THE SUPREME COURT AND THE USES OF HISTORY: *DISTRICT OF COLUMBIA V. HELLER*

Joyce Lee Malcolm*

The Second Amendment is unusual in that until District of Columbia v. Heller, *the Supreme Court had never interpreted the core meaning of the right. But it is that core meaning that, in recent years, has been in dispute. The issue is whether the Amendment was intended to protect a right for individuals to keep and bear arms, as the operative clause implies, or merely a right for states to have a militia and for members of that militia to be armed. In light of this ambiguity, the justices necessarily employed an originalist approach in order to recapture the intent of the Founders and the understanding of "the people" whose right it was meant to protect. History is essential to revealing that meaning, and all the justices tried their hands at employing historical inquiry. This Essay examines how their use of history accords with the basic rule for historical writers: Do not invent convenient facts and do not ignore inconvenient facts. Using that yardstick, I evaluate the justices' use, abuse, and avoidance of history, focusing on three aspects of the opinions in* Heller*: the analysis of the Amendment's language, the question of the right to be armed as a pre-existing right, and the Amendment's drafting history. The majority opinion is a model of rigorous historical inquiry, while the dissents fall short.*

"Real historical writers probe factual uncertainties but they do not invent convenient facts and they do not ignore inconvenient facts. People are entitled to their own opinions, but not to their own facts."

—William Kelleher Storey, *Writing History*[1]

---

* Professor of Law, George Mason University School of Law.

1. WILLIAM KELLEHER STOREY, WRITING HISTORY: A GUIDE FOR STUDENTS 44 (Oxford Univ. Press, Inc. 1999).

INTRODUCTION

The *ABA Journal*'s Supreme Court Report of August 2008 contained a headline to gladden the heart of a legal historian. It dubbed the justices of the Supreme Court "History Boys," because their opinions in the past term's most important cases provide lessons on "English kings and courts."[2] One such opinion is *District of Columbia v. Heller*.[3] The use of history in *Heller* was newsworthy because, while Justice Scalia and the four justices who joined with him in the majority opinion tend to take an originalist approach to the task of interpreting the Constitution, for which history is crucial, the four dissenting justices ordinarily do not. Yet in this case all nine justices used an originalist approach and tried their hands at historical investigation. The use of history by all the justices to interpret the Second Amendment should not surprise us because the debate over this Amendment, unlike that for other amendments, was still at the stage of determining its core meaning, and that meaning can only be ascertained by examining the Framers' purpose and the original public understanding. Whether the justices find that original purpose and understanding compelling today is another issue, one the Court was asked to reach in applying their historical findings to the question of the constitutionality of the District of Columbia's ban on the use of firearms in the home for self-defense.

While history should play a pivotal role in Court opinions, it can be misused. According to Professor Storey's basic standard for students of history,[4] not all the justices in *Heller* would qualify as real historical writers. Justice Scalia, writing for the majority of the Court, certainly would qualify.[5] In a carefully reasoned and scholarly opinion, Scalia painstakingly assessed both favorable and unfavorable historical evidence and parsed every word of the Second Amendment for its eighteenth-century meaning. Not so Justice Stevens writing for the dissent who disregarded inconvenient facts, remarking that the past twenty years of research had produced "[n]o new evidence . . . supporting the view that the Amendment was intended to curtail the power of Congress to regulate civilian use or misuse of weapons."[6] Only a highly selective reading that failed to take notice of any study with

2. David G. Savage, *The History Boys*, A.B.A. J., Aug. 2008, at 26–27.

3. 128 S. Ct. 2783 (2008).

4. STOREY, *supra* note 1, at 44. Storey's guidebook is an excellent source of instruction for students and a reminder for professional historians of the basics of historical scholarship.

5. Justice Scalia was joined in his opinion by Chief Justice Roberts, Justice Kennedy, Justice Thomas and Justice Alito. *Heller*, 128 S. Ct. at 2787.

6. *Id.* at 2822–23 (Stevens, J., dissenting). Justice Stevens was joined in his dissent by Justice Souter, Justice Ginsburg, and Justice Breyer.

uncongenial findings could permit Justice Stevens to reach this conclusion. Justice Stevens then goes on to employ linguistic devices that distort the plain meaning of the original text. Justice Breyer, the author of the second dissenting opinion, concurred with Stevens's conclusion that only members of a militia have a right to have firearms, but in his own dissent then employs another approach entirely.[7] Apparently he is a fan of Amitai Etzioni's communitarianism, that puts public policy considerations ahead of individual rights.[8] Breyer argues that the original intent of the Constitution's framers is trumped by what he deems sensible public policy. He rejects as reckless the notion that residents of Washington, D.C., one of the nation's most dangerous cities, have a constitutional right to have firearms in their homes to protect themselves and their families.

In *Heller*, the Supreme Court addressed for the first time the issue of whether the Second Amendment confers an individual right to possess a firearm, not for militia service, but for self-defense.[9] The case arose as a challenge to one of the strictest gun control measures in the country, a law enacted in 1976 by the District of Columbia. This law made it a crime for residents to carry an unregistered firearm, and further prohibited the registration of all handguns with the exception of handguns owned before the law took effect. Lawfully owned long guns were permitted to be kept in the home, but only if disarmed and disassembled or bound by a trigger lock. They could not be carried from one room to another within the house. The law also made it illegal to assemble a gun kept in the home for the defense of oneself and family, even in the case of a break-in.[10] The specific

7. *Id.* at 2847 (Breyer, J., dissenting). Justice Breyer was joined in his dissent by Justice Stevens, Justice Souter, and Justice Ginsburg.

8. See for example AMITAI ETZIONI, THE MONOCHROME SOCIETY (2001) and the discussion of his philosophy in Amitai Etzioni, *Communitarianism*, *in* 1 ENCYCLOPEDIA OF COMMUNITY: FROM THE VILLAGE TO THE VIRTUAL WORLD 224 (Karen Christensen & David Levinson eds., 2003). The Founders would have winced at this priority. Amitai Etzioni would have been pleased. In his 2001 article *Are Liberal Scholars Acting Irresponsibly on Gun Control?*, Etzioni cites my finding that the English Declaration of Rights included an individual right to have weapons, and asks, "With so much at stake, should scholars refrain from conducting studies that might have grave unsettling social consequences?" Amitai Etzioni, *Are Liberal Scholars Acting Irresponsibly on Gun Control?*, CHRON. HIGHER EDUC., Apr. 6, 2001, at B14. Etzioni concedes, "We cannot allow social consequences to dominate what we publish. That would be the end of scholarship." "[S]hould we therefore run to the other end of the seesaw," he asks, "and completely ignore social consequences?" *Id.* He then draws an analogy between finding that the Second Amendment protects an individual right to be armed and a web demonstration of how to make Ebola virus in your kitchen sink. *Id.* Justice Breyer would seem to agree.

9. *Heller*, 128 S. Ct. at 2797–2803. The *Miller* case, discussed in the opinions, never specifically addressed that question. *See* United States v. Miller, 307 U.S. 174 (1939).

10. D.C. CODE ANN. §§ 7-2501.01(12), 7-2503.01(a), 7-2502.02(a)(4) (West 2001). Residents were permitted to keep handguns that they owned before the law went into effect.

question in *Heller* was whether the District of Columbia's prohibition on the possession of usable handguns in the home violated the Second Amendment to the Constitution.

This Essay examines the use, abuse, and avoidance of history in *District of Columbia v. Heller*. Before examining the *Heller* opinions it is important to emphasize a distinctive feature of Second Amendment jurisprudence. Cases involving other constitutional rights routinely arise over the extent of their protections, or how the latest technology fits within the existing legal framework. In contrast, at the time of the Supreme Court's *Heller* decision, the debate over the Second Amendment was still at square one: the meaning of its core protection. Did it merely guarantee states the right to maintain a militia, not grant a right to the people at all? Did it protect an individual right to have firearms, or only a collective right for members of a well-regulated militia (that is, today's National Guard) to be armed? While the Amendment's language is susceptible to various interpretations if one is determined to craft them, from the time of its passage until about 1960 that meaning seemed quite clear. American citizens had a right to keep and own firearms for their personal protection.[11] Indeed, James Madison proposed this and the other constitutional amendments that became the Bill of Rights because he found them unexceptional and therefore likely to win easy passage.[12]

The right to self-defense, a tenet of natural law widely accepted in the United States at the time the Second Amendment was adopted,[13] served as the basis for this individual right.[14] In the words of William Blackstone, the

11. *See* JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 159–64 (1994); *see also* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 417 (1857) (noting that if slaves were citizens they would have the right to keep and carry guns wherever they went); STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876, at 43–44 (1998).

12. ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776–1791, at 206 (1955) (citing Letter from James Madison to Thomas Jefferson (June 13, 1789)).

13. *See, e.g.*, WILLIAM BLACKSTONE, 3 COMMENTARIES *3–4; A HOBBES DICTIONARY 185 (A.P. Martinich ed., Blackwell Pub'g. 1995); JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT §§ 6, 7, 11, 71 (J.M. Dent & Sons 1955) (1690).

14. *See* MALCOLM, *supra* note 11, at 129, 134. William Blackstone described the right to have arms as one of the five auxiliary rights meant to secure liberties. He wrote, "The fifth and last auxiliary right of the subject . . . is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law . . . and is, indeed, a publick allowance under due restrictions, of the natural right of resistance and self preservation . . . ." *Id.* at 130. Next to Montesquieu, Blackstone was the authority most frequently cited by the Founders. *See* Donald Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 194 tbl.3 (1984). For an example of colonial repetition of the Blackstone comment on self-defense see *Journal of the Times*, BOSTON EVENING POST, Apr. 3, 1769. Justice Scalia cites Justice James Wilson, one of the leading delegates to the Constitution Convention to the same affect on this subject. *See Heller*, 128 S. Ct. at 792 n.7, 2793.

leading eighteenth-century authority on common law rights, it must be lawful for an individual "to do himself that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force."[15]

For most of its history the Second Amendment was understood to confer an individual right. American society trusted the good sense of ordinary citizens in permitting them to be armed. By the early twentieth century, however, that trust was crumbling, as anxieties about who should or should not be allowed to have weapons led to discriminatory state laws against African-Americans in the south and against immigrants from southern and eastern Europe then streaming into the cities of the north.[16] Passage of the first federal gun law, the National Firearms Act of 1934,[17] was provoked by the shocking violence of 1930s mobsters armed with high-powered, automatic firearms, and was aimed specifically at controlling the weapons of choice of those criminals.[18] The law required registration, police permission, and payment of a prohibitive tax in order to own automatic weapons, sawed-off shotguns, and silencers.[19] A generation later, the riots and assassinations of the 1960s brought about more significant federal restrictions on personal ownership of firearms; The Gun Control Act of 1968 limited mail-order sales, the purchase of firearms by felons, and the import of military weapons.[20]

States and municipalities also have enacted a host of more specific gun regulations. Some of these, like the legislation in forty states allowing law-abiding citizens who meet certain basic conditions to carry a concealed

15. BLACKSTONE, *supra* note 13, at *4.

16. In 1911 New York State passed the Sullivan Law, making it a misdemeanor to carry a handgun without a license. It is still in force. *See* N.Y. PENAL LAW § 400 (McKinney 2008). The act granted local law enforcement authorities discretion to decide who could be armed. When first passed, it required an initial fee of $3.00 per gun, making it difficult for poorer people to license a weapon even if they were permitted to do so. *Id.* A *New York Times* editorial commenting on the proposed measure pointed to the dangerous tendencies of immigrants from Italy, Austria-Hungary, and other countries of southern Europe as the reason such a regulation was needed. *See Concealed Pistols*, N.Y. TIMES, Jan. 27, 1905. For additional commentary on the Sullivan Act and restrictive legislation aimed at African-Americans in the South, see Robert J. Cottrol, *Introduction* to GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT ix, xxi–xxv (Robert Cottrol ed., 1993). *See also* JOYCE LEE MALCOLM, GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE 222–24 (2002).

17. National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified at 26 U.S.C. § 5801 (2006)).

18. *See* Cottrol, *supra* note 16, at xxvi–xxvii.

19. *See* 26 U.S.C. §§ 5301–5302 (2006) (explaining taxes and registration requirements imposed on firearms dealers).

20. Gun Control Act of 1968, 18 U.S.C. §§ 921–928 (1968).

weapon, permit wide ownership and use of individual firearms.[21] Other laws, like those of New York, Chicago, and the District of Columbia, tightly restrict private ownership of firearms for self-defense, even in the home. At present there are estimated to be 20,000 state and municipal gun laws on the books, although no actual count has been taken.[22] Standing in the way of even more sweeping disarmament of civilians, which many people support, has been the Second Amendment's guarantee that "the right of the people to keep and bear Arms shall not be infringed."[23]

Why does this background history matter to the constitutional interpretation of the Second Amendment? The American gun control movement has invoked a theory that the Second Amendment was never meant to apply to individuals at all; rather, they assert that it protects a right of states to maintain a militia. In their view, the Amendment provides only that members of such a militia, the National Guard of today, have a right to be armed in connection with their military duties.[24]

The text of the Amendment is unfortunately susceptible to competing interpretations because it links a prefatory clause referring to the militia to an operative clause granting a right to "the people."[25] At each stage of its drafting by the first Congress, the Amendment became less explicit.[26] Doubtless the drafters felt no qualms about streamlining the language and omitting explanatory phrases because their constituents shared an understanding of the institutions and ideas behind it. But, in the long term, these understandings have vanished and brevity and elegance were achieved at the cost of clarity. The final version reads, "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."[27]

Those convinced that any individual right to be armed is dangerous understandably have a powerful incentive to insist that no such right exists and that the Second Amendment must mean something quite different. If it

21. *See* Posting of David Kopel to The Volokh Conspiracy, http://volokh.com/archives/archive20060326-20060401.shtml#1143873304 (Apr. 1, 2006, 12:35 EST).

22. *See* JON S. VERNICK & LISA M. HEPBURN, BROOKINGS INST., TWENTY THOUSAND GUN-CONTROL LAWS? (2002), *available at* http://www.brookings.edu/es/urban/publications/gunbook4.pdf; David J. Krajicek, *Guns and Gun Control*, *in* COVERING CRIME AND JUSTICE (2001), http://www.justicejournalism.org/crimeguide/chapter11/chapter11.html.

23. U.S. CONST. amend. II.

24. See for example ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL 38 (1995).

25. *Id.*

26. MALCOLM, *supra* note 11, at 161; RUTLAND, *supra* note 12, at 212 (writing that the Senate "slashed out wordiness with a free hand," and noting that what were the original Third and Fourth articles were combined into our present First Amendment).

27. U.S. CONST. amend. II.

protects an individual right than it is a dangerous anachronism. But amending the Constitution to eliminate the Second Amendment is too difficult. Finding a meaning that eliminates any individual right is far easier. In 1975, when competing interpretations had produced maximum confusion, the American Bar Association named a committee of its members to determine the original meaning of the Amendment. Unable to do so, the committee concluded that "[i]t is doubtful that the Founding Fathers had any intent in mind with regard to the meaning of this Amendment."[28] It has taken a concerted scholarly effort to retrieve that original meaning, in order to resolve the textual ambiguity of the Second Amendment and rescue one of our basic rights. In this undertaking, history has played an essential role.

Heller is a complicated decision, and a page-by-page analysis of its use and abuse of history would exceed the limits of this small Essay and exhaust the patience of its readers. This Essay therefore concentrates on four illustrations of the use and abuse of history by the justices in the *Heller* decision: the plain-text analysis of the language of the Amendment, the understanding that the Amendment embodied the pre-existing right to be armed, the drafting history of the Amendment, and the issue of the upheaval that might occur should the opinion put into question existing precedents and legislation.

I. THE PLAIN TEXT

First a small but telling point: Justice Scalia begins the majority opinion in *District of Columbia v. Heller* by reminding his colleagues and readers that the 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 . . . ."[29] This echoes former Chief Justice John Marshall's philosophy: "To say that the intention of the instrument must prevail," he wrote, "this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended . . . ."[30] In contrast to this search for common understanding, the dissent employs a string of highly idiosyncratic meanings of the Amendment's words and phrases to bolster their determination that its protection is a narrow, military one, not an individual right.[31]

The majority and dissenting opinions first diverge over the issue of whether the analysis should start with the prefatory clause (Justices Stevens

28. Ben R. Miller, *The Legal Basis for Firearms Controls*, 100 ANN. REP. A.B.A. 1052, 1078 (1975).
29. 128 S. Ct. 2783, 2788 (2008) (citing United States v. Sprague, 282 U.S. 716, 731 (1931)).
30. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, J., dissenting).
31. See *infra* notes 49–56.

and Breyer prefer "preamble") or the operative clause.[32] Scalia starts with the operative clause, insisting that the prefatory clause merely announces one purpose of the Amendment but "does not limit or expand the scope of the operative clause."[33] In keeping with a sound historical approach, Justice Scalia is careful to cite briefs espousing the contrary opinion.[34] To Justice Stevens' claim that this approach fails to take sufficient account of the preface and his insistence that every clause in a statute must have effect, Justice Scalia responds that "operative provisions should be given effect as operative provisions, and prologues as prologues," adding that "where the text of a clause itself indicates that it does not have operative effect, such as 'whereas' clauses in federal legislation or the Constitution's preamble, a court has no license to make it do what it was not designed to do."[35]

In fact, less time needs to be spent on the analysis of the prefatory clause, as there is general agreement that a militia, comprised—with few exceptions—of all the nation's free, adult males, was regarded as necessary to prevent government reliance on an army that might be used to tyrannize the people.[36] Scalia points out that it makes no difference whether the prefatory or operative clause is dealt with first because "'the right of the people to keep and bear arms' furthers the purpose of an effective militia."[37] Citing both English and American history, Scalia finds that the obvious connection between the prefatory and operative clauses simply ensures that the federal government cannot disarm the people, without whom there would be a select militia skewed to favor one political party or class, or no functioning militia at all.[38] He goes on to insist that the prefatory clause "does not suggest that preserving the militia was the only reason Americans valued the ancient right; most of them undoubtedly thought it even more important for self-defense and hunting."[39] Indeed, he finds "profoundly mistaken" Justice Breyer's assertion that individual self-defense was merely a "subsidiary interest" of the right to keep and bear arms, finding self-defense "the *central component* of

32. *See, e.g.*, *Heller*, 128 S. Ct. at 2824, 2826, 2829 (Stevens, J., dissenting); *id.* at 2848 (Breyer, J., dissenting).
33. *Id.* at 2789–90, 2789 n.3 (majority opinion).
34. *Id.* at 2789 n.3.
35. *Id.*
36. *See* MALCOLM, *supra* note 11, at 146–55.
37. *Heller*, 128 S. Ct. at 2790 n.4.
38. *Id.* at 2801–02.
39. *Id.* at 2801.

the right itself."[40] In any event Scalia does carefully analyze the prefatory clause in due course.[41]

While Scalia can be scathing about arguments he considers frivolous,[42] he always presents and addresses these, and never ignores them. By contrast the dissenters ignore evidence that casts doubt on their interpretation. This particular point about the two clauses in the Amendment is no mere semantic nicety, since those who identify only a collective rather than an individual right base their claim on the preface providing the *sole* rationale for the Amendment.[43]

The argument over the language of the prefatory clause controlling the operative clause is just the beginning of the hair-splitting idiosyncratic meanings, and ignoring of contrary evidence the dissenters employ to support their interpretation of the Second Amendment. This is plainly at odds with the manner in which former Chief Justice Marshall would have us understand the Constitution. The dissenters instead support their view by attributing special meanings to key phrases and words in the operative clause of the Amendment. These include an idiosyncratic meaning not only for "right of the people" (a phrase used in the First, Fourth and Ninth Amendments as well as in the original Constitution), but also for "Arms," "bear Arms," "keep and bear," and "keep Arms." In his analysis of the language Justice Scalia quite properly consults historical dictionaries of the eighteenth and early nineteenth centuries to ascertain how these terms were used at the time they were penned.[44]

First, Scalia tells us that when the phrase "right of the people" is used elsewhere in the Bill of Rights, an individual—not a collective—right is understood, and that nowhere in the Constitution is there a collective right that "may be exercised only through participation in some corporate body."[45] Stevens, on the other hand, contends that the First Amendment's right of the people to assemble and petition are both collective.[46] Yet both rights must be exercised by individuals. If no individual has a right to petition or assemble, than these rights are of no effect. Thus, at bottom, both are

40. *Id.*
41. *Id.* at 2799–2802.
42. *See id.* at 2791, 2795–97, 2797 n.14.
43. *Id.* at 2790 n.4.
44. *Id.* at 2791–92 (citing 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (5th ed., London, W. Strahan 1773)); *see also* TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (2d ed., London, W. Flexney 1771); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (photo. reprint 1989) (1828).
45. *Heller*, 128 S. Ct. at 2790, 2790 n.5.
46. *Id.* at 2790 & n.6.

individual rights. But not content with his argument that the First and Second Amendments describe only a collective right, Stevens goes to great lengths to distinguish the use of the phrase "the right of the people" in the Second Amendment from its use in the First Amendment and Fourth Amendment.[47] Scalia insists, on the contrary, that "[n]owhere else in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual right."[48] Even where, as in the preamble of Section 2 of Article 1 dealing with choosing members of the House, and in the Tenth Amendment, where the phrase "the people" arguably refers to the people acting collectively, Scalia finds that these uses pertain to the exercise or reservation of powers, not rights.[49] And where the Constitution refers to "the people" in a context other than rights, as in the preamble of Article 1, Scalia points out that the term "the people" "unambiguously refers to all members of the political community, not an unspecified subset" such as a well-regulated militia.[50]

Next, Stevens and his fellow dissenters express their view that within the phrase "to keep and bear Arms," the term "arms" means only military weapons, and that "bear Arms" implies solely a military purpose rather than meaning simply "to carry" weapons.[51] According to the dissent, the word "keep" is not to be understood as synonymous with the word "have" but as part of an idiom with bear ("keep and bear")," and therefore the word has no independent significance.[52] Stevens writes that the words "to keep and bear" "describe a unitary right: to possess arms if needed for military purposes and to use them in conjunction with military activities."[53] In addition, Stevens argues

47. *See id.* at 2826–27 (Stevens, J., dissenting). Stevens argues that because the Court finds that only "law-abiding, responsible citizens" are entitled to the right to keep arms, the Court is itself limiting the Second Amendment protection to a narrow subset of citizens, unlike the Court's interpretation of the individual protections of the First and Fourth Amendments. *Id.* at 2821, 2827. Stevens's reasoning depends on the problematic assumption that most citizens are neither law-abiding nor responsible.

48. *Id.* at 2790 (majority opinion).

49. *Id.* at 2790 n.6. The argument that the Second Amendment confers a right for states to have militias contradicts the common usage that only individuals have rights, states and governments have powers. Moreover the Second Amendment does nothing to alter the extensive federal power over state militia. *See, e.g.*, ROBERT NOZICK, THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA 837 (Christopher B. Gray ed., 1999).

50. *Heller*, 128 S. Ct. at 2790–91.

51. *Id.* at 2827–30 (Stevens, J., dissenting). Stevens further writes that "[e]ven if the meaning of the text were genuinely susceptible to more than one interpretation, the burden would remain on those advocating a departure from the purpose identified in the preamble and from settled law to come forward with persuasive new arguments or evidence. The textual analysis offered by respondent and embraced by the Court falls far short of sustaining that heavy burden." *Id.* at 2831. Of course, the issue of whether there is an individual right to keep and bear arms was not settled law.

52. *Id.* at 2827–28.

53. *Id.*

that because the Second Amendment refers to "the right" rather than "rights," a unitary use is established.[54] However, this argument, as Scalia points out, disregards the fact that state constitutions of the time often provided for unrelated protections through the singular word "right,"[55] and, of course, the First Amendment protects the "right" of the people to assemble and petition.[56]

A particularly idiosyncratic reading by the dissent, labeled by Scalia as a "bizarre argument," is the claim that because the word "to" is not included before "bear" but is used in the First Amendment before "petition," the unitary (that is, military) meaning of "to keep and bear" is established.[57] "We have never heard of the proposition," Scalia writes, "that omitting repetition of the 'to' causes two verbs with different meanings to become one. A promise 'to support and to defend the Constitution of the United States' is not a whit different from a promise 'to support and defend the Constitution of the United States.'"[58]

In his own opinion, Scalia turns again to historic dictionaries. He finds that "arms" has a broad meaning, including those weapons not designed for military use and not employed in a military capacity.[59] As for the argument that only weapons in existence in the eighteenth century are protected, Scalia finds this idea "bordering on the frivolous," stating that "[w]e do not interpret constitutional rights that way."[60] The phrase "to bear Arms" was also frequently used in a context that had nothing to do with military or militia service. To "keep Arms," he finds, means to "have weapons." "No party has appraised us of an idiomatic meaning of "keep Arms."[61] To "bear arms" merely means "to carry," as indeed the Court found in *Muscarello v. United States*,[62] in which Justice Ginsburg wrote that "[s]urely a most familiar meaning is, as the Constitution's Second Amendment . . . indicate[s]: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person."[63] Justice Ginsburg apparently revised

54. *Id.* at 2831.
55. *Id.* at 2797 (majority opinion).
56. U.S. CONST. amend. I.
57. *Heller*, 128 S. Ct. at 2831 n.14 (Stevens, J., dissenting).
58. *Id.*
59. *Id.* at 2791 (majority opinion).
60. *Id.*
61. *Id.* at 2792.
62. 524 U.S. 125 (1998).
63. *Id.* at 143 (Ginsburg, J., dissenting) (quoting BLACK'S LAW DICTIONARY 214 (6th ed. 1990)). The question before the Court was whether the fact that guns were found in a locked glove compartment, or the trunk of a car, preclude the application of 18 U.S.C. § 924(c)(1) (2006), which imposes a 5-year mandatory prison term upon a person who "uses or carries a firearm" during and in

her interpretation of the meaning of "bear Arms" when joining the Stevens dissent.[64]

Scalia adds that "bear Arms," at the time of the founding, did have an idiomatic meaning of serving as a soldier, but in those cases it was followed by the preposition "against," which was in turn usually followed by the target of the hostilities.[65] Stevens, on the contrary, insists "the stand-alone phrase 'bear Arms' most naturally conveys a military meaning *unless* the addition of a qualifying phrase signals that a different meaning is intended."[66] Stevens thereby sets aside numerous examples where the phrase "bear arms" has no military context, and he dismisses those state constitutional provisions analogous to the Second Amendment that identify private-use purposes for which the right is clearly individual.[67] In reply, Scalia scoffs that "[a] purposive qualifying phrase that contradicts the word or phrase it modifies is unknown this side of the looking glass (except, apparently, in some courses on Linguistics)."[68]

What quickly becomes apparent is that special rules relevant only to the Second Amendment are deployed throughout Stevens' dissent to deny any individual right to keep and bear arms, apart from service in a well-regulated militia.

II. PRE-EXISTING RIGHT

The Second Amendment's language and history make it clear it protects a preexisting right by declaring that it "shall not be infringed."[69] Had the right been new it might, for example, have been phrased as follows: "That the people be permitted to be armed for their defense." Justice Scalia points out that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing*

relation to" a "drug trafficking crime." In a 5–4 opinion delivered by Justice Stephen Breyer the Court held that the phrase "carries a firearm" applies to a person who knowingly possesses and conveys firearms in a vehicle, including a locked glove compartment or trunk of a car. *Id.* at 126–27 (majority opinion). Justice Ginsberg argued that "carries a firearm" means bearing a firearm in a manner as to be ready to use it as a weapon. *Id.* at 149 (Ginsburg, J., dissenting).

64. *Heller*, 128 S. Ct. at 2793. Stevens protests that this reliance on a dissent in *Muscarello v. United States* "borders on the risible" since the Court was considering the proper construction of the word "carries." *Id.* at 2828 n.8 (Stevens, J., dissenting).

65. *Id.* at 2794 (majority opinion).

66. *Id.* at 2829 (Stevens, J., dissenting).

67. *See id.* at 2828–31; *id.* at 2794–95, 2794 n.8 (majority opinion). *See, e.g.*, PENN. CONST. art. XIII; VT. CONST. ch. 1, art. 16.

68. *Heller*, 128 S. Ct. at 2795–96.

69. U.S. CONST. amend. II.

right."[70] He then provides the relevant English history of the article in the 1689 English Bill of Rights which, while more limited than the Second Amendment, recognized the right of the great majority of Englishmen to "have arms for their defense."[71]

The English right reads: "That the Subjects which are Protestants may have Arms for their defense Suitable to their Condition and as allowed by Law."[72] This English text has limitations built into it that might have restricted the right severely. First, it applied only to Protestants because Catholics had been regarded as potential subversives since the Reformation when the pope called upon them to overthrow the Protestant monarchy. Second, the English right permitted restrictions on the ownership of weapons based on their "suitability" for various social classes.[73] But Scalia performs a thorough historical search and points out that by the time of the American founding, English legal opinions and daily practice make it clear that the right to have arms for their defense was a right of Englishmen of all ranks and religions.[74] His analysis comports with the historical evidence.[75] Tellingly, there is no mention of the militia in the English Bill of Rights or in the subsequent discussion of that right.[76] William Blackstone, the English legal scholar regarded by eighteenth-century Americans as the authority on their rights as Englishmen, wrote of "the natural right of resistance and self-

70. *Heller*, 128 S. Ct. at 2797. While this is true of the right to keep and bear arms, the separation of church and state and freedom of the press in the First Amendment were not pre-existing rights. Neither right is part of English common law rights, nor in Magna Carta or the 1689 English Bill of Rights. England had, and still has, an established church, and eighteenth century libel laws that did not permit freedom of the press as we know it. *See* MAGNA CARTA (1215); Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.).

71. *Heller*, 128 S. Ct. at 2798. The Convention Parliament that crafted the English Declaration of Rights specifically rejected the language "for their common defence" in regard to this right. *See* MALCOLM, *supra* note 11, at 118–19.

72. Bill of Rights, 1689, 1 W. & M., c. 2, § 7 (Eng.).

73. MALCOLM, *supra* note 11, at 116–20, 126–28. Note that Protestants comprised some 90 percent of the English population at the time. Poorer people could have personal weapons but if they amassed weapons they would be looked upon as a threat to order. *See* J.R. JONES, THE REVOLUTION OF 1688 IN ENGLAND 77 n.2 (1972).

74. *Heller*, 128 S. Ct. at 2797–99. I have done extensive research in this area. See generally MALCOLM, *supra* note 11 for a thorough analysis. *See also*, Joyce Lee Malcolm, *The Creation of a 'True, Ancient, and Indubitable' Right: The English Bill of Rights and the Right to Be Armed*, 32 J. BRIT. STUD. 226, 226–49 (1993); Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285, 285–314 (1983).

75. *See* Brief of the CATO Institute & Joyce Lee Malcolm, *Amici Curiae* in Support of Respondent, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290); *see also* LOIS SCHWOERER, THE DECLARATION OF RIGHTS 1689 (1981).

76. *See* MALCOLM, *supra* note 11, at 115–21, 125–34.

preservation," and the "right of having and using arms for self-preservation and defence."[77]

In declining to look to the pre-existing and clearly individual English right to have weapons, Justice Stevens argues that the English right is not relevant because it can only be understood in the English social context.[78] However, this distinction is inconsistent with other interpretations of the U.S. Constitution that look to English rights of the people to petition, to the right to habeas corpus, to trial by jury, to freedom from unreasonable searches, and from cruel and unusual punishment.[79] Secondly, Stevens determines that the English right is irrelevant because it "contained no preamble or other provision identifying a narrow, militia-related purpose."[80] Indeed, the notion that the English right must implicitly refer to militia service, which tends to confirm the collective-right view of the Second Amendment, was argued by Roy Weatherup in 1975. Without any evidence, he insisted the English right that "the Subjects which are Protestants may have Arms for their Defence" actually meant that "Protestant members of the militia might keep and bear arms in accordance with their militia duties for the defense of the realm."[81] Weatherup's reading of an American preoccupation with militia service into an English right that does not mention it doesn't qualify as history. Indeed, the language of the Second Amendment, which has no limitations of religion or class, or any exception for lawful curtailment, is a far stronger assertion of this right than its English predecessor.

Having dismissed the relevance of the individual English right to have arms, Justice Stevens finds that "the right to keep and bear arms for service in a state militia was also a pre-existing right."[82] However, he confounds a duty with a right. Serving in the militia was an obligation, often an onerous and dangerous duty.[83] Stevens readily admits there is a "common-law right of self-

77. *Heller*, 128 S. Ct. at 2798; *see also* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 136–38 (1999).

78. *Heller*, 128 S. Ct. at 2837–38 (Stevens, J., dissenting).

79. Bill of Rights, 1689, 1 W. & M., c. 2, §§ 5, 10 (Eng.).

80. *Heller*, 128 S. Ct. at 2838 (Stevens, J., dissenting). Of course, had the militia been mentioned, Stevens almost surely would have regarded the mention of the militia as affirming his own insistence that ordinary people had a right to have weapons only for a collective, military purpose, not for personal defense.

81. Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 973–74 (1975).

82. *Heller*, 128 S. Ct. at 2831 (Stevens, J., dissenting).

83. MALCOLM, *supra* note 11, at 5–9, 37–38, 117. In crafting their Declaration of Rights, the members of the Convention Parliament complained that "The Acts concerning the Militia are grievous to the Subject" since the militia of Charles II and James II had been used to disarm the political opponents.

defense" but argues "there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution."[84] He brands Scalia's reliance on the Second Amendment codification of a pre-existing "right of law-abiding, responsible citizens to use arms in defense of hearth and home," as "overwrought and novel."[85] Apparently Stevens finds no protection in the Constitution for the right to self-defense, generally accepted in the eighteenth century as the first law of nature and first in the Declaration of Independence's triumvirate of inalienable rights to "Life, Liberty and the pursuit of Happiness."[86] In taking this stand he ignores philosophers such as Blackstone and Locke who influenced both the Framers and the voters who ratified the Constitution. Blackstone insisted on the right to self-defense and found it "impossible to say, to what wanton lengths of rapine or cruelty outrages [assaults] of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another."[87] He insisted the right to self-defense could not be taken away by the law of society.[88] John Locke, whose philosophy undergirded the American Constitution, maintained that self-defense was the first law of nature.[89] The great importance attached to the right to self-defense surely meant it would not be overlooked in crafting a list of the basic rights Americans insisted upon for their security.

III. THE DRAFTING PROCESS

When it comes to examining the drafting process for what became the Second Amendment, it is Justice Stevens who seems to be taking the more historical approach, expending quite a lot of ink on the concerns of the Framers about militia, standing armies, and conscientious objectors, while Justice Scalia sweeps aside the drafting record, claiming "[i]t is dubious to rely on such history to interpret a text that was widely understood to codify a pre-existing right, rather than to fashion a new one."[90] This is unfortunate, for while the record that has survived is spotty, especially since committee discussions of the amendments were not recorded, what remains supports the

84. *Heller*, 128 S. Ct. at 2822 (Stevens, J., dissenting).
85. *Id.* at 2821 (majority opinion); *id.* at 2831 (Stevens, J., dissenting).
86. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
87. BLACKSTONE, *supra* note 13, at *4.
88. *Id.* at *3–4.
89. LOCKE, *supra* note 13, at 122.
90. *Heller*, 128 S. Ct. at 2834–36 (Stevens, J., dissenting); *id.* at 2804 (majority opinion). Justice Scalia does take issue with Justice Stevens' analysis, although he does not examine the drafting history himself. *Id.*

individual right interpretation.[91] For example, we know Madison referred to the articles he drafted as "guards for private rights."[92] Further, he would not have placed what became the Second Amendment in Article 1, Section 8, Clauses 15 and 16, dealing with the militia, but in Article 1, Section 9, which forms a list of protected rights, between the third and fourth clauses.[93] "The third clause forbade Congress from passing bills of attainder or ex post facto laws, the fourth referred to direct taxation."[94] When the list of proposed amendments was taken up by the Senate, the senators denied a proposal to return more power over their militias to the states and rejected a motion to add "for the common defense" after "to keep and bear Arms."[95] Had the senators added that phrase, (had the Amendment read "the right of the people to keep and bear arms for the common defense") a collective right, or at least collective understanding, would have been intended. Its rejection demonstrates that Congress wanted to protect an individual right instead, one of their treasured rights as Englishmen. Unfortunately, Scalia omits this evidence. Stevens' discussion of the drafting process, which he presumably meant to be inclusive, leaves this evidence out as well.

Having refused to acknowledge any evidence for an individual right despite the historical evidence for it, Stevens and the other dissenters conclude that the majority has announced "a new constitutional right to own and use firearms for private purposes" upsetting "settled understanding."[96]

At this point Scalia and Stevens switch approaches. While Scalia ignored the drafting evidence, he quite rightly tracks the views of leading founding-era legal scholars St. George Tucker, William Rawle, and Joseph Story for their understanding of the Second Amendment's meaning.[97] These authorities repeatedly cite the English right to have arms for self-preservation and defense and recognize a right for individuals to have weapons. To take just one example, William Rawle, George Washington's candidate for the nation's first attorney general, described the scope of the Second Amendment's guarantee this way:

> The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitous attempt could only be made under

91. *See* LEVY, *supra* note 77, at 133–49 (1999); MALCOLM, *supra* note 11, at 159–64.
92. *See* LEVY, *supra* note 77, at 133–49 (1999); MALCOLM, *supra* note 11, at 159–64.
93. LEVY, *supra* note 77, at 145.
94. MALCOLM, *supra* note 11, at 159.
95. *See* STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 81 n.167 (1984).
96. *Heller*, 128 S. Ct. at 2845 (Stevens, J., dissenting).
97. *Id.* at 2805–07 (majority opinion).

> some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.[98]

Stevens, on the other hand, dismisses this evidence because, as opposed to his version of the drafting history, he finds the views of these authorities "not altogether clear, [as] they tended to collapse the Second Amendment with Article VII of the English Bill of Rights, and they appear to have been unfamiliar with the drafting history of the Second Amendment."[99] For Stevens the drafting history is all that matters, not what anyone at the time or in the years immediately afterward believed the Second Amendment meant. This is an improper use of historical material, seizing on one source of evidence and rejecting other key records that could and would illuminate the meaning of the Amendment.

IV. THE ISSUE OF UPHEAVAL

Justice Breyer's dissent differs from Justice Stevens' significantly enough that its historical integrity must be evaluated separately. To his credit, Breyer is more willing than his fellow dissenters to use historical evidence as he finds it and to acknowledge inconvenient facts. Most notably, he lists early laws restricting firearms.[100] He also examines modern criminological studies.[101] He admits that these studies show the harmful impact of firearms restrictions on public safety, and the failure of the District of Columbia gun law in particular to protect city residents.[102] However, on the first point his analysis of the original meaning of the Second Amendment is compromised by his concurrence with the Justice Stevens' interpretation. This directly impacts his application of the Amendment, since, like Stevens, he finds little historical support for Second Amendment protection of an individual right to self-defense. He therefore concludes that any tangential protection for the right to self-defense must yield to legislative policy, regardless of whether that policy turns out to be useless or actually harmful. He apparently subscribes to Etzioni's contention that what is, or is thought to be, in the public interest

98. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125–26 (2d ed. Philadelphia, Nicklin 1829).

99. *Heller*, 128 S. Ct. at 2839 (Stevens, J., dissenting).

100. *Id.* at 2848–50 (Breyer, J., dissenting).

101. *Id.* at 2858 (citing Brief for Academics as *Amici Curiae* 7–10; Criminologists' Brief 6–9, 3a–4a, 7a).

102. *Id.* at 2856–60.

must trump all else, even an accurate interpretation and application of a constitutional amendment.[103]

Breyer finds two major faults with the majority opinion. First, he disagrees with the majority that the historical evidence demonstrates that an individual right was protected. He insists the Amendment "protects militia-related, not self-defense-related interests," although he is more willing to credit the evidence for the individual right.[104] He concedes that "these two interests are sometimes intertwined" but argues that while the guns required for militia purposes would have been kept by militia members who could have used them for self-defense, "self-defense alone, detached from any militia-related objective, is not the Amendment's concern."[105]

Second, he reasons that "the protection the Amendment provides is not absolute."[106] He notes his agreement with the majority that the Amendment "embodies a general concern about self-defense," but refuses to "assume that the Amendment contains a specific untouchable right to keep guns in the house to shoot burglars."[107] To prove this point, Breyer combs the historical record to produce a list of colonial and early state restrictions prohibiting the use of guns so as to terrorize or endanger others.[108] For example, he cites a 1731 Rhode Island statute, An Act for preventing Mischief being done in the Town of *Newport*, or in any other Town in this Government, that prohibited the firing of "any Gun or Pistol . . . in the Streets of any of the Towns of this Government, or in any Tavern of the same, after dark, on any Night whatsoever."[109] Clearly, however, a prohibition against unsafe shooting in the streets after dark was a routine safety measure to prevent accidental injuries and did not infringe on private ownership of firearms. More importantly, since no right in the Bill of Rights is absolute and all have some limitations, it is unclear why that fact should be seized upon to deny the existence of the right *only* with respect to the Second Amendment.

But Breyer's view of the limited importance of self-defense goes to the very basis of the aim of public safety and his role as a judge. He freely admits

103. *See supra* note 8 and accompanying text.

104. *Heller*, 128 S. Ct. at 2847 (Breyer, J., dissenting).

105. *Id.* Justice Breyer argues that the main weapon of the militia, the musket, would have been an inefficient and cumbersome weapon for ordinary self-defense rather than battle. *Id.* at 2866–67. However, he disregards the fact that the public had an array of other firearms at their disposal. *See* MALCOLM, *supra* note 11, at 139–40.

106. *Heller*, 128 S. Ct. at 2847 (Breyer, J., dissenting).

107. *Id.* at 2848.

108. *Id.* at 2848–49.

109. *Id.* at 2849 (citing 1731 R.I. Pub. L. No. 240–41).

unfavorable evidence about the impact of the District of Columbia's gun law on safety. He grants that the District's ban on handguns and its requirements that prohibit having a usable gun in the home for protection have not reduced gun crime and that, indeed, violent crime "has increased, not decreased."[110] He points out that "a comparison with 49 other major cities reveals that the District's homicide rate is actually substantially *higher* relative to these other cities than it was before the handgun restriction went into effect."[111] He even admits that ownership of firearms has been shown to increase public safety.[112] All this is to his credit in acknowledging inconvenient facts. But nevertheless, since Breyer's judicial philosophy privileges policy judgments, he is unwilling to let these facts affect his opinion. He concludes that

> [t]hese empirically based arguments may have proved strong enough to convince many legislatures, as a matter of legislative policy, not to adopt total handgun bans. But the question here is whether they are strong enough to destroy judicial confidence in the reasonableness of a legislature that rejects them. And that they are not . . . . They succeed in proving that the District's predictive judgments are controversial. But they do not by themselves show that those judgments are incorrect.[113]

This is the "kind of empirically based judgment" that Breyer believes "legislatures, not courts, are best suited to make."[114] While Breyer agrees that the law "does prevent a resident from keeping a loaded handgun in his home . . . . [and] consequently makes it more difficult for the householder to use the handgun for self-defense in the home against intruders," it "burdens to some degree an interest in self-defense."[115] "In weighing needs and burdens," he asks if there are less restrictive means to further the ban's intent to reduce the number of handguns in the District of Columbia, and finds that "there is no plausible way to achieve that objective other than to ban the guns."[116] Weighing the competing interests, Breyer concludes that "the self-defense interest in maintaining loaded handguns in the home to shoot intruders is not the *primary* interest, but at most a subsidiary interest that the Second Amendment seeks to serve."[117] He further assures us that "any

110. *Id.* at 2857.
111. *Id.* at 2858.
112. *See id.*
113. *Id.* at 2859.
114. *Id.* at 2859–60.
115. *Id.* at 2863–64.
116. *Id.* at 2864.
117. *Id.* at 2866.

self-defense interest at the time of the Framing could not have focused exclusively upon urban-crime related dangers."[118]

This reasoning ignores the historical context. The Founders, living in a country without professional police and with both urban and rural crime, were surely aware of the dangers. Indeed, that was an important reason for people to have a right to protect themselves. Every American colony, for example, passed legislation to establish the institutions of watch and ward, requiring armed citizens to take it in turn to protect their community.[119] They established citizen militias of men between the ages of sixteen and sixty, and in some colonies required not only militia members but all householders to be armed to help keep the peace.[120] There were also traditions of "hue and cry" and the duty to join a posse to pursue criminals.[121] Moreover, thousands of Americans lived along the frontier where there were dangers from Indians and wild animals. Clearly the Founders appreciated the need for weapons of self-defense.

Breyer's dissent also focuses on how dangerous to settled law it would be to acknowledge an individual right in the Second Amendment. Stevens voices a similar concern when he writes, "Even if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself . . . would prevent most jurists from endorsing such a dramatic upheaval in the law."[122] On the basis of this argument, that a decision must not upset settled law, the Supreme Court would never have decided in *Brown v. Board of Education*[123] that the settled law that had found "separate but equal" education constitutional was, in fact, wrong.[124] As Nelson Lund and David Kopel point out in dealing with this objection of Breyer's, "*Brown* caused enormous political upheavals, and triggered an explosion of litigation that continues to this day."[125] They add: "There is no reason to expect

118. *Id.*

119. MALCOLM, *supra* note 11, at 138–39. Householders took turns guarding their villages by keeping watch at night, or ward during the day.

120. *Id.* at 139.

121. *Id.* at 138–39.

122. *Heller*, 128 S. Ct. at 2824 (Stevens, J., dissenting).

123. 347 U.S. 483 (1954).

124. *See* Nelson Lund & David B. Kopel, *Unraveling Judicial Restraint: Guns, Abortion, and the Faux Conservatism of J. Harvie Wilkinson, III*, GEO. MASON U. L. ECON. RES. PAPER SERIES, 2008, at 15–18 (comparing the novelty and inconvenience caused by the *Brown* decision to any novelty or potential inconvenience of the *Heller* decision); *see also* Brown v. Bd. of Educ., 347 U.S. 483.

125. Lund & Kopel, *supra* note 124, at 15.

comparable results from *Heller*. *Heller* (unlike *Brown*) was broadly supported by the public, and was quite consistent with current and historical practice."[126]

According to Breyer, in this instance policies meant to ensure public safety, however misguided or even harmful in their impact, should take precedence over this individual right. What Breyer leaves out in his bow to the wisdom or foolishness of legislatures, is that restrictions such as the District of Columbia's handgun ban violate the fundamental right of the people to keep and bear arms, which, as William Blackstone explained, was permitted for "self-preservation and defense."[127] This right was not just infringed by the District's gun ban but, had *Heller* not struck down the ordinance, would have been meaningless. As Justice Scalia concludes:

> We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem . . . . But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.[128]

CONCLUSION

All individual rights have some dangerous aspects, but they embody principles that have kept us free. As the English jurist Lord Browne-Wilkinson explained in a 1985 opinion, "It is implicit in a genuine right that its exercise may work against (some facet of) the public interest: a right to speak only where its exercise advanced the public welfare or public policy . . . would be a hollow guarantee against repression."[129] The majority of the Supreme Court's History Boys understood that principle and employed historical analysis according to the proper rules for historical investigation. Historical analysis in the manner prescribed by John Marshall himself was, in this

126. *Id.* at 16.
127. *Heller*, 128 S. Ct. at 2798 (citing 1 BLACKSTONE, *supra* note 13, at *136, *139–40).
128. *Id.* at 2822.
129. Wheeler v. Leicester City Council, (1985) 1 A.C. 1054 (H.L.) (appeal taken from Eng.) (Browne-Wilkinson, L.J.), *cited in* MALCOLM, *supra* note 16, at 255.

instance, essential in recapturing the meaning of the Second Amendment. Good history triumphed in *Heller*, but only just.