op., at Majority 7.

differences between the U.S. (federalist, popular sovereignty, classically republican citizenship) and England (monarchy, parliament, unitary governance without federalism, liberal right for subjects)¹⁰⁵ is sheer ignorance. Simply because a document was based on a preexisting document does not mean that the documents are identical in meaning; a movie based on true events does not mean the movie is a documentary. As Professor Akhil Amar sarcastically notes in response to the proclamation that the Second Amendment is identical to the English right, “Or perhaps the Second Amendment aimed to add republican and federalist elements to the liberal English right without subtracting one iota from the libertarian self-defense core of English law,”¹⁰⁶ conveying the ludicrousness of the deduction that any substantial conclusions about the *actual* meaning of the Second Amendment could possibly be drawn from analyzing the English Bill of Rights. Justice Stevens elucidates the purpose of the English Bill of Rights: to arm a suspect of the people “as a body” to combat possible “oppression by rulers who disarmed their political opponents” and to codify the sovereignty of the Parliament¹⁰⁷, clearly different from a private defense right. Since Scalia utilizes the English common law right to justify his claim that the Second Amendment recognizes “the pre-existence of this right” to individual self-defense¹⁰⁸, this surmise may be discarded; ergo, there seems to be no “pre-existing” self-defense right other than the one conceived of within Scalia’s misguided employment of history and textual analysis.

Part II C: Precedent, Interrupted

One of the most brazen conclusions Justice Scalia proliferates in his opinion occurs when, upon completion of his historical and textual analysis of the Second Amendment, proceeds to an examination of precedent wherein his first sentence reads: “We now ask whether any of our precedents forecloses the conclusions we have reached about the meaning of the Second Amendment.”¹⁰⁹ This directly assumes that he has not only proven that an individual right to gun ownership exists outside the context

¹⁰⁵ Amar, “Heller, HLR” at pg170-171

¹⁰⁶ Amar, “Heller, HLR” at pg171

¹⁰⁷ *Heller*, slip op., at Stevens Dissent 29: “The English Bill of Rights responded to abuses by the Stuart monarchs; among the grievances set forth in the Bill of Rights was that the King had violated the law “[b]y causing several good Subjects being Protestants to be disarmed at the same time when Papists were both armed and Employed contrary to Law.” Article VII of the Bill of Rights was a response to that selective disarmament; it guaranteed that “the Subjects which are Protestants may have Armes for their defence, Suitable to their condition and as allowed by Law.”

¹⁰⁸ *Heller*, slip op., at Majority 22

¹⁰⁹ *Heller*, slip op., at Majority 47

of militia service but also that the logical reasoning employed to arrive at his conclusion is infallible. In his analysis, he addresses problems arising from *United States v. Cruikshank*,¹¹⁰ *Presser v. Illinois*¹¹¹, and concludes with a shallow but more thorough (in comparison with *Cruikshank* and *Presser*) inquiry of the opinion most controlling in this case, *United States v. Miller*¹¹².

Scalia's hubris with regard to his "originalist interpretation" of the Second Amendment blinded him from considering any of the aforementioned precedents with a modicum of esteem because he had already closed the debate definitively. This lack of consideration is in conflict with the Vesting Clause of Article III of the Constitution, normally interpreted as incorporating "a principle of *stare decisis*;"¹¹³ additionally, the Vesting Clause is crucial if Supreme Court decisions are to have any substance in the long term. Ergo, any true originalist, provided the precedent does not conflict with the Constitution, would strictly adhere to the Vesting Clause¹¹⁴ or risk being in violation of the Constitution. Problematic, though, is that the useful case law on the Second Amendment is "missing in action."¹¹⁵ Lacking precedent does not indicate that an issue has not been thoroughly discussed but, rather "a widely shared perspective" that the current functioning of a clause or provision is proficient with regard to its purpose.¹¹⁶ But, Justice Scalia audaciously alters the meaning of the Second Amendment while maintaining that this new definition would leave the controlling precedent intact, permitting him to snub past case law and chronological progression of meaning with another form of backwards induction.¹¹⁷

Originalism functions best, with "best" referring to "allowing for subjective interpretation of

¹¹⁰ *United States v. Cruikshank*, 92 U.S. 542 (1875).

¹¹¹ *Presser v. Illinois*, 116 U.S. 252 (1886).

¹¹² *United States v. Miller*, 307 U.S. 174 (1939).

¹¹³ Lund, "Heller, and Originalist Jurisprudence" at pg1347

¹¹⁴ United States Constitution, Article III, Section I: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office."

¹¹⁵ Van Alstyne "Personal Right" at pg1239

¹¹⁶ *Mack and Printz v. United States*, 521 U.S. 898 (1997) at 978, Justice Breyer dissenting. Justice Breyer maintains that lacking precedent, with regard to "direct federal assignment of duties to state officials," indicates "a widely shared practice of assigning such duties in other ways." With regard to the Second Amendment, the rarity of Second Amendment litigation implies that legislation on the Amendment operates in ways that are not restrictive enough to be seriously contested – except when in the hands of gun-rights advocate such as Respondent Dick Heller of *Heller*.

¹¹⁷ *Heller*, slip op., at Majority 52, footnote 24: "In any event, it should not be thought that the cases decided by these judges would necessarily have come out differently under a proper interpretation of the right." Conversely, an independent right to own guns would change the decision in each controlling precedents.

contentious clauses,” when it is uncontrolled by prior decisions and “doctrine is not developed” on the issue, “but the Court has rarely spoken in originalist terms even when doctrine barely exists.”¹¹⁸ However, a lack of precedent may be representative. One reason for regarding *Heller* as a particularly important test of originalism is that there were virtually no relevant Supreme Court precedents, and certainly none that could be considered dispositive. The Court, facing few precedents (the most recent of which was decided in 1939), had room to operate, facing few obstacles to creating this new, substantive right within the Second Amendment; where controlling precedent led to a conclusion with which the Court “simply [did] not approve,”¹¹⁹ the Court would disregard the decision because it reached a different (and thus controlling) conclusion than the one articulated in *Heller*, undermining the judicial activism of the decision. Thus from the ashes of *Heller* arose a new right and a new type of ruling: *Heller* was “the first time in U.S. history that the Supreme Court has invoked the amendment to invalidate a statute or, as in this case, a city ordinance that is directly subject to the restraints of the Bill of Rights: the functional equivalent of a federal statute.”¹²⁰ From 1791 to 2008, the Court never showed any inclination that it believed the Second Amendment to control the right to anything but military use of weapons as determined by the state. Why did the essential meaning of the Second Amendment suddenly change in 2008 after remaining virtually unchallenged for such a long time?¹²¹

William Merkel avers that, while originalism typically fails to procure a precise reading of Constitutional text when no dominant understanding appeared at the time of the text’s creation, in the “rare case” of unambiguous text, originalism can be “honestly and faithfully applied” to arrive at an unambiguous answer .¹²² In the “rare case” of the Second Amendment, the unambiguous answer is the

¹¹⁸ Sunstein, “Griswold” at pg. 250

¹¹⁹ *Heller*, slip op., at Stevens Dissent 45

¹²⁰ Levinson, “Assessing *Heller*” at pg. 317

¹²¹ The answer to this question is, simply, that the Court of popular debate, bolstered by aggressive National Rifle Association propaganda, began to believe in a fundamental right to gun ownership for private purposes. Cass Sunstein remarks, in Sunstein, “Griswold” at pg. 253, that “Any ruling against an individual right to have guns for purposes of self-defense and hunting would have been wildly unpopular. Such a ruling would have polarized the nation. By contrast, *Heller* itself was met with widespread social approval.”

¹²² Merkel, “Scalia Perverse” at pg. 356 (remarking that “in such cases, originalism cannot elevate constitutional judging above the contentious plane of politics because the meaning of the constitutional text was hotly, bitterly, and ideologically contested at the time it was created.”) The extensive duration throughout which the Second Amendment’s meaning was uncontested almost demands that the “public understanding” was understood – as in, the guaranteed protection was to the state militia from central government interference. Since the Second Amendment was never understood to protect other rights, be them hunting or self-defense, for over 200 years, the Court’s determination that it magically *did* protect other

right of a state to a militia without federal government interference.” Of the three relevant precedents, all support that definition of the Second Amendment Right. *Cruikshank* framed the Second Amendment as federalist in quality, declaring that the Second Amendment is a restriction on the powers of the central government, as deferential to the state, positing that violation of a citizen’s rights is to be redressed by “powers which relate to municipal legislation” or police powers of a state or locality, and as not concerning “bearing arms for a lawful purpose” as “that right is not guaranteed by the Constitution.”¹²³ *Presser* arrives at its conclusion, protecting the “exercise of this power [of militia] by the states is necessary to the public peace, safety, and good order,”¹²⁴ by relying heavily on *Cruikshank*, a pristine example of adhering to the principle of *stare decisis*. While reviewing *Cruikshank* and, subsequently, *Presser* in *Heller*, the Court seems to forget *stare decisis* by blatantly misinterpreting the normal reading of *Cruikshank* (see note 121) while challenging *Presser* not on its evocation of *Cruikshank*’s normal meaning to arrive at its decision but, alternatively, as saying “nothing about the Second Amendment’s meaning or scope.”¹²⁵ Thus, *Presser* and *Cruikshank*’s concurrence in a meaning and scope of the Second Amendment “say nothing about the Second Amendment’s meaning or scope,” a nonsensical conclusion further bolstering the absurdity and fallacy underlying the majority opinion.¹²⁶

*United States v. Miller*¹²⁷ should have been the controlling precedent for *Heller* had the Court obliged *stare decisis*; it held that the National Firearms Act of 1934 was constitutional exercise of

rights was not a result rooted in history but, rather popular opinion.

¹²³ *Cruikshank*, 92 U.S. 553. “The right there specified is that of ‘bearing arms for a lawful purpose.’ This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by Congress.” Somehow, the Majority in *Heller* (*Heller*, slip op., at Majority 47) misinterprets this sentence to arrive at the conclusion that *Cruikshank* “described the right protected by the Second Amendment as ‘bearing arms for a lawful purpose.’” As recognized by Stevens in his dissent, this conclusion is wholly inaccurate. (*Heller*, slip op., at Stevens Dissent 39.) The “normal reading” of this statement explicitly denies constitutional protection under the Second Amendment to “bearing arms for a lawful purpose,” implying that constitutional protection may be had for that specific right under a future amendment.

¹²⁴ *Presser*, 116 U.S. 268: “All citizens capable of bearing arms constitute the...reserved militia of the United States as well as of the states...the states cannot...prohibit the people from keeping and bearing arms so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.”

¹²⁵ *Heller* slip at 49; Justice Stevens, in Dissent, stated that *Presser* proliferated the notion that the constitutionally protected right was that of arms in the context of militia; rights outside the militia context were protected (*post* at 40).

¹²⁶ And, both opinions directly conflict with the majority in *McDonald* by explicitly stating that the Second Amendment is a right of the *states* against the government, hence why it was not incorporated by the Fourteenth Amendment to apply to the states (until the decision in *McDonald*) while almost all of the other provisions of the bill of rights were.

¹²⁷ *United States v. Miller*, 307 U.S. 174 (1939)

government power and not a violation of the Second Amendment or of the states' militia right.¹²⁸ Furthermore, it classified the type of weapon used to have no “reasonable relationship to the preservation or efficiency of a well regulated militia” to render it unprotected under the Second Amendment penumbras, mostly due to the fact that the weapon was not “part of the ordinary military equipment” and use of the weapon would likely not “contribute to the common defense.”¹²⁹ *Miller*, like *Heller*, discussed the Blackstone Commentaries, the English militia system, the state militia system, and legislature enacted by the states in the before and during the Constitutional era, in order to arrive at a definition for “militia” as it was employed in the Second Amendment – as a military entity. The *Heller* Court immediately dismissed the findings of *Miller* except that the Second Amendment may not apply to certain types of weapons.¹³⁰

Ironically, the Court criticized *Miller* for arriving at its opinion through a consideration of the English Right to Bear Arms, a piece of evidence employed earlier in the *Heller* decision to support its finding of an individual arms right.¹³¹ Despite *Miller* blatantly connecting the Second Amendment to militia use and limiting “Arms” to those used by a militia, the Court in *Heller* discarded most of the decision, reading it “to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right...”¹³² By not *entirely* discarding *Miller*, the Court pretends that, yes, it did adhere to *stare decisis*. And, in *McDonald*, the Court most certainly held to the *stare decisis* of *Heller* by overturning *Cruikshank* and *Presser* (this time overtly). But, common sense dictates that the Court’s decision was not informed by “straight path of *stare decisis*.”¹³³

¹²⁸ *Miller*, 307 U.S. 174, at 174, the Court explains that a “12-gauge shotgun with a barrel less than 18 inches long,” as a result of the weapon’s passage through state lines (interstate commerce), the lack of registration, and the non-military or militia use of that weapon did not merit protection under the Second Amendment and violated the National Firearms Act. The decision implies that Congress can regulate this particular usage of guns as a result of the interstate travel of the gun despite the fact that the right to keep and bear arms varied from state to state – indicating federal government supremacy while maintaining room for experimentation with Arms legislation within the states as is provided in a federalist system of divided powers.

¹²⁹ *Miller*, 307 U.S. 174, at 178.

¹³⁰ *Heller*, slip op., at Majority at 50

¹³¹ *Heller*, slip op., at Majority at 51

¹³² *Heller*, slip op., at Majority 53

¹³³ *Heller*, slip op., at Stevens Dissent 4. Justice Stevens articulates, “While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged “to bring its opinions into agreement with experience and

Page | 25

Part III A: Popular Constitutionalism & Pandering

In *Heller*, the Court determines that *Miller* indicated that “the traditional militia was formed from a pool of men bringing arms ‘in common use at the time’ for lawful purposes like self-defense.”¹³⁴ But, as Professor Reva Siegel notices, “It is, to say the least, striking that an *originalist* interpretation of the Second Amendment would treat civic republican understandings of the amendment as antiquated, and refuse to protect the arms a militia needs to defend against tyranny.”¹³⁵ Ergo, in maintaining that *Miller* has a semblance of relevance (prohibiting non-military weapons), the Court simultaneously stripped it of that same relevance (by changing “non-military” weapons to an allowance for arms “in common use at the time”). The net of this alteration of *Miller*’s meaning is not the prohibition of non-military weapons but the allowance of “common” weaponry, like handguns, decidedly non-military in almost all uses. If the Court allows weaponry to refer to those arms common at the time, and most persons in the United States are not in the military and, by proxy, do not have access to military weapons (legally, at least), then the definition of weaponry regards almost solely non-military weapons and fluctuates over time, technology, and accessibility. Originalists maintain that the Constitution is a static document, uninfluenced by the ebb and flow of public opinion; concurrently, in a supposedly “originalist” decision, Justice Scalia finds the static “original meaning” of the Second Amendment through evidence rife with temporal oddities and finds the definition of the range of weapons to be protected by that Amendment to be subjectively based on the desires and tendencies of the public. Pandering to public sympathies does not comport with “original meaning;” Justice Scalia’s decision, at

with facts newly ascertained.” Most certainly, the *Heller* majority did not adhere to *stare decisis* nor did they abide by the *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) test for overturning precedent nor to the ideal set by Chief Justice John Roberts’s concurring opinion in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) “[*Stare decisis*’s] greatest purpose is to serve a constitutional ideal—the rule of law. It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent.” *Heller* does not comport with this “unusual circumstance” given the uncontested nature of the constitutional ideal for centuries that solidifies its “original meaning.”¹³⁴ *Heller*, slip op., at Majority 52; ironically, “traditionally” is a phrase indicates a progression and alteration over time of a practice anchored in the cultural history of a people. This, with regard to the “traditional” use of militia, would never be construed to be a “citizen’s militia” because, traditionally, people that were eligible to be in the militia and wanted to join the militia were in the militia as constructed by the state. Just as “militiamen” did not traditionally act as vigilantes, staying within the confines of the state’s orders, the ideal of vigilantism as embodied by the “citizen’s militias” is not in accord with the traditional meaning of “militia.” The Constitution traditionally reserved police power to the states; it did not traditionally allow unrestricted use of weaponry for the lofty and undefinable concept of “self-defense.”

¹³⁵ Siegel, “Dead or Alive” at pg193

the very least, diverges from originalism and “original meaning.” He interprets the Constitution based on populist opinion, injecting the Supreme Court into the realm of “Culture War” he so abhors.¹³⁶

In “Federalist 49,” James Madison warns against the succumbing to public opinion in any of the three branches of government because it poses a threat to “public tranquillity[sic];” deducing that public “passion” should not “sit in judgment” instead of public “reason,” Madison asserts that the Government’s responsibility is to control the deleterious effects of public “passion” through government regulation.¹³⁷ With gun violence, something usually the result of “passion” (hence the phrase “crime of passion”), becoming an epidemic, the need for national gun regulation is palpable but possibilities for it are unduly hindered by *Heller* and *McDonald*. Three of the District of Columbia’s handgun ordinances, in *Heller*, were struck down because “few laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban,”¹³⁸ insinuating that its ordinance was an outlier, not in comport with the national consensus of “acceptable” gun –control laws, and ergo likely to be supported by less-than-reasonable tenets.¹³⁹

Professor Cass Sunstein opines that “both historians and political scientists have shown that the connections between judicial rulings and public convictions are far more pervasive than is usually thought.”¹⁴⁰ That line of reasoning seems to provide context for the *Heller* decision answers the question of why 207 years elapsed between the ratification of the Second Amendment and the Supreme Court codifying a personal property right in firearms: because, for about 150 of those years, the “people” did not believe that they had an individual right to gun ownership under the Second Amendment¹⁴¹. Reva

¹³⁶ See *supra* note 100. Perhaps he participates in this “culture war” because he’s been involved in it since before he ascended to the Supreme Court. According to Robert Barnes article “Gun case presents quandary for Supreme Court justices,” published March 1, 2010 in *the Washington Post* (Section A01), Scalia “is unquestionably the court’s most outspoken proponent of gun rights. He has lamented in speeches that gun ownership is too often linked with criminal behavior and his hunting trip with then-Vice President Cheney caused a national controversy.” That would explain, too, why he insists so adamantly in changing the constitutionally-accepted definition of the Second Amendment – so he can continue to hunt turkeys without fear of disarmament by Draconian, tyrannical gun-control laws.

¹³⁷ “Federalist 49,” James Madison (308/310)

¹³⁸ *Heller*, slip op., at Majority 57

¹³⁹ Sunstein, “Griswold” at pg263

¹⁴⁰ Sunstein, “Griswold” at pg. 262

¹⁴¹ William Van Alstyne romantically recounted his life-altering encounter with the NRA’s reading of the Second Amendment in his pivotal article “The Second Amendment and the Personal Right to Arms,” *Duke Law Journal*, Volume 43, 1993-1994 at page1241: “That “something more,” I think, requires one to consider what one might be more willing to think about in the following way-that *perhaps the NRA is not wrong, after all, in its general Second Amendment stance-a* stance we turn here briefly to review.”

Siegel recounts that the “New Right” gun lobby, spearheaded by the NRA, changed the cultural consensus surrounding the Second Amendment in response to threats of gun-control legislation – this change in constitutional culture resulted in a change in constitutional law, embodying the process that Siegel terms “Popular Constitutionalism.”^{142, 143} Scalia, it appears, made himself a figure in the gun-rights social movement through his penning of *Heller*, and the loud voice of the gun-rights lobby supported his decision so loudly that the non-legal public neglected to see the flaws in his argument.¹⁴⁴ Like the Civil Rights Movement achieving its first major victory legal in *Brown v. Board of Education*¹⁴⁵ after a long, labored attempt to change the cultural discourse surrounding segregationist policies, the Gun Right Movement achieved its first major legal victory in *Heller*; furthermore, with Justice Scalia as its speaker-box, the New Right movement had its views normalized and trumpeted through a Justice able to speak to “his colleagues and his political friends simultaneously.”¹⁴⁶

It cannot be asserted that *Heller* was rooted in constitutional text or law since the New Right gun-rights movement preceded the case by at least 30 years to effectively alter the public discourse. As Professor Akhil Amar muses, if a change in public discourse is so great as to convince enough people that a right exists and that this right is fundamental, then the right becomes “a right of the people” regardless of how erroneous the roots for the specific belief are.¹⁴⁷ If *Heller* is “living constitutionalism

¹⁴² Siegel, “Dead or Alive” at pg192: Describing popular constitutionalism and its ramifications: “On the popular constitutionalism view, the Court itself is deciding whether handgun bans are consistent with the best understanding of our constitutional tradition; the determination is made in the present and responds to the beliefs and values of living Americans who identify with the commitments and traditions of their forbear... the Court is normatively engaged in matters about which living Americans passionately disagree, enforcing its own convictions about the best understanding of a living constitutional tradition to which *Heller* contributes. On this account, *Heller*, through its originalism, participates in what Justice Scalia refers to in his *Lawrence* dissent as “the culture war.”

¹⁴³ Siegel, “Dead or Alive;” Reva B. Siegel, *The Supreme Court, 2007 Term - Comment: Dead or Alive: Originalism As Popular Constitutionalism in *Heller**, 122 *Harvard Law Review*. 191 (2008)

¹⁴⁴ Lori Guinier, “Demosprudence through Dissent,” published in *Harvard Law Review*, Vol 122, No 1. (Nov 2008) at page 94. (Hereafter Guinier, “Demosprudence”)

¹⁴⁵ *Brown v. Board of Education*, 347 U.S. 483 (1954)

¹⁴⁶ Guinier, “Demosprudence” at pg114, continuing, “In the process, he camouflages the law/politics distinction and creates his own exception to the law/politics divide. Justice Scalia uses his originalism jurisprudence as a language that a political movement can both understand and rally around” and aligns himself “with “with a social movement or community of accountability that mobilizes to change the meaning of the Constitution over time.”

¹⁴⁷ Amar, “*Heller*, HLR” at pg162, Amar derisively refers to this kind of process wherein ideological change in the people influences Court interpretation as Ninth Amendment supercedents: “Such rights-expanding cases that Americans have come to embrace, whether or not these cases originally got the Constitution's text and original understanding correct, deserve a name. Let us call them Ninth Amendment superprecedents. And let us honor these cases and the new rights they proclaim, rather than denying or disparaging these rights of the people, by the people, for the people, and from the people.”

for conservatives,”¹⁴⁸ then Siegel’s definition of “popular constitutionalism” holds for the majority opinion as it gives the people of the present the ability to choose their rights based on the interpretation of text from the past – more backwards induction.

Part III B: Scrutiny & Dicta

A seemingly inconsequential case, *United States v. Carolene Products Company*¹⁴⁹, provides the answer to a question (likely deliberately) left unanswered by the Court in *Heller*: if guns are a fundamental right, what level of judicial scrutiny are they afforded? Justice Scalia, footnoting *Carolene Products*, remarks “Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family, ‘would fail constitutional muster.’”¹⁵⁰ He maintains that “rational basis scrutiny” would not apply to the District of Columbia’s handgun law because of the higher scrutiny afforded to enumerated rights; however, that level of scrutiny is never articulated. Provided that firearms are a fundamental, individual right, and support for gun-ownership is widespread, it is unlikely that law passing through a legislature could muster up enough support to successfully pass and implement a “Draconian” gun law. This cultural fact renders Justice Scalia’s omission of a scrutiny level moot: a proposed law substantially infringing fundamental gun rights will not be perceived by many, if any, legislatures to be rationally related to a policy goal, and, resultantly, fail to become law.

Employing the scrutiny standards established in *Carolene* to protect fundamental rights, Sunstein remarks, “There is no special reason for an aggressive judicial role in protecting against gun control, in light of the fact that opponents of such control have considerable political power and do not seem to be at a systematic disadvantage in the democratic process.”¹⁵¹ This comment not only reinforces the conception of a powerful national gun lobby, capable of changing the constitution, but also to the failures of a democratic system where gun rights are supported by a minority of the people affected

¹⁴⁸ Lund, “Heller, and Originalist Jurisprudence” at pg1345

¹⁴⁹ *United States v. Carolene Products Company*, 304 U.S. 144 (1938), concerning Footnote 4

¹⁵⁰ *Heller*, slip op., at Majority 56, 57

¹⁵¹ Sunstein, “Griswold” at pg260

directly by gun violence¹⁵². Because statistical studies have been rejected by the Court as acceptable evidence in holding a claim of racial bias in a law,¹⁵³ it is unlikely that a statistical study showing a discrepancy in the race of crime victims versus the race of crime owners would trigger strict scrutiny and force the Courts to balance the protection of gun rights with that of a protected class. Still, the only references the Court makes, in both *Heller* and *McDonald*, concerning intersection of race and gun-control is in the context of black disarmament (as a result of irrational, racist fears at the time of ratification) and of the Civil War. When a law attempting to reduce violence through restrictive gun laws in a majority-minority city, like the District, is struck down by a panel of Justices, all of whom received the benefit of an Ivy-League education and one of whom is black, without considering the population of the community governed by the law (though many references were made to the “political community,”) the analysis will always be lacking.¹⁵⁴

While the lack of scrutiny¹⁵⁵ level befuddles the breadth of *Heller’s* newfound right, the dicta in part IV of the majority opinion questions the sanity of those joining in the opinion.¹⁵⁶ The dicta, “presumptively lawful regulatory measures,”¹⁵⁷ limit the scope of the fundamental right found and codified by the preceding sections of the majority opinion, conferring the type of plausible gun control laws that would not conflict with new reading of the Second Amendment: felon restrictions, mentally-

¹⁵² Maxine Burkett, “Much Ado About...Something Else: D.C. v. Heller, the Racialized Mythology of the Second Amendment, and Gun Policy Reform” *Legal Studies Research Paper Series* (March 20, 2008) at page 37; On the upcoming *Heller* decision and the ability of the Court to protect minorities by deferring the individual decision of the legislature of the District of Columbia, “The extent to which courts are willing to do so is likely to be one of the true legacies of *Heller*, which will confront a white plaintiff’s challenge to gun control laws enacted to stem the violence in a majority-black city where victims are black in nearly 100% of gun homicides.”

¹⁵³ *McCleskey v. Kemp*, 481 U.S. 279 (1987), where the Court rejected “The Baldus Study,” a statistical analysis showing a statistically significant correlation between race of victim and race of offender on the likelihood that the offender will receive the death penalty.

¹⁵⁴ This, of course, is a problem with strict adherence to an Originalist doctrine: no consideration of the present societal conditions.

¹⁵⁵ In Carlton F.W. Larson, “Four Exceptions in Search of a Theory: *District of Columbia v. Heller* and Judicial *Ipse Dixit*” published in *Hastings Law Journal*, Vol 60. (2009) at page 1373, Larson argues that, through a backwards induction-inspired dissection of the dicta exceptions in the *Heller* opinion, one can “identify the standard of scrutiny actually employed...the standard of scrutiny simply *cannot* be strict scrutiny, as many of the exceptions are inexplicable under strict scrutiny.” (Hereafter, Larson, “*Ipse Dixit*”)

¹⁵⁶ Levinson, “Assessing *Heller*” at pg. 322-323, Levinson alludes to a conspiracy theory proffered by other legal scholars, surmising that Justice Scalia would not have labored so intensely to found a new constitutional right only to have the dicta in his own opinion restrict that right greatly: “Although there is no direct evidence, one suspects that the most likely explanation has to do with the internal bargaining of the five justices in the majority. It certainly would not be surprising if Justice Anthony Kennedy threatened to withhold his vote from Scalia’s opinion if it did not, gratuitously or not, take pains to indicate its minimal scope.”

¹⁵⁷ *Heller*, slip op., at Majority 26

ill restrictions, sensitive space prohibitions, economic regulation-centric restrictions or requirements, and certain types of non-“bearable” weapons. The exceptions are not particularly well founded in historical interpretation and occasion unjustifiable precepts to govern the classes of people, places, and things (being weaponry) subject to gun-control legislation; for example, Martha Stewart, domestic Goddess, creator of her own line of towels, and convicted inside trader, is a felon and cannot, within *Heller’s* exceptions to the Second Amendment Right made in dicta, legally “keep and bear arms.” Professor Carlton Larson argues that the “Court’s claim about the need to ‘expound upon the historical justifications for the exceptions’ in a later case seems inconsistent with a stark interpretation/construction dichotomy.”¹⁵⁸ Surely, it follows, an Originalist such as Scalia would not appreciate the future direction of his opinion be rerouted according to state and local legislatures or, even worse, another Supreme Court decision. Thus, the exceptions, though limiting the scope of the right found in the Amendment, must have been a “peril of compromise” informed by a strain of “policy analysis and balancing”¹⁵⁹ thoroughly decried earlier in the opinion by Scalia. The most limiting of the exceptions, that the Second Amendment provides for self-defense in the context of a home environment¹⁶⁰, without specifying other possible locations for “self-defense,” thoroughly limits widespread applicability of the statute. However, the mere allowance for handguns within the home, as Justice Breyer notes in his dissent, “If a resident has a handgun in the home that he can use for self-defense, then he has a handgun in the home that he can use to commit suicide or engage in acts of domestic violence.”¹⁶¹ Since handguns are used in a majority of murders¹⁶², it seems logical to assume that some of those murders occur within the home; therefore, the portability of handguns intensifies

¹⁵⁸ Larson, “*Ipsse Dixit*” at pg1373

¹⁵⁹ Mark Tushnet, “*Heller* and the Perils of Compromise,” published in 13 *Lewis & Clark L. Rev.* 419 2009 cited at page 427 (Hereafter, Tushnet, “Compromise”) Tushnet, when explaining the logic behind the “popularity of weapon” dicta, questions how such a formula arose, arrives at a plausible conclusion: “The answer must be based in some sort of policy analysis and balancing, perhaps that contemporary handguns are “enough like” muskets and pistols with respect to their ability to protect against assaults in the home and to their susceptibility to dangerous misuse, where the metrics of ability-to-protect and misuse take contemporary circumstances into account.”

¹⁶⁰ *Heller*, slip op., at Majority 53; that the Second Amendment surely protects an individual’s right to bear handguns to protect their “hearth and home.”

¹⁶¹ *Heller*, slip op., at Breyer Dissent 33

¹⁶² Professor Carl Bogus, “Gun Control and America’s Cities: Public Policy and Politics”, *Albany Government Law Review* (Vol I, 2008) at page 447, remarking that over 60% of murders are committed with a handgun even though handguns account for about a third of all guns owned in the United States. (Hereafter, Bogus, “Gun Control”)

their ability to harm others and be misused (in other words, used for reasons other than self-defense of hearth and home).

Part III C: *Heller* and the Perils of Compromise

As of now, the Second Amendment with Scalia's interpretive lens and activist dicta reads: "The 'not unlimited'¹⁶³ right of all people with a 'lawful purpose'¹⁶⁴ to keep and to bear firearms considered popular (based on the ownership statistics of the gun-owning populace), unless such firearms be popular but of a 'dangerous and unusual' character,¹⁶⁵ should not be infringed because this 'not unlimited right,' although unnecessary to a well regulated Militia (National Guard), is a necessary option for the "Citizen's Militia," of which all people are members (provided these people are physically able, not mentally ill, not a felon, not subject to the "conditions and qualifications on the commercial sale of arms,"¹⁶⁶ and not planning to enter a "sensitive place"¹⁶⁷), because of an improbable but possible relationship to the security of free state, defined as either a state championing republican liberties or a physically-bounded commonwealth, in the event that the National Guard is incapacitated during an occasion of insurrection." Whatever judicial principle guided the *Heller* majority and arrived at this definition is woefully flawed.

In his dissenting opinion, Justice Breyer foretold of the ambiguity of *Heller* encouraging "legal challenges to gun regulation throughout the Nation,"¹⁶⁸ imposing an unnecessary burden on the

¹⁶³ *Heller*, slip op., at Majority 54 "Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."

¹⁶⁴ From Note 122, the Court conceives the phrase "lawful purpose" to be compulsory for the proper bearing of arms, deriving this definition from *Cruikshank*, a case wherein the Court cleared convictions for some of the white men that participated in the Colfax Massacre. Despite the death of hundreds of black people as a result of the Massacre, the *Heller* Court decides that this constituted a lawful use of guns under the Second Amendment. Furthermore, the pliable meaning of "lawful purpose" could provide for a myriad of situations to receive Constitutional protection. Therefore, vigilantism is tacitly encouraged by the *Heller* majority, encouraging the people to protect themselves instead of entrusting themselves to the police power of the state for protection.

¹⁶⁵ *Heller*, slip op., at Majority 55, explaining that military weapons may be banned because they are not "in common use" by the public. Justice Breyer, dissenting at slip 42, remarks "On the majority's reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so." This is the perfect illustration of the ludicrousness of the majority's proposition. Moreover, if you can show me a gun "in common use" (otherwise known as a handgun) that is not dangerous, then that gun is certainly unusual and possibly defective.

¹⁶⁶ *Heller*, slip op., at Majority 54. This obliquely permits the federal government to pass legislation restricting guns through their powers granted by the Commerce Clause of the United States Constitution.

¹⁶⁷ *Heller*, slip op., at Majority 54, defining "sensitive place" as "schools or government buildings."

¹⁶⁸ *Heller*, slip op., at Breyer Dissent 40

legislative branch. As he predicted, gun-rights groups flocked together to capitalize on the Court's opportunistic opinion hoping to capitalize on its majority-Conservative membership. By opening the flood-gates to accommodate myriad of gun-control challenge suits, *Heller's* ambiguity seems more purposeful in retrospect: if Justice Scalia is a gun-rights supporter, then leaving *Heller* ambiguous would guarantee swift legislative action to expand the *Heller* Second Amendment right while Scalia and company were still on the Court. Unsurprisingly, the NRA led the pack in lawsuits: "The day that *Heller* was decided, suit was filed against the City of Chicago challenging its ban on handgun registration and its re-registration requirement for other firearms. The next day, the National Rifle Association filed five lawsuits challenging handgun prohibitions in Chicago, in the suburbs of Chicago, and in public housing in San Francisco."¹⁶⁹ One of the NRA's lawsuits, *NRA v. Chicago*,¹⁷⁰ was consolidated with another case to form *McDonald*, the ugly offspring of off-brand originalism, public constitutionalism, incorrect textual interpretation, states' rights supremacy, selective adherence to *stare decisis*, and, worst of all, *Heller*.

The amalgamation of all of *Heller's* missteps with the added bonus of expanding *Heller's* misguided suppositions to apply to all state and local government through the Fourteenth Amendment's Due Process Clause. Subsequently, the fundamental right to individual gun ownership in *Heller* – including its holding averring the "central component" imparting Second Amendment Rights to be "individual self-defense" – was deemed "fundamental to our scheme of ordered liberty,"¹⁷¹ entrenching the "gun right" as a substantive due process right. With *McDonald* striking down two of the City of Chicago's gun-control ordinances, considered an "outlier" akin to the three "Draconian" provisions of DC's ordinance struck down in *Heller*, the Court is tacitly degrading the federalist concept of experimentation and deference to local authority.¹⁷² For those counting, the Court disregarded three

¹⁶⁹ Wilkinson, "Of Guns, Abortion" at pg. 282

¹⁷⁰ 567 F3d 856 (7th Cir 2009)

¹⁷¹ *McDonald*, slip op. Majority at 19

¹⁷² Brannon P. Denning & Glenn Harlan Reynolds, "Five Takes on *McDonald v. Chicago*," published in *Journal of Law & Politics*, Volume XXVI: 273, April 2011 (Hereafter Denning, Reynolds, "Five Takes"), cited at page 13. "Like *Heller*, *McDonald* produced a result that aligned with the expectations of many Americans. The decision is another data point in favor of the theory that the Court is a lagging, rather than a leading indicator of popular preference, often constitutionalizing a national consensus and enforcing that consensus against outliers." See also at note 129.

precedents grounded in federalism, two local laws governed in federalism, and the federalist meaning formulating the principle ratiocination for the drafting of the Second Amendment. Rejecting federalist principles in this manner results in the disenfranchisement of the people; the Court's decision deems the people unfit to elect adept legislators that enact constitutionally valid laws, thereby removing any semblance of local government authority through nullification of the government's legislative decisions without inquiry into the legislation's net effect on the "general welfare" of their citizenry.¹⁷³

Fortunately, only one Justice, Justice Thomas, accorded with the *McDonald* Petitioner's assertion that the Second Amendment was to be incorporated under the Fourteenth Amendment's "Privileges or Immunities Clause" of Citizens; had more Justices sided with Thomas and found that the "gun right" was a privilege of citizenship, overturning the *Slaughter-House Cases*,¹⁷⁴ then the right would win strict scrutiny level review¹⁷⁵, be in conflict with the *Heller* dicta exclusions for the "not unlimited" gun-right, and preclude a large share (if not all) preexisting gun-control legislation. Although the "gun-right" should not be considered a fundamental right, taking *Heller*'s conclusions as correct, it would seem that the *Heller* majority's derivation of the "self-defense right" from reading "militia" to encompass both formal and informal (re: "Citizen's militia") definitions would compel any future incorporation of the Second Amendment right to be performed under the Fourteenth Amendment Clause regarding citizens rather than due process (encompassing all persons). Certainly, the Framers and "the people" at the time of Fourteenth Amendment (and Second Amendment) ratification would not have liked their constitution to provide a right to weaponry for parties within the United States but not citizens, especially because of the intense xenophobia of that time (re: "No Irish Need Apply;" Know-

¹⁷³ *McDonald* majority, Alito at 43 "Second, petitioners and many others who live in high-crime areas dispute the proposition that the Second Amendment right does not protect minorities and those lacking political clout." Justice Alito is misguided here: the problem is not the Second Amendment; the problem is that the Court conducts a *de facto* removal of their right by invalidating the decisions of their legislature. If the Court resided in a "high-crime area," they would likely support actions to limit the proliferation of gun violence – something not achieved by striking down gun-control laws. In 2012, two years after *McDonald*, the murder rate in Chicago has increased by 38%. See "Chicago's murder rate up 38% in 2012" by Edward Fadden at <http://www.examiner.com/article/chicago-s-murder-rate-up-38-2012>

¹⁷⁴ *Slaughter-House Cases*, 16 Wall. 36 (1873), employed an extremely limited interpretation of the "Privileges or Immunities" Clause of the 14th Amendment that essentially rendered it ineffectual and inconsequential. Thomas's concurrence in *McDonald* approbates overturning the *Slaughter-House Cases* to restore the original meaning of the Fourteenth Amendment and to "protect with greater clarity and predictability than the substantive due process framework" the fundamental rights of the people of the United States (*McDonald* 561 U.S. ____ at Thomas slip pg. 8).

¹⁷⁵ This is just a postulation based on footnote 4 of *Carolene Products, Co.* (see note 151).

Nothing Party). Since many suppose that incorporating rights under the “Privileges or Immunities” clause of the Fourteenth Amendment would necessitate incorporation of the entire Bill of Rights to apply to the states, and the selective incorporation doctrine declined to incorporate all the amendments of the Bill of Rights, it could also be proffered that, if the Second Amendment were meant to apply to the states, it would have been done so sooner than 2010.

During oral arguments for *McDonald*, Justice Scalia seemed almost pained about the ideological tear he was about to undergo by siding with a decision wherein a new substantive right was codified and applied to the states, choosing gun-rights over faithfulness to the “original intent” doctrine he essentially authored.¹⁷⁶ Although Scalia abandons his avowal to stay away from “Culture Wars” and refrain from “judicial usurpation”¹⁷⁷ through finding new, substantive fundamental rights in the Due Process Clause of the Fourteenth Amendment, the entire Court, including the dissenters, opt not to revisit the historical premises of *Heller* in any meaningful scope; therefore, the majority’s flagrant contravention of the history record that premises the unfathomable act of judicial activism embodied by redefinition of an Amendment at the behest of public pressures is destined to leave an ugly stain on Second Amendment *stare decisis* trajectory for future decisions. In terms of public health, this poses a great danger to citizens in jurisdictions with high rates of gun violence where the legislature cannot successfully pass or maintain gun-control regulation as a consequence of the precedent set by *Heller* and *McDonald*.

The maxim “more guns, less crime” is not sustainable. The proper statement would read “more guns, more gun proliferation, more potential for both gun misuse and for gun use, more potential for gun accidents, more potential for rapid escalation during “confrontations,” more crime.”¹⁷⁸ In the

¹⁷⁶ In oral arguments, Justice Scalia asked Mr. Gura, attorney for Mr. McDonald, if “rights rooted in the traditions and conscious of our people” would be a sufficient “guidepost” to clarify the “unenumerated rights which the Framers and the Ratifiers didn’t literally understand,” and, upon Mr. Gura replying in the affirmative (“Yes”), Scalia sarcastically remarked “That happens to be the test we have used under substantive due process.” Accessible at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1521.pdf

¹⁷⁷ See note 101 on *Lawrence v. Texas*. *City of Chicago v. Morales*, 527 U.S. 41 (1999), Justice Scalia dissenting at 85. “The entire practice of using the Due Process Clause to add judicially favored rights to the limitations upon democracy set forth in the Bill of Rights (usually under the rubric of so-called “substantive due process”) is in my view judicial usurpation. But we have, recently at least, sought to limit the damage by tethering the courts’ “right-making” power to an objective criterion.”

¹⁷⁸ These are, roughly, summaries of the statistical evidence in “Gun Control and America’s Cities: Public Policy and Politics” by Professor Carl Bogus, *Albany Government Law Review* (Vol I, 2008).

District of Columbia, a comparative analysis revealed that, after the employment of its “draconian,” “outlier” gun-control law, gun-related homicides fell by more than 25% while no statistically significant change occurred in the surrounding communities in Virginia and Maryland; additionally, gun-related suicides fell by 23%.¹⁷⁹ The ban welcomed an “abrupt” decline in homicides upon its date of effect.¹⁸⁰ There are a multitude of studies showing a positive correlation between increased strength of gun-control laws and decreased rate of gun-related injuries and death. To deprive state, local, and federal jurisdictions from passing policy that best addresses the gun control needs of its citizenry is to deprive of their most valuable right; it is not a coincidence that “right to life” is always ordered before “liberty” and “property.”

Part IV: The 2nd Amendment Jurisprudence Trajectory and How to Change It

A “balancing-interest” approach was completely disregarded by the majorities of *Heller* and *McDonald* as judicial activism. Conversely, one can also find the majority opinions in those cases to be judicial activism. This discrepancy in meaning underlies the entire debate surrounding the Second Amendment; a rational individual would read the Court’s whole opinion in each case, muse at the level of squabbling between majority and minority factions, and wonder about the effect that these decisions have had on society in the macrocosm of the United States and the microcosm of an individual community. As Chief Justice John Marshall stated in *McCullough v. Maryland*, “The government proceeds directly from the people; is ‘ordained and established,’ in the name of the people, and is declared to be ordained, ‘in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity.’”¹⁸¹ In Third Grade, all children in the United States learn that there are three branches of government in their history classes. One of those branches is the judicial branch, thus binding all the members of the Court to Marshall’s adages in *McCullough v. Maryland*. The Court’s decisions in *Heller* and *McDonald* do not decide in accordance with any of the above maxims. The Court brazenly adopts the NRA’s interpretation

¹⁷⁹ Bogus, “Gun Control” at page 457

¹⁸⁰ Bogus, “Gun Control” at page 457

¹⁸¹ *McCullough v. Maryland*, 4 Wheat. 316 (1819), Chief Justice John Marshall for the majority. Notice, these phrases are from the Preamble to the United States Constitution.

of the Second Amendment, despite it being “one of the greatest pieces of fraud...on the American public by interest special interest groups,”¹⁸² but fails to definitively resolve the question of what gun control laws are permissible for federal, state, and local governments with these controlling precedents. Hence, *McDonald* did not stop the flood of litigation succeeding *Heller*; instead, it allowed for more persons to have standing to file litigation through incorporation of the new Second Amendment Right. Perhaps this is because the Court wants to control the trajectory of judicial precedent regarding the Second Amendment while they are all still alive and still Conservative. Or, maybe, the Court simply likes pretending to be an expert on Founding Era documentation. Either way, new cases regarding gun-control provisions are being filed and ruled on while the gun-as-right v. gun-as-social-evil debate roars. Regardless, the fact remains that when a human life is at stake, Justices need exercise caution when arriving at decisions that could imperil a life. Thus, an “interests-balancing/undue burden” analysis, much to the loathe of Justice Scalia¹⁸³ and celebration of Justice Stevens, should be employed when evaluating the constitutionality of federal, state, and local gun laws with respect to the limitations of the “not unlimited”¹⁸⁴ Second Amendment Right.

In the past month, both the 2nd and the 7th U.S. Circuit Court of Appeals delivered opinions employing *Heller* and *McDonald* to determine the validity of concealed carry laws; however, the 2nd Circuit contracted the Second Amendment Right while the 7th Circuit expanded it, illustrating the ambiguity of the exceptions to the Second Amendment Right created, codified, and incorporated in the aforementioned controlling precedents. Despite this ambiguity, District Court Justice Seeborg opines that a “two-step approach”¹⁸⁵ is the common methodology employed in post-*Heller* Circuit court

¹⁸²Quoting Chief Justice Warren Burger. Later, he comically remarks “I don’t want to get sued for slander, but I repeat that they [the NRA] . . . have had far too much influence on the Congress of the United States than as a citizen I would like to see—and I am a gun man. I have guns. I have been a hunter ever since I was a boy.” *MacNeil/Lehrer NewsHour*: Interview by Charlayne Hunter-Gault with Warren Burger: (PBS television broadcast, Dec. 16, 1991) (Monday transcript # 4226), available at <http://www.lexisnexis.com> (News Library, NewsHour with Jim Lehrer File)

¹⁸³ *Heller*, slip op., at Majority 62, 63: “We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.”

¹⁸⁴ *Heller*, slip op., at Majority 54

¹⁸⁵ Justice Seeborg, writing for the United States District Court for the Northern District of California, denied the request of Espanola Jackson (in conjunction with the NRA) to enjoin the City of San Francisco from enforcing its safe storage laws, requiring guns to be locked in the home when not carried on the person and banning the sale of certain ammunition. In Page | 37

decisions, first analyzing legislation with regard to the Second Amendment Right, then, if a violation is found, conducting a burden analysis to arrive at a standard of scrutiny, proceeding from there to a decision. In *Kachalsky v. County of Winchester*,¹⁸⁶ the Court addressed the validity of New York's concealed carry handgun license provision, necessitating "proper cause" be shown prior to obtaining the right to carry a concealed weapon outside the confines of the *Heller*-approved "hearth and home" provision. In New York, firearms may not be attained without a license and cannot be concealed and carried outside the home in lieu of receiving a separate of firearm license showing that an individual has "proper cause" outside of their profession, to carry a concealed weapon.¹⁸⁷ The Court determined that limits to the right to "keep and bear arms" outside the home were not articulated in *Heller*, consequently resulting in an opaque view of the scope of rights intended by the Supreme Court outside of the home. Ultimately, the Court found that "outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense,"¹⁸⁸ creating a tradition of state regulation of firearms in public, that did not outweigh the compelling government interest in public safety under the level of intermediate scrutiny such as to preclude any justification of legislative override of the legislature's decision. Most importantly, the Court averred that incorporation does not mean no opportunities for legislation with regard to the Second Amendment Right.¹⁸⁹

The 7th Circuit Case, *Moore v. Madigan*,¹⁹⁰ evaluated the constitutionality of Illinois's ban on concealed carry, finding it unconstitutional by an expansive reading of *Heller* and *McDonald*, reasoning, "to confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*."¹⁹¹ The Court's opinion, written by Judge

the Order, he wrote "Circuit court decisions after *Heller* have generally applied a 'two-step' approach, first examining whether the challenged law places a burden on conduct falling within the scope of the Second Amendment as historically understood, and then applying either strict or intermediate scrutiny, depending on the severity of any such burden."

Espanola Jackson v. City and County of San Francisco, No. C 09-2143 RS; order denying Plaintiff's motion for injunction.

¹⁸⁶ *Kachalsky et al. v. Cty. of Westchester et al* United States Court of Appeals for the Second Circuit, Docket No 11-3642(L), decided November 27, 2012.

¹⁸⁷ *Kachalsky, v. County of Winchester* at page 7, citing N.Y. Penal Law §§ 265.01-265.04, 265.20(a) (3), providing the definition of firearm; at page 10, defining "proper cause" as "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession."

¹⁸⁸ *Kachalsky, v. County of Winchester* at page 31.

¹⁸⁹ *Kachalsky, v. County of Winchester* at page 17.

¹⁹⁰ *Michael Moore et al., and Mary E. Shepard, et al. v. Lisa Madigan, et al.*, United States Court of Appeals for the Seventh Circuit, Docket no. Nos. 12-1269, 12-1788, decided December 11, 2012.

¹⁹¹ *Moore v. Madigan*, majority at 8. Judge Posner utilizes an analogy here to solidify his point: that a woman being

Posner, regards the Illinois law as an overly restrictive “outlier;”¹⁹² however, he wrestles with the conception that, perhaps, concealed carry restrictions effectively combat the issue of crime throughout his opinion, interspersing his doubts with assertions of concealed carry’s validity¹⁹³. Eventually, Judge Posner settles on the position that, absent of conclusive proof that laws preventing concealed carry lead to societal benefit and in conjunction with Illinois’s ability to curtail gun use by those unfit to wield them (as delineated in *Heller*), the right of law-abiding citizens to utilize arms in public and in private should not be curtailed.¹⁹⁴ In balancing public health concerns with private Second Amendment Rights, Judge Posner employs strict scrutiny; conversely, in conjunction with his claims of possible benefit to society with a ban on concealed weapons in public, it seems as if the interest of the State is substantially related to its means and narrow in scope to invoke a lower scrutiny level.

These Circuit Court decisions do little, in that they conflict, to rectify the (very rational) assumption that *Heller* and *McDonald* will not provide enough room for legislatures to pass effective gun regulation laws. Instead, the lack of a consistent application of the principles articulated in those cases leads back to the notion that the majority opinions were politically, not constitutionally, motivated. In light of the lack of consistent applicability in these cases, I propose that Congress utilize its “Commerce Clause” powers by passing “Necessary and Proper” legislation to end the gun violence epidemic in the United States. Since guns are a tradable commodity and highly portable, their ability to

victimized by a stalker has a “stronger self-defense claim” in public than in her apartment where she “has a claim to sleep with a loaded gun under her mattress.” This analogy is simply not apt for the situation: a stalker presents a clear and present danger (alongside a dereliction of police duty to not sufficiently address such an issue) whereas it is far less likely that a given individual has a sufficient, constantly present danger in their life as to require the constant carrying of a handgun. This contention comports more so with the “proper cause” informed right to concealed carry articulated and upheld in *Kachalsky, v. County of Winchester*.

¹⁹² *Moore v. Madigan*, majority at 15: “Remarkably, Illinois is the only state that maintains a flat ban on carrying ready-to-use guns outside the home.”

¹⁹³ *Moore v. Madigan*: Judge Posner’s opinion is less effective as a result. He shows too much of the benefit conferred by restricting guns to the home to justify rebutting a significant state interest in utilizing such a law to curb violence. He points to violent crime decreasing “for many years” alongside a decrease in gun ownership (at 11), that a gun poses more danger to more people when carried in public (8), the lack of a “strong pro-gun” culture in Illinois (12), that carrying a gun makes a person more likely use the weapon for crime than for defense against criminals (13), that a person becomes a “menace to himself and others” if he carries a gun in public without proper firearm training (16), among other reasons.

¹⁹⁴ *Moore v. Madigan*, majority at 14-15 “A blanket prohibition on carrying gun in public prevents a person from defending himself anywhere except inside his home; and so substantial a curtailment of the right of armed self-defense requires a greater showing of justification than merely that the public might benefit on balance from such a curtailment, though there is no proof it would... And empirical evidence of a public safety concern can be dispensed with altogether when the ban is limited to obviously dangerous persons such as felons and the mentally ill. *Heller v. District of Columbia*, *supra*, 554 U.S. at 626.”

pass through State and City lines (wherein gun-control restrictions will likely be different) fluidly (whether licitly or illicitly) bestows upon Congress the power to regulate such movement of merchandise through a uniform law based on the hypothesis that less individual gun ownership with more restrictions and barriers to ownership has a positive correlation with a decreased amount of gun violence and of gun-related death. A given state has no interest in protecting non-residents from gun violence; therefore, a given state will pass laws without regard to the concern of other states, allowing for its own citizens to be harmed by the weaponry permissible through the laws of other states.

Resultantly, because the Federal government has a responsibility to all its citizens, it has a responsibility to ensure their right to life is protected against the negligent or oppressive policies of other states.¹⁹⁵ The epidemic of gun violence in combination with the notorious proliferation of the gun trade between states¹⁹⁶ would allow Congress to pass laws regarding “a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.”¹⁹⁷ Thus, in this current state of ambiguity on the Second Amendment Right limitations on gun control policies at all levels of government, it is necessary that Congress follow “its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce” such that it is “is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use,”¹⁹⁸ like the provision of guns. This is the only possible method to circumvent the Court’s deleterious effect on public welfare by creating the Second Amendment Right.

¹⁹⁵ “Federalist 25,” Alexander Hamilton regarding the danger posed to other states and to the federal government arising from the separate possession of military force: “The framers of the existing Confederation, fully aware of the danger to the Union from the separate possession of military forces by the States, have, in express terms, prohibited them from having either ships or troops, unless with the consent of Congress. The truth is, that the existence of a federal government and military establishments under State authority are not less at variance with each other than a due supply of the federal treasury and the system of quotas and requisitions.”

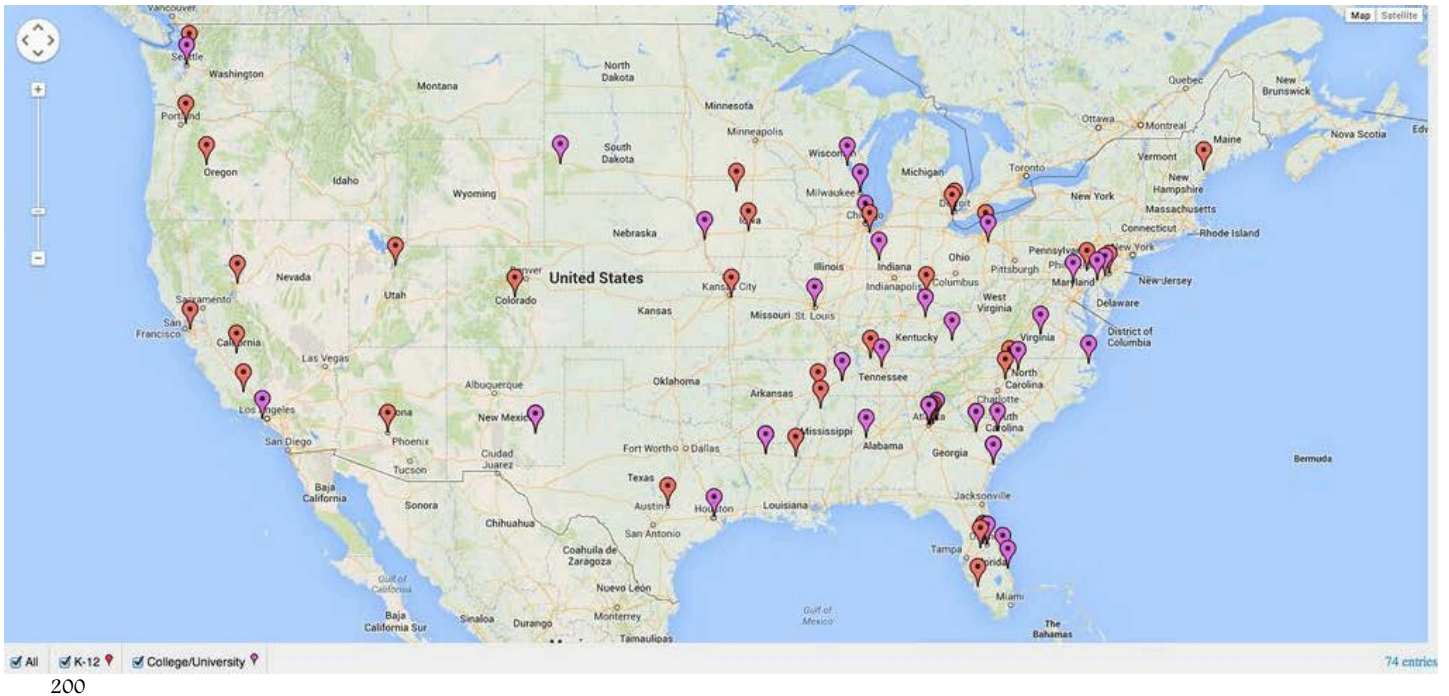
¹⁹⁶ The article, “Virginia’s Gift to Gunrunners,” published in the *New York Times* on February 29, 2012, discusses in great depth the “Virginia-New York” gun pipeline, wherein almost 40% of the guns used in New York City homicides can trace their origins to Virginia, and the impact that Virginia’s relaxation of gun purchasing limits could potentially have on violence in New York City. <http://www.nytimes.com/2012/03/01/opinion/virginias-gift-to-gunrunners.html>

¹⁹⁷ *United States v. Alfonso Lopez, Jr.*, 514 U.S. 549 (1995), majority at 562.

¹⁹⁸ *United States v. Darby*, 312 U.S. 100 (1941), Justice Stone for the majority at 114.

Addendum Summer 2014

Between the release of this paper and June 10, 2014, 74 school shootings¹⁹⁹ have occurred in the United States:

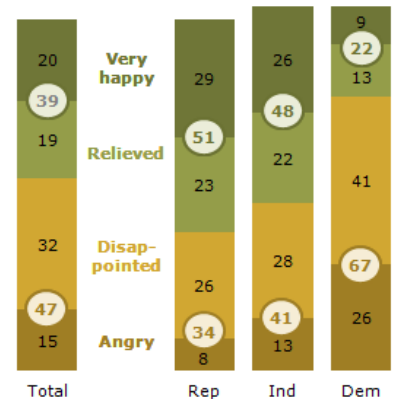


Three bills were introduced in the Senate to address some of the questions left open by *Heller* and *McDonald* regarding the scope of background checks, the permissibility of assault rifles, and whether limitations could be put on magazine cartridges. None passed.²⁰¹ The public sentiment in the wake of this legislative failure was far from uproarious. But why, in the wake of Newtown, did the level of outrage fail to translate into action? Apathy. Since the failure of those three bills, no new legislation concerning gun control has been introduced. Tragedy compounds tragedy, yet apathy wins out.

The United States has failed in its duty to protect its citizens; in their dereliction of duty, hundreds of lives were needlessly lost. People kill people, but guns are the main impetus for this violence. Gun control is an issue of life or death. The time to act was yesterday. So, today must be the day of action. Belated is still better than benumbment. Now, how many more people will fall victim to a bullet before someone cries “Enough!?” Most likely, not soon enough. And that is the great tragedy of the recklessness shown by the Court in *Heller* and *McDonald*: by creating this new “right,” the avenues available to challenge the state of guns in the United States are severely limited. ENOUGH!

Divided Reactions to Last Week's Senate Gun Vote

What word best describes how you feel about the Senate voting down new gun control legislation that included background checks on gun purchases?



PEW RESEARCH CENTER/WASHINGTON POST April 18-21, 2013.

¹⁹⁹ "School Shootings in America since Sandy Hook," *Everytown for Gun Safety*(June 10, 2014), <http://everytown.org/article/schoolshootings/>.

²⁰⁰ Zack Beauchamp, "This Map Shows Every School Shooting since Sandy Hook," *Vox*(2014), <http://www.vox.com/2014/6/10/5797306/map-school-shooting-sandy-hook>.

²⁰¹ Jonathan Weisman, "Drive for Gun Control Blocked in Senate," *The New York Times*(2013), <http://www.nytimes.com/2013/04/18/us/politics/senate-obama-gun-control.html?pagewanted=all>.

Works Cited:

- Amar, Akhil Reed. "Heller, Hlr, and Holistic Legal Reasoning." *Harv. L. Rev.* 122 (2008): 145.
- Beauchamp, Zack. "This Map Shows Every School Shooting since Sandy Hook." *Vox* (2014).
<http://www.vox.com/2014/6/10/5797306/map-school-shooting-sandy-hook>.
- Bogus, Carl T. "Gun Control and America's Cities: Public Policy and Politics." *Alb. Gov't L. Rev.* 1 (2008): 440.
- Brown V. Board of Education of Topeka*, 98 F. Supp. 797 (1951).
- Burnett, Sara. "Aurora Theater Shooting: Gun Sales up since Tragedy." *Denver Post* (2012).
- Chevron USA Inc. V. Natural Resources Defense Council, Inc*, 467 US 837 (1984).
- City of Chicago V. Morales*, 118 S. Ct. 1510 (1998).
- Cook, Philip J, Jens Ludwig, and Adam M Samaha. "Gun Control after Heller: Threats and Sideshows from a Social Welfare Perspective." *UCLA L. Rev.* 56 (2008): 1041.
- Cornell, Saul. "Heller, New Originalism, and Law Office History: Meet the New Boss, Same as the Old Boss." *UCLA L. Rev.* 56 (2008): 1095.
- . "Originalism on Trial: The Use and Abuse of History in District of Columbia V. Heller." *Ohio St. LJ* 69 (2008): 625.
- Denning, Brannon P, and Glenn H Reynolds. "Five Takes on Mcdonald V. Chicago." *JL & Pol.* 26 (2010): 273.
- Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D. and Jeffrey P. Kaplan, Ph.D. "Brief for Professors of Linguistics and English. Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D. And Jeffrey P. Kaplan, Ph.D. In Support of Petitioners,." *District of Columbia v. Heller*, 128 S. Ct. 2783 (No. 07-290) (2010).
- District of Columbia V. Heller*, 128 S. Ct. 2783 (2008).
- Doherty, Michael Dimock and Carroll. "Mixed Reactions to Senate Gun Vote: Democrats More Disappointed Than Angry." *A Few Research Center/Washington Post Survey* (2013): 6. Published electronically April 24, 2013. <http://www.people-press.org/files/legacy-pdf/4-24-13%20Gun%20Vote%20Reaction.pdf>.
- . "Views on Gun Laws Unchanged after Aurora Shooting." *A Few Research Center/Washington Post Survey* (2012). Published electronically July 30, 2012. <http://www.people-press.org/files/legacy-pdf/7-30-12%20Gun%20Control%20Release.pdf>.
- Epstein, Richard A. "Structural Interpretation of the Second Amendment: Why Heller Is (Probably) Wrong on Originalist Grounds, A." *Syracuse L. Rev.* 59 (2008): 171.
- Fisher, Max. "What Makes America's Gun Culture Totally Unique in the World, in Four Charts." *The Washington Post* (2012). Published electronically December 15, 2012.
<http://www.washingtonpost.com/blogs/worldviews/wp/2012/12/15/what-makes-americas-gun-culture-totally-unique-in-the-world-as-demonstrated-in-four-charts/>.
- Guinier, Lani. "Foreword: Demosprudence through Dissent." *Harvard Law Review* 122, no. 1 (2008): 4.
- Horwitz, Joshua, and Casey Anderson. *Guns, Democracy, and the Insurrectionist Idea*. University of Michigan Press, 2009.
- Jacobson V. Massachusetts*, 197 US 11 (1905).
- Kachalsky V. County of Westchester*, 701 F. 3d 81 (2012).
- Konig, David. "Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America." *UCLA Law Review* 56, no. 1295 (2009).
- Kozuskanich, Nathan R. "Pennsylvania, the Militia, and the Second Amendment." *Pennsylvania Magazine of History and Biography* (2009): 119-47.
- Larson, Carlton FW. "Four Exceptions in Search of a Theory: District of Columbia V. Heller and Judicial Ipse Dixit." *Hastings LJ* 60 (2008): 1371.
- Lawrence V. Texas*, 539 US 558 (2003).
- Levinson, Sanford. "United States: Assessing Heller." *Int'l J. Const. L.* 7 (2009): 316.
- Lund, Nelson. "Past and Future of the Individual's Right to Arms, The." *Ga. L. Rev.* 31 (1996): 1.
- . "Second Amendment, Heller, and Originalist Jurisprudence, The." *UCLA L. Rev.* 56 (2008): 1343.
- Mark Follman, Gavin Aronsen, and Pan Deanna. "A Guide to Mass Shootings in America." *MotherJones* (2012). Published electronically December 12, 2012. <http://www.motherjones.com/politics/2012/07/mass-shootings-map>.
- McCleskey v. Kemp*, 481 U.S. 279 (1987)
- Mcculloch V. Maryland*, 17 US 316 (1819).
- Mcdonald V. City of Chicago, Ill*, 130 S. Ct. 3020 (2010).
- Merkel, William G. "District of Columbia V. Heller and Antonin Scalia's Perverse Sense of Originalism, The." *Lewis & Clark L. Rev.* 13 (2009): 349.
- . "Heller as Hubris, and How Mcdonald V. City of Chicago May Well Change the Constitutional World as We Know It." *Santa Clara L. Rev.* 50 (2010): 1221.

Miller, Darreil AH. "Guns as Smut: Defending the Home-Bound Second Amendment." *Columbia Law Review* (2009): 1278-356.

Moore V. Madigan, 702 F. 3d 933 (2012).

National Rifle Ass'n of Amer., Inc. V. City of Chicago, 567 F. 3d 856 (2009).

Posner, Richard A. "In Defense of Looseness-the Supreme Court and Gun Control." NEW REPUBLIC INC 1331 H STREET, NW STE 700, WASHINGTON, DC 20005 USA, 2008.

Presser V. Illinois, 116 US 252 (1886).

Printz V. United States, 521 US 898 (1997).

Rossiter, Clinton, John Jay, James Madison, and Alexander Hamilton. *The Federalist Papers: Alexander Hamilton, James Madison, John Jay; with an Introduction, Table of Contents, and Index of Ideas by Clinton Rossiter*. New American Library, 1961.

"School Shootings in America since Sandy Hook." *Everytown for Gun Safety* (June 10, 2014). <http://everytown.org/article/schoolshootings/>.

Siegel, Reva B. "Dead or Alive: Originalism as Popular Constitutionalism in Heller." *Harv. L. Rev.* 122 (2008): 191.

The Slaughterhouse Cases, 15 F. Cas. 649 (1870).

Solum, Lawrence B. "District of Columbia V. Heller and Originalism." *Nw. UL Rev.* 103 (2009): 923.

Story, Joseph. *Commentaries on the Constitution of the United States*. Vol. 2: Little, Brown, 1858.

Tushnet, Mark. "Heller and the Critique of Judgment." *Supreme Court Review* 2008, no. 1 (2008): 61-87.

———. "Heller and the New Originalism." *Ohio St. LJ* 69 (2008): 609.

———. "Heller and the Perils of Compromise." *Lewis & Clark L. Rev.* 13 (2009): 419.

United States V. Carolene Products Co, 304 US 144 (1938).

United States V. Cruikshank, 92 US 542 (1876).

United States V. Darby, 312 US 100 (1941).

United States V. Lopez, 514 US 549 (1995).

United States V. Miller, 307 US 174 (1939).

United States V. Sprague, 282 US 716 (1931).

Van Alstyne, William. "The Second Amendment and the Personal Right to Arms." *Duke Law Journal* (1994): 1236-55.

Volokh, Eugene. "Commonplace Second Amendment, The." *NYUL Rev.* 73 (1998): 793.

Voorhees, Josh. "Americans Aren't Nearly as Angry About the Gun Vote as You'd Expect." *Slate Magazine* (2013). Published electronically 04/24/2013. http://www.slate.com/blogs/the_slatest/2013/04/24/pew_poll_on_background_checks_americans_aren_t_nearly_as_angry_about_the.html.

Weisman, Jonathan. "Drive for Gun Control Blocked in Senate." *The New York Times* (2013). Published electronically April 17, 2013. <http://www.nytimes.com/2013/04/18/us/politics/senate-obama-gun-control.html?pagewanted=all>.

Wilkinson III, J Harvie. "Of Guns, Abortions, and the Unraveling Rule of Law." *Va. L. Rev.* 95 (2009): 253.