

# HELLER'S CATCH-22

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*Joseph Heller's satire Catch-22 has become a classic for its revealing look at the illogic, inconsistency, and circular reasoning common in modern bureaucratic life. This Article uses Heller's novel to frame a critical analysis of the recent landmark Second Amendment decision of the U.S. Supreme Court that carries the Catch-22 author's surname, District of Columbia v. Heller. The majority opinion in Heller suffers from many of the missteps and contradictions Heller's novel identified. Although hailed as a "triumph of originalism," the opinion paradoxically relies on a thoroughly modern understanding of gun rights. Justice Scalia has argued that originalism is necessary to preserve the legitimacy of the Court, but Heller is more likely to be accepted as legitimate precisely because Scalia's opinion departed from the original meaning of the Second Amendment. Moreover, this celebrated landmark decision has had almost no effect on the constitutionality of gun control. To date, the federal courts have yet to invalidate a single gun control law for violating the Second Amendment right to bear arms, despite scores of cases. While some laws are sure to be invalidated in time, the new Second Amendment's bark is far worse than its right. The greatest irony is that Heller's logical flaws and inconsistencies improve the decision, making it more likely to endure and helping to cement a reasonable, not radical, right to bear arms.*

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## INTRODUCTION

Joseph Heller's satirical novel *Catch-22* is a classic of American literature.<sup>1</sup> The novel, which follows the travails of a group of military airmen in World

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1. JOSEPH HELLER, *CATCH-22* (1961).

War II, is an insightful and humorous account of the quagmires and incongruities of contemporary bureaucratic life. In the novel, a “Catch-22” is a nonexistent military rule that, by its self-contradictory logic, all service personnel must obey. The notion of a Catch-22 has since become famous as an idiom representing a no-win situation built on illogic and circular reasoning. Perhaps the best illustration of the frustrating double bind of the Catch-22 is found in the following exchange, which deals with forcing pilots to fly especially dangerous combat missions:

There was only one catch and that was Catch-22, which specified that a concern for one’s own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn’t, but if he was sane he had to fly them. If he flew them he was crazy and didn’t have to; but if he didn’t want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.

“That’s some catch, that Catch-22,” Yossarian observed.

“It’s the best there is,” Doc Daneeka agreed.<sup>2</sup>

In this Article, I want to use Heller’s novel as a launching point for analyzing some of the logical inconsistencies, missteps, and contradictions that bedevil the gun rights debate in contemporary America and, in particular, the recent landmark U.S. Supreme Court decision carrying the *Catch-22* author’s surname, *District of Columbia v. Heller*.<sup>3</sup> Just as Heller’s novel is widely regarded as one of the greatest novels of the twentieth century, the *Heller* decision, which held that the Second Amendment protects an individual right to keep and bear arms unrelated to militia service, has already been hailed as one of the most significant constitutional law decisions of the twenty-first century. In more substantive ways, however, *Heller* and *Heller* belong together; the Supreme Court’s decision suffers from many of the irrationalities and paradoxes that animate Joseph Heller’s famous novel.

This Article explores a few of these contradictions. Part I begins with the gun debate generally, in which extremists on both sides of the aisle take hypocritical and inconsistent positions that lead to silly and ineffective gun policies. Part II then turns to the *Heller* decision. *Heller* has been hailed as a “triumph of originalism,”<sup>4</sup> but the decision really hinges on a modern

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2. *Id.* at 46.

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

4. *See supra* note 30.

understanding of the right to keep and bear arms—that is, it relies on the “living” Constitution. Part III demonstrates that the *Heller* decision is also paradoxical because, based on a census of all the post-*Heller* Second Amendment cases to date, it appears that the newfound individual right has almost no significant effect on gun control; *Heller*'s bark is much worse than its right. Part IV considers the illogic embedded in *Heller*'s reading of the Second Amendment to protect a right of self-defense in the home, which conflicts with numerous aspects of the Court's ruling. Finally, I argue in Part V that *Heller*'s greatest irony is that the mistakes and flaws of the opinion end up improving the decision. *Heller*'s imperfections help to cement a more reasonable right to keep and bear arms.

### I. THE UNREASONABLE RIGHT TO BEAR ARMS

A good place to start is the D.C. gun control law that was challenged in the *Heller* case. Commentators have characterized the D.C. law as a complete ban on handguns,<sup>5</sup> but the law was not that simple. Formally, the District of Columbia only prohibited people from having handguns if the weapons were not registered.<sup>6</sup> One might infer that the District permitted registered handguns, but a different provision of the D.C. Code prohibited the registration of handguns.<sup>7</sup> Another provision outlawed the carrying of handguns, either openly or concealed, without a license.<sup>8</sup> But the District did not issue licenses.<sup>9</sup> And despite the common understanding of “carrying” a pistol to refer to possessing the weapon in public, rather than at home, the District stretched the term well beyond that meaning and defined “carrying” to include moving handguns from one room to another within one's own house.<sup>10</sup>

The contradictions of the D.C. gun law, which was the strictest in the nation, resembled the confusing gun policies of many major American cities. In almost every state, one can obtain a permit to carry a concealed weapon<sup>11</sup>—except where one cannot. In many states, local sheriffs or chiefs

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5. See, e.g., David Nakamura & Robert Barnes, *D.C.'s Ban on Handguns in Homes Is Thrown Out*, WASH. POST, Mar. 10, 2007, at A1.

6. D.C. CODE ANN. § 7-2502.01(a) (LexisNexis 2008).

7. See *id.* § 7-2502.02(a)(4).

8. See D.C. CODE ANN. § 22-4504(a) (LexisNexis 2008).

9. See *Bsharah v. United States*, 646 A.2d 993, 996 n.12 (D.C. 1994) (“It is common knowledge . . . that with very rare exceptions licenses to carry pistols have not been issued in the District of Columbia for many years and are virtually unobtainable.”).

10. See D.C. CODE ANN. § 22-4504 (a) (making it a crime to carry a pistol without exception).

11. See Christopher Keleher, *District of Columbia v. Heller: The Death Knell for Illinois Handgun Bans?*, 96 ILL. B.J. 402, 405 (2008) (“Forty-eight states maintain concealed carry.”).

of police have broad discretion over who may receive a permit and, depending on the city or county, no permits may be issued.<sup>12</sup> For example, in Torrance, California, one of the largest cities in Los Angeles County, one can apply for a permit and, as required by state law, receive a permit application from the city. But the police chief includes in the mailing a statement of the department's longstanding policy to refuse all application requests.<sup>13</sup> Please apply, but no applications accepted.

The District of Columbia employed a slightly different version of this argument to defend its strict law. It argued that the law did not burden the right to keep and bear arms because individuals could still own other guns besides handguns, like shotguns and rifles. And indeed, the law did permit residents of the District to own such long guns. Shotguns and rifles could be registered, but then the District barred owners from using them in the District. They had to be maintained disassembled or secured with a trigger lock<sup>14</sup> and, according to a D.C. court decision, a gun owner was not permitted to unlock or assemble his long gun to use in self-defense, even if a burglar or rapist was climbing through the window.<sup>15</sup> One could unlock or assemble the long guns to use for hunting or recreational shooting, yet there was no place in the city limits where one could lawfully hunt or shoot recreationally.<sup>16</sup> In essence, the District's position was that individuals had a right to have a long gun in the city, they just couldn't fire it in the city. It is a bit like having a right to free speech, but being barred from opening your mouth.

The seeming inanity of the D.C. law is all too common in the gun rights debate more generally. Gun control advocates seem ever willing to adopt any gun regulation no matter how unlikely the law is to actually accomplish its objectives. The well-known controversy over assault rifles is a good example. Who could be opposed to prohibitions on "assault weapons," like AK-47s,

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12. See David B. Kopel, *The Licensing of Concealed Handguns for Lawful Protection: Support From Five State Supreme Courts*, 68 ALB. L. REV. 305 & n.3 (2005) (listing California, Delaware, Hawaii, Maryland, and Massachusetts as states with "discretionary licensing" where, "especially in big cities, it may be very difficult to obtain a permit").

13. See the account provided in Complaint for Damages, *Spears v. City of Torrance*, No. 2:08-CV-03686 (SSx) (C.D. Cal. June 5, 2008), available at [http://www.californiaconcealedcarry.com/ccw/cache/pdf/files/torrance\\_complaint.pdf](http://www.californiaconcealedcarry.com/ccw/cache/pdf/files/torrance_complaint.pdf).

14. D.C. CODE ANN. § 7-2507.02 (LexisNexis 2008).

15. Cf. *McIntosh v. Washington*, 395 A.2d 744, 755-56 (D.C. 1978) (recognizing that the D.C. law only allowed assembling or unlocking a long gun for "lawful recreational purposes").

16. There is one shooting range in the District of Columbia, belonging to the Metropolitan Police; it is neither open to the public nor does it permit the firing of long guns. The National Rifle Association's comprehensive directory of firing ranges lists this as the only firing range in the District. Nat'l Rifle Ass'n Headquarters, Shooting Range Services: Find a Local Range, <http://www.nrahq.com/shootingrange/findlocal.asp?State=DC> (last visited Apr. 16, 2009). Independent research has turned up no others.

which look so menacing? The problem is that assault weapons are only so menacing in the way they look. Of course, like all firearms, they can be used to injure others. But assault weapons pose no unusual risk. "Appearance notwithstanding, 'assault weapons' are functionally indistinguishable from normal-looking guns . . .," writes David Kopel, a frequent contributor to gun debates. "[T]hey fire only one bullet with each press of the trigger and the bullets they fire are intermediate-sized and less powerful than the bullets from big game rifles."<sup>17</sup>

So what makes an assault rifle so bad that it had to be banned by federal law? If one were to judge by reference to the federal statute, the distinguishing feature of these weapons is primarily their appearance: medium-sized barrels, pistol grips, flash suppressors, telescoping stocks, bayonet fittings, and a compact and lightweight design. Because assault rifles function pretty much like any other rifle, the federal law defined which weapons were banned largely by their military-style appearance.<sup>18</sup> If this were not silly enough, the law, which specifically banned nineteen different types of guns, went on to exempt 661 other types of sporting rifles that might otherwise fit the definition of a banned firearm.<sup>19</sup> 661! When an overwhelming majority of firearms that meet the definition of an assault weapon are not dangerous enough to be banned, then maybe the definition itself has to be reconsidered. Constitutional law has a term for legal rules so poorly designed to meet their underlying objectives: irrational.

Gun control advocates are hardly the only ones in the gun debate who favor unreason and contradiction over common sense and good public policy. Some gun rights organizations claim to support laws that disarm felons and the mentally ill but have historically fought against laws that would improve such bans.<sup>20</sup> Or they vigorously insist that gun control laws include various loopholes so that the laws don't adversely impact the law-abiding citizen, but

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17. David B. Kopel, *Clueless: The Misuse of BATF Firearms Tracing Data*, 1999 L. REV. M.S.U.-D.C.L. 171, 180; accord Bruce H. Kobayashi & Joseph E. Olson, In Re 101 California Street: A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of "Assault Weapons," 8 STAN. L. & POL'Y REV. 41, 43 (1997).

18. See GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 111 (1997); WILLIAM J. VIZZARD, SHOTS IN THE DARK: THE POLICY, POLITICS, AND SYMBOLISM OF GUN CONTROL 140-41 (2000).

19. ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL 133 (4th ed. 2008).

20. See DANIEL R. VICE, BRADY CTR. TO PREVENT GUN VIOLENCE, THE NRA: A CRIMINAL'S BEST FRIEND: HOW THE NATIONAL RIFLE ASSOCIATION HAS HANDCUFFED FEDERAL GUN LAW ENFORCEMENT 2 (2006), [http://www.bradycampaign.org/pdf/facts/reports/enforcement\\_fable.pdf](http://www.bradycampaign.org/pdf/facts/reports/enforcement_fable.pdf).

then turn around and criticize gun control laws for doing too little to stop criminals from obtaining guns.<sup>21</sup>

For instance, consider federal background checks. The primary mechanism in federal law designed to keep guns out of the hands of felons and the mentally ill is the requirement that purchasers of firearms undergo background checks.<sup>22</sup> But the background check system has two problems. The first problem is that states don't always report mental health adjudications or criminal convictions to the federal government.<sup>23</sup> As a result, the data used to check potential purchasers is incomplete and the system is not nearly as effective as it could be. Gun rights organizations opposed the creation of the background check system, and in recent years some still fight against proposed reforms designed to improve state reporting.<sup>24</sup>

The second problem with the federal background check system is the "secondary market loophole." Only federally-licensed firearms dealers are required to check the status of potential gun purchasers. Under the federal law, anyone not ordinarily in the business of selling firearms—a secondary market seller—does not have to conduct a background check.<sup>25</sup> The so-called "gun show loophole" is one aspect of this problem: unlicensed individuals can go to a gun show and sell their firearms without conducting background checks, so criminals know that gun shows are good places to obtain firearms. But the secondary market loophole is much broader because it applies to sales at flea markets and through classified advertisements. All told, secondary market sales comprise about 40 percent of all gun sales.<sup>26</sup> The completely unsurprising result of a federal law requiring background checks in only 60 percent of firearms sales is that felons and the mentally ill can still easily obtain a firearm. This problem could be mitigated by requiring all gun sales to go through a federally-licensed dealer, who would be required to conduct a background check of the purchaser. Granted, this requirement might raise

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21. See *id.* at 8–10, 12–18.

22. See 18 U.S.C. §§ 921–922 (2006).

23. See Mike Wereschagin, *Gun Bill Mandates Sharing Records in Nation, Pa.*, PITTSBURGH TRIB.-REV., July 25, 2007, available at [http://www.pittsburghlive.com/x/pittsburghtrib/news/s\\_518889.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/s_518889.html) (noting the Gun Owners of America's opposition to a bill reforming the state reporting obligations).

24. See Linda M. Harrington, *In 8 Years Toll Soars as Brady Gun Bill Awaits OK*, CHI. TRIB., Aug. 23, 1993, at 1 (noting the Gun Owners of America and National Rifle Association's opposition to the Brady Bill).

25. SPITZER, *supra* note 19, at 140. Spitzer does however note that as of the year 2000, eleven states did require background checks of unlicensed dealers. *Id.* For a definition of the secondary market, see Violence Policy Center, *An Agenda for Genuine Gun Control* (1999) [http://www.vpc.org/fact\\_sht/agenda.htm](http://www.vpc.org/fact_sht/agenda.htm).

26. SPITZER, *supra* note 19, at 140.

the cost of firearms. But the Second Amendment provides a right to “keep” arms, not a right to buy them at the cheapest price possible.

Closing the secondary market loophole will not completely disarm felons or the mentally ill. With approximately 280 million guns in America, nothing ever will. But it could have an effect on the margins. Indeed, during its first three years in existence, the federal background check system stopped approximately 250,000 attempted purchases by individuals who were legally banned from owning a firearm.<sup>27</sup> In light of the heightened danger posed by criminals obtaining guns, any marginal gain is worthwhile. We can't stop car accidents, but we can adopt measures like speed limits that reduce the number of car accidents. But the National Rifle Association,<sup>28</sup> Gun Owners of America,<sup>29</sup> and other gun rights groups oppose closing the secondary market loophole. Their position seems to be “Let's keep guns out of the hands of criminals, just don't pass any laws that make it harder for criminals to get their hands on guns.”

Welcome to the great American gun debate.

## II. HELLER: THE “TRIUMPH” OF ORIGINALISM

In light of the contradictions and inconsistencies of the gun debate generally, one shouldn't be surprised that similar problems bedevil the Supreme Court's decision in *Heller*. A particularly striking inconsistency in the *Heller* decision is rooted in its purported method of constitutional interpretation. Hailed as “a triumph of originalism,”<sup>30</sup> Justice Scalia's majority opinion actually embodies a living, evolving understanding of the right to keep and bear arms.

Justice Scalia's opinion relies heavily on historical sources to conclude that the Second Amendment was understood by the Framers to protect a right to keep and bear arms for private purposes, in addition to militia purposes. The lengthy opinion includes roughly forty-five pages of discussion of the original

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27. *Id.* at 139.

28. See Wayne LaPierre, Op-Ed., *Illegal Sales Already Covered*, USA TODAY, Dec. 13, 2001, at 13A (stating opposition to closing the gun show loophole).

29. See Ben DuBose, *Senators Try to Widen Scope of Firearm Background Checks*, L.A. TIMES, Feb. 1, 2008, at A11 (referencing Larry Pratt, executive director of Gun Owners of America, voicing opposition to closing the gun show loophole).

30. Cf. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 256 (2009); Linda Greenhouse, *SIDEBAR: 3 Defining Opinions*, N.Y. TIMES, July 13, 2008, at WK4; Eric Posner, *Will Heller Implode?*, SLATE, June 29, 2008, <http://www.slate.com/blogs/blogs/convictions/archive/2008/06/29/will-heller-implode.aspx>. These sources refer to the possibility that *Heller* is a triumph of originalism, in those terms, without hailing the decision. For hailing on these grounds (without using that phrase), see Debra Cassens Weiss, *Second Amendment Ruling Is Justice Scalia's Originalism "Legacy"*, A.B.A. J., June 27, 2008, available at [http://abajournal.com/news/second\\_amendment\\_ruling\\_is\\_justice\\_scalias\\_originalism\\_legacy](http://abajournal.com/news/second_amendment_ruling_is_justice_scalias_originalism_legacy).

meaning of the Second Amendment meant to resolve a host of issues: whether the amendment's reference to "the right of the people" meant an individual right or a state right; whether "keep and bear Arms" had a purely military connotation; how to construe the phrases "well regulated Militia" and "necessary for the security of a free State"; how to understand the relationship between the amendment's prefatory and operative clauses; and how the amendment was interpreted in the wake of the Constitution's ratification.<sup>31</sup>

Justice Scalia's use of originalism was hardly surprising. Throughout his twenty-two years on the Court, Scalia has argued that the only proper way to interpret the Constitution is by discerning the original understanding of its provisions.<sup>32</sup> For Scalia and his fellow originalists, originalism is required largely to maintain the public legitimacy of the rule of law. They likewise argue that the other approach—living constitutionalism—allows the personal value choices of the judge to decide the case and diminishes respect for the Court.<sup>33</sup> A living constitution transforms the text from law to mere politics.<sup>34</sup>

*Heller* was characterized as a triumph of originalism in part because even the dissenters adopt this approach in arguing that the Second Amendment was restricted to the militia. The majority and the dissenters "came to opposite conclusions but proceeded on the premise that original understanding of the amendment's framers was the proper basis for the decision," wrote Linda Greenhouse, the Supreme Court reporter for *The New York Times*.<sup>35</sup> In light of the similar methodologies and starkly different conclusions, one might conclude that originalism should be taken with a grain of salt—or at least a dose of humility. Apparently, Justice Scalia doesn't think so. At a lecture at Harvard Law School several months after the *Heller* decision, Scalia opined on the virtues of originalism: "[W]hat method would be easier or more reliable than the originalist approach taken by the Court?"<sup>36</sup> Perhaps he had forgotten about Justice Stevens's dissent. Or perhaps he was channeling the bureaucrats in Joseph Heller's novel, who would have readily agreed that a methodology leading to such disparate conclusions is nevertheless "easy" and "reliable."

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31. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789–812 (2008).

32. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (arguing for originalism).

33. See *id.* at 854–55, 863–64.

34. *Id.*

35. Greenhouse, *supra* note 30.

36. Elaine McArdle, *In Inaugural Vaughan Lecture, Scalia Defends the "Methodology of Originalism,"* SPOTLIGHT HARV. L. SCH., Oct. 3, 2008, <http://www.law.harvard.edu/news/spotlight/constitutional-law/scalia-vaughan-lecture.html>.



Soon after the decision, Scalia's majority opinion was scathingly condemned by a trio of illustrious conservative legal thinkers: Richard Posner,<sup>37</sup> considered by many to be the most influential judge not on the Supreme Court;<sup>38</sup> Douglas Kmiec, a well-known conservative law professor;<sup>39</sup> and J. Harvie Wilkinson,<sup>40</sup> a Reagan appointee who was reportedly on President George W. Bush's short list of potential Supreme Court nominees.<sup>41</sup> All harshly criticized what Posner termed the "faux originalism"<sup>42</sup> of the decision. According to Posner and Kmiec, a sincere originalist inquiry would have led to precisely the opposite result; from the context of the Framing, the Second Amendment was primarily concerned with preserving the militia.<sup>43</sup> Wilkinson contended that the historical evidence on both sides was equally strong and the conservative majority should have deferred to the legislature rather than imposed its own values on the text.<sup>44</sup> *Heller*, Wilkinson claimed, was "an exposé of original intent as a theory no less subject to judicial subjectivity and endless argumentation as any other."<sup>45</sup> According to Posner, *Heller's* finding of an individual right to keep and bear arms unrelated to the militia was "not evidence of disinterested historical inquiry" but rather "evidence of the ability of well-staffed courts to produce snow jobs."<sup>46</sup>

If Posner and the conservative critics are right that from a historical perspective, the individual right to keep and bear arms did not take the form that Justice Scalia's opinion describes, then perhaps they need to be reminded of *Catch-22*. In the novel that rule also does not actually exist; that is precisely its power. Everyone believes that the rule exists, but, because it doesn't, it cannot be repealed or repudiated.<sup>47</sup> Same with the individual-right reading of the Second Amendment. The vast majority of Americans believe

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37. See Richard Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 32.

38. See Adam Liptak, *Ruling on Guns Elicits Rebuke From the Right*, N.Y. TIMES, Oct. 21, 2008, at A1 (noting Posner's reputation); Brian Tamanaha, *Are We Witnessing the Receding Tide of Law and Economics? (The Evolving Views of Judge Posner)*, BALKINIZATION, Dec. 17, 2008, <http://balkin.blogspot.com/search?q=Are+We+Witnessing+the+Receding+Tide+of+Law+and+Economics%3F> (same).

39. See Douglas Kmiec, *Guns and the Supreme Court: Dead Wrong*, TIDINGS ONLINE, July 11, 2008, <http://www.the-tidings.com/2008/071108/kmiec.htm>.

40. See Wilkinson, *supra* note 30.

41. Jeffrey Rosen, *McJustice: Liberals' Long-Feared Judicial Apocalypse Is Nigh*, NEW REPUBLIC, Nov. 5, 2008, at 19–21.

42. Posner, *supra* note 37, at 33.

43. *Id.* at 32; see also Kmiec, *supra* note 39.

44. See Wilkinson, *supra* note 30, at 266–67.

45. *Id.* at 256.

46. Posner, *supra* note 37, at 35.

47. See HELLER, *supra* note 1, at 400.

the Constitution guarantees an individual right to keep and bear arms.<sup>48</sup> So even if the right is not guaranteed by the Second Amendment, it retains its incredible potency as a force to limit gun control. Did the *Heller* Court really have any other choice?

It is on the very issue of gun control that Justice Scalia's opinion most clearly departs from originalism. For any individual right, the most important questions center on what laws are prohibited by the constitutional provision and what laws the constitutional provision allows. Individual rights are limitations on government action, so what exact limits on government action does the right to keep and bear arms impose? This is where the Second Amendment rubber hits the road. If the Second Amendment is to be a meaningful constraint on government, then it must do more than just identify a fundamental right in abstract terms. It must also separate out what the government can do from what the government cannot. But here, where it really counts, Justice Scalia's opinion in *Heller* completely ignores original meaning.

Consider how Justice Scalia's opinion addresses D.C.'s ban on handguns. An originalist would look to historical sources to determine whether those who ratified the Constitution thought a ban on a particular type of weapon was contrary to the right to keep and bear arms. But Scalia's opinion doesn't do this. Handguns are protected, according to the opinion, because they are "the most preferred firearm in the nation" to keep for self-defense.<sup>49</sup> After listing several reasons twenty-first century Americans prefer handguns, Scalia's opinion concludes: "Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."<sup>50</sup> In place of the rock-hard original meaning of the Second Amendment, Scalia looks to the fickle dynamics of contemporary consumer choices. Handguns are protected because people today choose handguns for protection.

In contrast to handguns, the Court suggests that machine guns might be banned because they are "dangerous and unusual weapons" that are not in "common use."<sup>51</sup> But why are machine guns so rare? Because federal law has effectively prevented civilians from purchasing them for the past seventy-five

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48. Harris Interactive, *Second Amendment Supreme Court Ruling Matches With Public Opinion From the Harris Poll*, HARRIS POLL, June 26, 2008, [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=922](http://www.harrisinteractive.com/harris_poll/index.asp?PID=922).

49. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817–18 (2008) (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007)).

50. *Id.* at 2818.

51. See *id.* at 2815–17.

years.<sup>52</sup> Federal gun control in the twentieth century made machine guns unusual and uncommon. So here, rather than defer to the original understanding, the majority opinion looks to contemporary government regulation. This sounds a lot like a right evolving with the times—that is, a living Constitution.

In constitutional law, a right is supposed to define the scope of contemporary government regulation. In the *Heller* world—or should that be the Heller world?—contemporary regulation defines the scope of the right.

*Heller* also strays from originalism in what is, for practical purposes, the most important part of the opinion. In a paragraph near the end of the opinion, the Court lists a number of “longstanding prohibitions” on guns that remain good law: bans on possession by ex-felons and the mentally ill; bans on guns in sensitive places like schools and government buildings; and restrictions on the commercial sales of firearms.<sup>53</sup> The vast majority of gun control laws fits within these categories. So while forcefully declaring an individual right to keep and bear arms, the Court suggests that nearly all gun control laws currently on the books are constitutionally permissible. Hardliners in the gun rights community cannot help but be disappointed with their triumph.

The dilemma for the originalist is that none of these broad exceptions are grounded in the original meaning of the Second Amendment. At least *Heller* makes no effort to ground these broad exceptions in original meaning. This “laundry list” of Second Amendment exceptions is simply offered up with no discussion whatsoever about how these exceptions comply with the Founders’ understanding of the right to keep and bear arms. *Heller* does not cite a single historical source to support these exceptions. Not one. So much for sticking to history and restricting the personal value choices of the judges.

At one point in *Catch-22*, a character who has been mistreated by the military under the justification of *Catch-22* is asked if the military personnel had shown her the text of the rule.<sup>54</sup> She replies that she was told that the rule stipulates that the military need not show it to her.<sup>55</sup> The military had good reason for its reluctance because the rule didn’t actually exist. Justice Scalia also had good reason to hide the originalist ball on the laundry list of exceptions. There probably is no evidence to support these particular exceptions as part of the original understanding.

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52. Under the National Firearms Act of 1934, machine guns can only be lawfully owned by civilians with specific authorization from government. See National Firearms Act of 1934, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801–5872 (2000)).

53. *Heller*, 128 S. Ct. at 2816–17.

54. HELLER, *supra* note 1, at 398.

55. *Id.*

Gun controls existed in the Founders' day, so there is historical precedent to which Justice Scalia could have looked to determine what types of gun restrictions the Founding generation thought were consistent with the right to keep and bear arms.<sup>56</sup> For example, the armed citizenry was required to report with their guns to militia "musters," where the weapons would be inspected and the citizens trained.<sup>57</sup> Authorities often required that militia guns be registered;<sup>58</sup> in some instances, colonists conducted door-to-door surveys of gun ownership.<sup>59</sup> There were laws requiring gun powder to be stored safely, even though the rules (like maintaining the powder on the top floor of a building) made it more difficult for people to load their guns quickly to defend themselves against attack.<sup>60</sup> The Founders also had more severe limitations, including complete bans on gun ownership by free blacks, slaves, Native Americans, and those of mixed race.<sup>61</sup> Whites who refused to swear loyalty oaths—first to the Crown and then, when times changed, to the Revolution—were also disarmed.<sup>62</sup> Loyalty oaths meant that somewhere near 40 percent of the population was susceptible of being disarmed on the eve of the Revolution.<sup>63</sup> Couple that with the restrictions imposed on racial minorities and it turns out that only a fraction of the people enjoyed the right to own a gun. The Founders understood that guns were dangerous and warranted regulation—including, when necessary, disarmament. Little wonder the Second Amendment points to the necessity of a "well regulated Militia."<sup>64</sup>

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56. Some of these forms of gun control were described in Justice Breyer's dissent. See *Heller*, 128 S. Ct. at 2848–50 (Breyer, J., dissenting). For a more comprehensive treatment, see SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 26–30 (2006).

57. See CORNELL, *supra* note 56, at 3 & 27.

58. See *id.* (noting that some militia statutes allowed the government to keep track of who had firearms).

59. See Robert H. Churchill, *Gun Ownership in Early America: A Survey of Manuscript Militia Returns*, 60 WM. & MARY Q. 615, 620 (2003) [hereinafter Churchill, *Gun Ownership*]; Robert H. Churchill, *Gun Regulation, the Police Power and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 161 (2007) [hereinafter Churchill, *Gun Regulation*].

60. See, e.g., Act of June 26, 1792, ch. 10, 1792 Mass. Acts 208 (addressing the carting and transporting of gunpowder in Boston); Act of Mar. 1, 1783, ch. 13, 1783 Mass. Acts 218 (prohibiting the storage of firearms loaded with gunpowder in dwellings and other buildings in Boston); Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627 (concerning the storage of gunpowder).

61. CORNELL, *supra* note 56, at 28–29.

62. Churchill, *Gun Regulation*, *supra* note 59, at 157–60.

63. CORNELL, *supra* note 56, at 28.

64. U.S. CONST., amend. II.

One thing the Founders did not do was impose any gun control laws obviously equivalent to those on the laundry list.<sup>65</sup> They had no restrictions on the commercial sales of firearms as such. Licensing of gun dealers, mandatory background checks, and waiting periods on gun purchases first arose in the twentieth century. Nor did the Founders have bans on guns in schools, government buildings, or any other “sensitive place.”<sup>66</sup> The Founding generation had no laws limiting gun possession by the mentally ill, nor laws denying the right to people convicted of crimes.<sup>67</sup> Bans on ex-felons possessing firearms were first adopted in the 1920s and 1930s, almost a century and a half after the Founding.<sup>68</sup>

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65. Nor are any of the laws on the laundry list defensible as unbroken traditions that reflect the original understanding. Some originalists, including Justice Scalia, argue that courts should defer to “constant and unbroken national traditions” that reflect the original meaning. See *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting). But none of these exceptions originated in the Founding era or even in the immediate post-Revolutionary period. They are instead products of the popular understanding of the right to keep and bear arms as it evolved in the twentieth century. Would the ban on handguns be permissible today if it had been adopted in the 1930s instead of the 1970s, and if it was adopted by many jurisdictions rather than just a few? That seems to be enough for the *Heller* majority. But an originalist would demand that any tradition be *consistent* with the original meaning of the text. Otherwise, tradition trumps text. When the trumping tradition first emerges in the twentieth century, then the scope of constitutional protection is evolving to reflect contemporary values, conditions, and preferences. In short, we have a living Constitution.

66. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008).

67. Scholars have offered two historical bases for excluding felons from the Second Amendment. One argument is that felons were not part of “the people” mentioned in the Second Amendment. See Don B. Kates, *Gun Rights for Felons?*, N.Y. POST, July 22, 2008, available at [http://www.nypost.com/seven/07222008/postopinion/opedcolumnists/gun\\_rights\\_for\\_felons\\_\\_120908.htm](http://www.nypost.com/seven/07222008/postopinion/opedcolumnists/gun_rights_for_felons__120908.htm). *Heller*, however, suggested that “the people” referred to in the Second Amendment should be treated the same as “the people” referred to in the First and Fourth Amendments. See *Heller*, 128 S. Ct. at 2790–91. Felons retain their rights under the First and Fourth Amendments, so *Heller* would seem to mean they must retain their rights under the Second Amendment too.

Second, some have argued that the Founders understood the right to keep and bear arms to extend only to “virtuous” citizens. See Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS., Winter 1986, at 143, 146; Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995). While this may be historically accurate, if anything it suggests the necessity of abandoning the original meaning of the Second Amendment. In modern constitutional law, rights are not selectively doled out by legislatures to those whom elected officials deem to be sufficiently virtuous or worthy. Indeed, for years gun rights advocates have railed against discretionary permitting precisely because it wrongfully allowed government officials to selectively grant the right to keep and bear arms.

All this is not to say that felons shouldn't be disarmed. They should be. But it is not because they don't have the right to keep and bear arms. They do. But like all rights, the Second Amendment right can be limited when government has sufficiently good public policy reasons to do so. That some people are not virtuous enough for the legislature's liking is not a good public policy reason. That some people are too dangerous to permit to have firearms is. See *infra* text accompanying and following notes 118–119.

68. While states passed their own restrictions on felons possessing firearms during this era, the federal government effectively banned felons from purchasing firearms through the Federal

The Court didn't give any substantive explanation for why the types of laws mentioned in the laundry list were constitutional aside from a description of them as "longstanding."<sup>69</sup> It is entirely unclear why the mere fact that these laws have been on the books for a long time suffices to save them from legal defeat. Would the District's ban on handguns have been constitutional if it were adopted a long time ago? That a constitutional violation is longstanding hardly seems good reason to uphold it.

*Heller's* emphasis on age is especially paradoxical because the Second Amendment had long been read not to have any relevance to gun control. For the previous seventy years, the lower federal courts read the amendment to protect only a militia-related right.<sup>70</sup> During that period, many gun control laws were adopted and, thanks to the militia-based reading of the Second Amendment, those laws were upheld. Now the Second Amendment has been reinterpreted to protect an individual right, but the new reading doesn't call into question those longstanding gun control laws. Why? Because those gun control laws are longstanding—that is, they did not run afoul of the militia theory of the Second Amendment.

Maybe historical research will one day uncover evidence that the Founders originally understood laws such as those on the laundry list to be consistent with the Second Amendment. This much is clear today: *Heller* didn't base any of these exceptions on originalism. Worse yet, from the perspective of an honest originalist, the laundry list reflects the very living Constitution that Justice Scalia claims to abhor. Laws regulating commercial gun sales, banning guns in schools and government buildings, and disarming felons and the mentally ill are all products of the twentieth century. The exceptions trace their roots to modern era understandings about the right to keep and bear arms and its limits, not to Founding-era understandings.

Why does an originalist opinion accept these modern day limits on guns? One good bet is public legitimacy: if the Court had said that guns could only be regulated in ways similar to Founding-era gun control, public respect for the Court would have been sorely tested. And it would not only have been the gun control advocates who would have screamed and hollered. So too would gun rights proponents. Imagine their reaction if the Court had suggested that states could require every gun owner to report to public gatherings to have his arms inspected by a government official and included

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Firearms Act of 1938. See Federal Firearms Act (Copeland Firearms Act), ch. 850, 52 Stat. 1252 (1938) (codified as amended at 18 U.S.C. § 921-31 (2005)) (repealed 1968).

69. *Heller*, 128 S. Ct. at 2816–17.

70. *Id.* at 2823 (Stevens, J., dissenting).

on a census of available militia weapons. Or that states could selectively disarm groups of people on the basis of their political views or racial background. Like a character in the Heller novel, the originalists on the Court had to sell their originalist souls to survive. Just call it, as Joseph Heller did in reference to a chaplain who learns that sinning can be excused because it feels good, a “protective rationalization.”<sup>71</sup> As the chaplain discovers, it “was almost no trick at all, he saw, to turn vice into virtue and slander into truth, impotence into abstinence, arrogance into humility, plunder into philanthropy, thievery into honor, blasphemy into wisdom, brutality into patriotism, and sadism into justice.”<sup>72</sup>

Here we find *Heller's Catch-22*: originalism was necessary to preserve the court's legitimacy, but the only way the decision would be deemed legitimate was if the Court adhered to a living, evolving understanding of the right to keep and bear arms.

### III. SHALL NOT BE INFRINGED?

One of the more famous lines from *Catch-22* is spoken by an old woman, who notes that the fabled rule gives the military “a right to do anything we can't stop them from doing.”<sup>73</sup> In other words, the rule limiting what the military can do doesn't actually limit the military from doing anything. Due to the laundry list of exceptions, *Heller* makes the Second Amendment look a lot like *Catch-22*: this limit on government doesn't stop the government from doing very much. At least this is the emerging picture of *Heller* and the newly minted Second Amendment right in the lower courts.

As many people predicted,<sup>74</sup> *Heller* led to an avalanche of challenges to gun control laws. Every person charged with a gun crime saw *Heller* as a get out of jail free card. By January 15, 2009, lower federal courts had decided over seventy-five different cases challenging gun control laws under the Second Amendment.<sup>75</sup> The variety of laws challenged has been quite remarkable. There have been suits against laws banning possession by felons,<sup>76</sup> drug

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71. HELLER, *supra* note 1, at 356.

72. *Id.*

73. *Id.* at 398.

74. See, e.g., Posner, *supra* note 37, at 34.

75. A comprehensive database of published and unpublished opinions relying on *Heller* is maintained by the author. Anyone can obtain the same information by running a simple Shepard's search of *Heller*.

76. See, e.g., *United States v. Miller*, No. CR 108-112, 2008 WL 5170440 (S.D. Ga. Dec. 9, 2008); *Holter v. United States*, No. 2:08-CV-100, 2008 WL 5100846 (D. N.D. Dec. 1, 2008).

addicts,<sup>77</sup> illegal aliens,<sup>78</sup> and individuals convicted of domestic violence misdemeanors.<sup>79</sup> Courts have confronted laws prohibiting particular types of weapons, including sawed-off shotguns<sup>80</sup> and machine guns,<sup>81</sup> in addition to weapons attachments like silencers.<sup>82</sup> Defendants have challenged laws barring guns in school zones<sup>83</sup> and post offices.<sup>84</sup> Individuals charged with failing to obtain a license to carry a concealed weapon<sup>85</sup> have raised Second Amendment challenges, as have individuals who possessed an unregistered firearm.<sup>86</sup> Courts have ruled on penalty enhancements for commission of a crime while possessing a gun,<sup>87</sup> bans on possession of ammunition,<sup>88</sup> and the federal law giving the Attorney General broad discretion over gun importation.<sup>89</sup> Remarkably, not one gun control law has been declared unconstitutional on the basis of the Second Amendment since *Heller*.<sup>90</sup>

Exceptions: 75, Individual Right: 0.

One might imagine that at least some lower courts, inspired by *Heller*'s originalist façade, would have looked to the original understanding of the Second Amendment to decide the constitutionality of these laws. But the reality is altogether different. Nearly every case has been decided solely on the basis of the laundry list. Rather than seriously grapple with these Second Amendment

77. See, e.g., *United States v. Yancey*, No. 08-CR-103-BBC, 2008 WL 4534201 (W.D. Wis. Oct. 3, 2008).

78. See, e.g., *United States v. Boffil-Rivera*, No. 08-20437-CR-GRAHAM/TORRES, 2008 U.S. Dist. LEXIS 84633 (S.D. Fla. Aug. 12, 2008).

79. See, e.g., *United States v. Booker*, 570 F. Supp. 2d 161 (D. Me. 2008).

80. See, e.g., *United States v. Artez*, 290 Fed. App'x 203, 208 (10th Cir. 2008).

81. See, e.g., *United States v. Fincher*, 538 F.3d 868, 873–74 (8th Cir. 2008); *Hamblen v. United States*, No. 3:08-1034, 2008 WL 5136586, at \*3–4 (M.D. Tenn. Dec. 5, 2008).

82. See, e.g., *United States v. Garnett*, No. 05-CR-20002-3, 2008 WL 2796098, at \*4 (E.D. Mich. July 18, 2008) (finding that *District of Columbia v. Heller* does not “cast[] doubt on the constitutionality of federal regulations over . . . machineguns and silencers”).

83. See, e.g., *United States v. Walters*, No. 2008-31, 2008 WL 2740398 (D.V.I. July 15, 2008).

84. See, e.g., *United States v. Dorosan*, No. 08-042, 2008 WL 2622996 (E.D. La. June 30, 2008).

85. See, e.g., *United States v. Hall*, No. 2:08-00006, 2008 WL 3097558 (S.D. W. Va. Aug. 4, 2008).

86. See, e.g., *United States v. Perkins*, No. 4:08CR 3064, 2008 WL 4372821 (D. Neb. Sept. 23, 2008).

87. See, e.g., *United States v. Heredia-Mendoza*, No. CR08-5125BHS, 2008 WL 4951051 (W.D. Wash. Nov. 18, 2008).

88. See, e.g., *District of Columbia v. Lewis*, No. 2007 CDC 15745, 2008 WL 4961591 (D. D.C. Nov. 17, 2008).

89. See, e.g., *Mullenix v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, No. 5:07-CV-154-D, 2008 WL 2620175, at \*5 (E.D. N.C. July 2, 2008).

90. There have been two federal court decisions that struck down a provision in federal law that barred people charged with, but not yet convicted of, certain crimes from possessing arms; these decisions were both due process cases, not Second Amendment cases. See *United States v. Arzberger*, 592 F. Supp. 2d 590 (S.D.N.Y. 2008); *United States v. Kennedy*, 593 F. Supp. 2d 1221 (W.D. Wash. 2008).



challenges, lower courts have simply referenced *Heller's* admonition that the right to keep and bear arms is not unlimited and recited the exceptions recognized by the opinion.<sup>91</sup>

It is not terribly surprising that lower courts have been following the Supreme Court's lead by upholding the very types of laws mentioned in the laundry list. In our hierarchical judiciary, lower courts are supposed to follow Supreme Court decisions. One might expect, however, that at least a few of the lower courts would have engaged in some substantive analysis of whether the exceptions are consistent with the underlying right to keep and bear arms. After all, the laundry list is offered up in the *Heller* opinion without any reasoning or explanation. Moreover, none of the exceptions were formally at issue in *Heller*; they were not the subject of briefing by both sides or trial by interested adversaries. The laundry list was, in a first-year law student's favorite word, dicta.

But in the upside down universe of *Heller*—or is that *Heller?*—the dicta are what really matter.

Lower courts are also hewing closely to the laundry list in cases challenging laws that have no clear relationship to the exceptions specified by the *Heller* majority. In other words, they aren't hewing closely to the list at all. They are stretching it far and wide to capture every conceivable type of gun restriction.

For example, in several cases lower courts have upheld the federal law that bars individuals convicted of domestic violence misdemeanors from possessing firearms.<sup>92</sup> Without much substantive analysis, these lower courts have simply analogized this law to the ban on felons. Of course, there is a big difference between felonies and misdemeanors—not least that gun bans applicable to domestic violence misdemeanor convicts, unlike felon bans, are not “longstanding prohibitions.” Whatever sound public policy reasons support the domestic abuser ban, the federal law is a recent phenomenon: it was adopted in 1996,<sup>93</sup> some twenty years after the District of Columbia adopted its insufficiently longstanding ban on handguns.

Before *Heller*, none of the numerous challenges to gun control laws raised in recent months would have had any hope of winning. Now, with a revolutionary ruling recognizing a renewed individual right to keep and bear arms, they still have no hope of winning. So far, the only real change from *Heller* is that gun owners have to pay higher legal fees to find out they lose.

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91. See, e.g., *United States v. Luedtke*, No. 08-CR-189, 2008 WL 4951139, at \*1 (E.D. Wis. Nov. 18, 2008) (recognizing this pattern).

92. See, e.g., *United States v. Booker*, 570 F. Supp. 2d 161 (D. Me. 2008).

93. 18 U.S.C. § 922(g)(9) (2006).

“I would have preferred that that not have been there,”<sup>94</sup> said Robert Levy about the list of exceptions. Levy, executive director of the Cato Institute and the person who provided the funding for the *Heller* litigation, believes that the paragraph in Scalia’s written opinion “created more confusion than light.”<sup>95</sup> But to a die-hard gun rights advocate, the problem is exactly the opposite: the laundry list shed too much light. It revealed that the Supreme Court believes that almost all gun control measures on the books today are perfectly legal.

#### IV. FOR THE SECURITY OF A FREE . . . HOME?

Another confusing set of contradictions in the *Heller* case stems from the self-defense rationale adopted by the Court. According to the majority, personal self-defense was one of the central purposes of the Second Amendment.<sup>96</sup> The D.C. law went too far because it effectively made it illegal for a person to use a gun to defend himself in his own home.<sup>97</sup>

It is hard to square the right to have a gun for self-defense with the exceptions recognized by the *Heller* majority. Why don’t felons have the same right of self-defense as everyone else? We are really talking about ex-felons—convicts who have served their sentences and returned to the community. One might suppose that people with felony convictions are relatively likely to live in dangerous neighborhoods with disproportionately high numbers of armed criminals. Felons therefore might need the ability to defend themselves with guns more than the average person. The ban on felons possessing firearms might be longstanding, but that doesn’t mean that felons’ need for self-defense from criminal attack has somehow evaporated during that time.

Given the self-defense rationale, why should schools be deemed a “sensitive place” where arms can be prohibited? Students and teachers in schools need to defend themselves, too. While we might all wish that no gun ever came into a school, the awful mass murders at Columbine High School and Virginia Tech University show that students and teachers are subject to violent attack. Dangerous and unstable people can sneak guns onto campuses and wreak deadly havoc. If the basis of the right to keep and bear arms is self-defense, then students and teachers shouldn’t be left defenseless.

Self-defense can also be undermined by restrictions on commercial sales of firearms. One common commercial sale restriction is a short waiting period: a prospective purchaser goes to a gun store, picks out a firearm, and then has to

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94. Liptak, *supra* note 38.

95. *Id.*

96. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797–2804 (2008).

97. *Id.* at 2817–18.

wait several days (or ten in California<sup>98</sup>) before the gun can be delivered. These laws might well be good public policy because they discourage impulse buying by a depressed person looking to commit suicide or an angry employee looking to kill the boss who just fired him. But they also interfere with self-defense. A woman who learns that she is being stalked may need a gun right away, and, if there is a delay, she could become a victim of an attack. A homeowner in a town where riots have broken out may need a gun today to defend his family; next week is too late. For some people, self-defense is an immediate need with which commercial sale restrictions can interfere.

Add to the list of contradictory limitations on the right *Heller's* apparent approval of bans on the concealed carry of weapons.<sup>99</sup> The Court was correct to recognize the long historical pedigree of bans on concealed carry, which date back much further than the other exceptions recognized by the Court. Such laws were first adopted in the 1820s and 1830s in southern states—not to disarm blacks, who were already disarmed by discriminatory laws, but to limit public dueling.<sup>100</sup> Although these laws are among the oldest surviving form of gun control, they too are not justified by the original understanding of the Founders. The Founders did not have any laws similar to contemporary regulations requiring individuals to obtain a permit before carrying a concealed weapon.<sup>101</sup> More to the point, prohibitions on concealed carry also interfere with self-defense. Because many violent attacks occur on public streets, the ability to carry a firearm on those streets might be considered an essential aspect of the right of self-defense.

Like laws banning guns in sensitive places, concealed carry laws are consistent with *Heller's* self-defense rationale only because the Court claimed to limit the arms right to the home.<sup>102</sup> Of course, nothing in the text of the Second Amendment places location-based limits on the right to keep and bear arms. The amendment says “security of a free State,” not “security of a free Home.”<sup>103</sup>

Nor is there much evidence that restricting self-defense to the home comports with the Founders' original understanding. Justice Scalia's majority opinion finds support for the individual-rights reading of the Second Amendment in a host of legal materials: state constitutions, legal treatises by

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98. See CAL. PENAL CODE § 12071(b)(3)(A) (West 2000).

99. *Heller*, 128 S. Ct. at 2816–17.

100. See generally CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM (1999).

101. For an account of dueling and the rise of concealed carry laws in the early 1800s, see *id.* at 139–41.

102. *Heller*, 128 S. Ct. at 2817–18.

103. U.S. CONST. amend. II.

English and American authors, the common law, and post-ratification state court cases.<sup>104</sup> While these sources provide some support for the notion of a right of self-defense, none of them limit that right to the home. Indeed, several of the sources specifically approve of self-defense *outside* of the home.<sup>105</sup> For instance, the common law right of self-defense in early America was clearly not limited to the home. Even in public, one did not have a duty to retreat from a felonious attacker under English or American common law.<sup>106</sup> In the majority of American states, the only duty placed upon one forced to defend oneself in public was that the defender act reasonably, which did not require retreat.<sup>107</sup> In some jurisdictions, there was a duty to retreat in public but not in one's home—the so-called Castle Doctrine<sup>108</sup>—but the retreat requirement was only in a minority of jurisdictions. In *Heller* though, the minority rules.

Even in public policy terms, restricting self-defense to the home is questionable. The need to defend oneself from violent attack is arguably far greater in public than in the home. One rarely encounters strangers in the home, which can be secured with locks, burglar alarms, or a really big dog. In public, where we daily encounter hundreds of strangers, we have very little protection and can easily be victimized by criminals. One might imagine some reasonable arguments to support limiting self-defense to the home, but one will look in vain for them in the *Heller* opinion.

A great illustration of why self-defense is not easily confined to the home is the Wisconsin case of *State v. Hamdan*.<sup>109</sup> On the books, the right to keep and bear arms in Wisconsin state law looks a lot like the right recognized in *Heller*: it gives residents a right to have a gun in the home, but prohibits concealed carry outside of it.<sup>110</sup> Munir Hamdan, a convenience store owner in a high-crime neighborhood in Milwaukee, was charged with

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104. *Heller*, 128 S. Ct. at 2791–817.

105. For example, the Georgia and Louisiana decisions relied upon by the Court invalidated bans on the open carrying of firearms in public on the basis of the self-defense rationale. See *Nunn v. State*, 1 Ga. 243, 251 (1846); *State v. Chandler*, 5 La. Ann. 489, 490 (1850). Whether these cases have anything worthwhile to show about the original understanding of the Second Amendment is highly doubtful. Notice the date of these two sources, a half-century after the ratification of the Bill of Rights. It is akin to reading *Lawrence v. Texas*, 539 U.S. 558 (2003), which found a right to same-sex sodomy, as indicative of the original understanding of the Supreme Court justices who wrote *Griswold v. Connecticut*, 381 U.S. 479 (1965), finding a right of privacy within the context of heterosexual marriage.

106. See RICHARD MAXWELL BROWN, NO DUTY TO RETREAT 5 (1991).

107. See RICHARD G. SINGER & JOHN Q. LA FOND, EXAMPLES & EXPLANATIONS: CRIMINAL LAW 444–45 (4th ed. 2007).

108. See *Cooper v. United States*, 512 A.2d 1002, 1005 (D.C. 1986) (discussing the castle doctrine).

109. 665 N.W.2d 785 (Wis. 2003).

110. *Id.* at 789–90 nn.1–2.

having a concealed weapon after police discovered that he kept a handgun either in his pocket or under the checkout counter of his store.<sup>111</sup> The Wisconsin Supreme Court held that the state law banning concealed weapons was constitutional, but created an exception for Hamdan because of his remarkable circumstances.<sup>112</sup> In the few years prior to his case, Hamdan's store had been robbed at gunpoint three separate times. In one incident, a masked robber put a gun to Hamdan's head and pulled the trigger, but the gun misfired.<sup>113</sup> In another incident, Hamdan and his wife were pistol-whipped by a thief.<sup>114</sup> The Wisconsin court held that denying Hamdan the ability to have a concealed weapon in his store would have left him an easy target for the obvious and aggressive criminal element in his neighborhood.<sup>115</sup> The concealed weapon ban, as applied to Hamdan, "practically nullified] the right"<sup>116</sup> to defend himself against attack.

*Hamdan* illustrates the difficulty of basing the right to keep and bear arms on self-defense and then limiting that right to the home. The dangers that society presents to us are not exclusively or even primarily in the home. The dangers are out on the street, in a parking garage, or in a convenience store. If self-defense is the core principle of the Second Amendment, limiting the right to keep and bear arms to the home requires considerably more justification than *Heller* offers.

None of this is to say that the limitations on the right to keep and bear arms recognized in *Heller* are bad ones or should be invalidated as unconstitutional. They just don't make sense given the *Heller* Court's reasoning. They are not based on the original understanding of the Founders and they inhibit the ability of people to defend themselves against attack.

So why are these limits justified? The simple and straightforward reason is, as Joseph Heller might have predicted, the one that *Heller* explicitly rejects. The *Heller* Court goes out of its way to insist that courts should not engage in "interest-balancing" to decide Second Amendment cases.<sup>117</sup> Due to its commitment to originalism, the majority claims it would be illegitimate for courts to engage in this type of balancing: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope

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111. *Id.* at 789.

112. *Id.* at 808–12.

113. *Id.* at 791.

114. See Mark Johnson, *Grocer Endures Risk to Support His Family*, MILWAUKEE J. SENTINEL, July 19, 2000, at 1B.

115. *Hamdan*, 665 N.W.2d at 812.

116. *Id.* at 809.

117. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008).

too broad.”<sup>118</sup> But *Catch-22* teaches us that words are not always what they seem to be. While the Court rejects interest balancing in name, something very much like it underlies the many limitations on the right recognized by the Court. Felons are disarmed because they have proven themselves too dangerous to have weapons. It is not that they don’t have the right to keep and bear arms; they do, just like they have First Amendment rights of speech and religious freedom. But just like every other right, the Second Amendment right can be limited when the government has sufficiently important reasons to limit its exercise. That is how constitutional rights work in modern America. Just as the government’s interest in national security justifies a prohibition on publicizing troop movements despite the individual’s interests in unfettered speech,<sup>119</sup> the government’s interest in public security justifies a prohibition on felon gun ownership despite the felon’s interest in self-defense.

The same logic justifies the bans on guns in sensitive places, restrictions on commercial sales, and concealed carry laws. Even though all of these laws interfere with the ability of people to defend themselves against attack, they are nevertheless legitimate because government has sound reasons to impose them. We do not want dangerous people to obtain firearms, so we regulate commercial gun sales. We do not want guns in schools because, given the immaturity of many students, we fear that guns there will result in violence and death. Concealed carry restrictions limit self-defense, but are viewed as a way to marginally improve the safety of public streets and prevent confrontations from escalating into violence. Maybe none of these laws actually furthers the underlying government ends; certainly, the assumptions underlying them are open to question.<sup>120</sup> But the best reason for such limitations to exist is because government is thought to have sufficiently weighty interests to justify them. History, as such, has little to do with it.

Consider again the Court’s argument about why handguns can’t be banned while machine guns can. Recall that the Court said that handguns were common while machine guns were not.<sup>121</sup> Suppose a gun manufacturer developed a plastic pistol that was lightweight, cheap, and required relatively little maintenance. The one downside was that the gun was undetectable by most security screening devices. Now imagine that most people would prefer such a light, inexpensive, and low maintenance firearm and that, if given time,

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118. *Id.*

119. *Cf.* *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (recognizing the legitimacy of restrictions on publication of the location of military troops).

120. *Cf.* JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS* (1998) (arguing that allowing concealed carry of firearms reduces violent crime).

121. *Heller*, 128 S. Ct. at 2817.

it would become the most common type of handgun. If the government bans the sale of these weapons, is such a prohibition constitutional because the gun is a brand new technology and not yet in common use? Or suppose that, before the government bans them, the desirability of the gun leads to ninety million purchases. Is the ban unconstitutional because the gun is in common use? That would be silly. The ban would be constitutional regardless of the gun's prevalence because the government has a strong enough interest in preserving the effectiveness of security screening devices to override gun owners' interest in possessing this weapon. What matters—or what should matter—is the government's interest in controlling the weapon, not whether consumers like it. Machine guns are subject to regulation despite the Second Amendment not because they are uncommon, but because they are uncommonly lethal.

All of these exceptions—a ban on plastic pistols, bans on felony gun possession, sensitive place limitations—are products of interest balancing. If they are constitutional, it is because government's underlying reasons for limiting the right to keep and bear arms are sufficiently strong. Yet this simple process of weighing the government's interest to determine if a limitation on an individual right is justified—a process that governs most individual rights—is deemed a stranger to the Second Amendment by the *Heller* majority. The Second Amendment, in other words, should be interpreted just like the other amendments. The same, only different.

## V. REASON'S PHOENIX

*Heller* presents another contradiction. In a twist that seems to come straight from *Catch-22*, the missteps and flaws in its reasoning actually improve the decision. Because of its failings, *Heller* is more likely to have a salutary effect on the gun debate in America by improving future gun policies.

If we are to believe the conservative critics of *Heller*, the Court strayed from originalism in rejecting the militia theory of the Second Amendment, finding instead an individual right to keep and bear arms for purposes of self-defense. For this, the Court should be commended. Whatever the Second Amendment meant two centuries ago, the right to keep and bear arms has evolved in the public consciousness and in the law. For well over a hundred years, Americans have understood the right to keep and bear arms in personal terms, as a guarantee of their ability to protect themselves from violent attack.<sup>122</sup> Despite

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122. For a historical assessment of the transformation of popular understandings of the Second Amendment from a militia-based right to one based on personal self-defense, see generally CORNELL, *supra* note 56.

heated disagreement over the proper way to interpret the Constitution, our Constitution does in fact evolve. One simply cannot link the vast majority of constitutional doctrines to original understanding. Like all of our worthwhile rights, the right to keep and bear arms has changed over time. Today, forty-two of the fifty state constitutions provide for the individual right to keep and bear arms unrelated to militia service<sup>123</sup>—by far the best expression of the constitutional commitments of We the People. The living Constitution strongly supports the *Heller* majority's recognition of an individual right to keep and bear arms.

Judge Wilkinson argued that the Court should have stayed out of the Second Amendment thicket and allowed the political process to work through the gun controversies without judicial involvement.<sup>124</sup> Such an approach, however, would not have been particularly promising from a public policy perspective. Although constitutional scholars have bemoaned for thirty years how the Supreme Court's decision in *Roe v. Wade* supposedly prevented Americans from coming to a moderate consensus on abortion rights,<sup>125</sup> the experience with the Second Amendment suggests that judicial abstention does not inevitably lead to political consensus. For seventy years, the Court has remained on the sidelines of the gun debate and the result has been anything but a gradual move towards a moderate middle on gun rights. Instead, the Court's absence has allowed the forces of political unreason to command the field. Thanks to their power over the gun rights debate, we are left with the usual bad public policy that comes from inflamed rhetoric and unwillingness to compromise.

*Heller* offers the opportunity to restore some measure of sanity to the gun debate, thanks in no small part to the contradictions in the decision. If the Court had found an individual right to keep and bear arms but had refused to carve out a list of exceptions, then federal courts today might be striking down all sorts of reasonable gun control laws. The laundry list, misplaced as it was in the opinion, has provided lower courts with at least some of the guidance that the Supreme Court is institutionally charged with giving. The laundry list has also prevented lower courts from throwing into disarray the gun control regimes of the fifty states and the federal government.

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123. See Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686 (2007).

124. See Wilkinson, *supra* note 30, at 301–02.

125. See MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 48 (1987); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199–1208 (1992); Jeffrey Rosen, *Dissenting*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 170 (2005). For a persuasive contrary view, see David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 840–41 (1999).



By recognizing an individual right and also a variety of permissible limits, the Court also denied victory to both extremes in the gun debate. Unlike the radical and unrecognizable right to keep and bear arms envisioned by those groups—in which the right cannot coexist with regulation—*Heller* stands as a symbol of a truly reasonable right to keep and bear arms. There is a right, but it can and should be subject to regulation—and perhaps quite a bit of it.

Perhaps the only clear limit established by the *Heller* Court is that complete disarmament is unconstitutional. The obsession of both gun lovers and gun haters, disarmament has been a major distraction to the gun debate. Gun rights extremists believe any gun control is a step towards inevitable involuntary gun confiscation, while anti-gun extremists secretly, and sometimes openly, aspire to eliminate all privately owned guns. In truth, total disarmament has never been a serious possibility. There is no political will for such an effort. And even if there were, the folly of disarmament is illustrated by the 280 million guns in America and the fact that many, if not most gun owners would never comply with a law requiring them to turn in their guns. We have tried in the past to get rid of small, easy-to-conceal things that people feel passionately about, like alcohol and drugs, with little success. Gun confiscation would likely do no more than what Prohibition and the Controlled Substances Act did: create a vibrant black market, strain law enforcement resources, and turn otherwise law-abiding citizens into criminals. Guns, like drugs and booze, are here to stay. *Heller* is going to help us get used to that fact.

With disarmament off the table, gun rights absolutists may no longer be able to rally the troops to oppose each and every gun law as a step towards inevitable confiscation. Shortly after *Heller* was decided, the Brady Campaign's Dennis Henigan argued, "By erecting a constitutional barrier to a broad gun ban, the *Heller* ruling may have flattened the gun lobby's 'slippery slope,' making it harder for the NRA to use fear tactics to motivate gun owners to give their time, money and votes in opposing sensible gun laws and the candidates who support those laws."<sup>126</sup> This sanguine view is held not only by hopeful gun control advocates. Pro-gun libertarian Jacob Sullum has written that judicial recognition of the individual right to bear arms would put "wholesale disarmament . . . out of the question"—"a development that could help calm the often vociferous conflict over gun policy."<sup>127</sup> Prior to *Heller*,

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126. Dennis A. Henigan, *The Heller Paradox: A Response to Robert Levy*, CATO UNBOUND, July 16, 2008, <http://www.cato-unbound.org/2008/07/16/dennis-henigan/the-heller-paradox-a-response-to-robert-levy/>.

127. Jacob Sullum, *Second Sight*, REASON, Oct. 23, 2001, available at <http://www.reason.com/news/show/35880.html>.

Glenn Harlan Reynolds, a conservative law professor, gun rights proponent, and host of the popular Instapundit blog, predicted, “If the Supreme Court were to interpret the Second Amendment” to protect an individual right, “gun owners would have less reason to fear creeping confiscation, and sensible gun control laws—those aimed at disarming criminals, not ordinary citizens—would pass much more easily.”<sup>128</sup>

*Heller* will also promote better public policy by adding a forceful new voice of reason to counter the passions of the gun debate: the federal courts. Just as many commentators predicted, a renewed Second Amendment has led to a flood of lawsuits challenging a wide variety of gun control laws. Now, the final word on those laws is not given by the heated gun partisans but by the dispassionate federal courts. Legal philosopher Ronald Dworkin famously called the Supreme Court a “forum of principle,”<sup>129</sup> but we might similarly recognize federal courts as forums of reason. Far more than elected officials, federal courts insist on reason-giving, deliberation, and justification as the basis for legal decisions rather than emotion and raw political power.<sup>130</sup> In nearly all future debates over gun policy, we can expect that the previously silent federal courts will have a prominent voice.

Of course, the views of *We the People* still matter. Nearly fifty years ago, political scientist Robert G. McCloskey argued that for all the fire surrounding judicial activism, the Supreme Court tends to stay within the broad mainstream of American public opinion.<sup>131</sup> On occasion the Court pushes society a bit more in one direction than the views of the day might support, as in *Brown v. Board of Education*.<sup>132</sup> And on occasion the Court is a bit behind the times, as when it maintained barriers to Franklin D. Roosevelt’s New Deal. Political institutions and social forces check the courts and keep constitutional doctrine close to the political center.

The political center on guns is pretty much where *Heller* landed. The Court held that the Second Amendment protects an individual right to keep and bear arms and rejected the militia-only view. Polls consistently show that three in four Americans believe the Constitution guarantees an individual right to keep and bear arms.<sup>133</sup> The Court struck down a relatively draconian

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128. Glenn Harlan Reynolds, Letter to the Editor, REASON, June 1996, at 10, available at <http://www.reason.com/news/show/29954.html>.

129. See RONALD DWORKIN, A MATTER OF PRINCIPLE 71 (1985).

130. See Frank I. Michelman, *The Supreme Court 1985 Term: Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 76–77 (1986).

131. See ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 14 (4th ed. 2005).

132. 347 U.S. 483 (1954).

133. See Jon S. Vernick et al., *Public Opinion Polling on Gun Policy*, 12 HEALTH AFF. 198, 204–05 (1993) (reviewing public opinion polls).

Washington, D.C. law that barred all handguns, required that all other firearms be maintained locked or disassembled, and effectively made illegal the use of a firearm in self-defense. According to a 2001 study by the National Opinion Research Center, only 11 percent of Americans support a ban on handguns<sup>134</sup>—a less extreme law than the D.C. gun ban. *Heller's* laundry list has raised the ire of hard-line gun advocates, but those exceptions are well aligned with popular sentiment. The 2001 National Opinion Research Center study surveyed polling data and concluded, “Large majorities back most general measures for controlling guns, policies to increase gun safety, laws to restrict criminals from acquiring firearms, and measures to enforce gun laws and punish offenders.”<sup>135</sup> One need not believe that the Court should slavishly follow polling results—it shouldn’t—to acknowledge that such a mainstream approach makes the decision much more likely to command public respect. Sticking to the middle makes the Court’s interpretation far more likely to endure.

Federal courts are conservative institutions. By this, I don’t mean they support Republican policies as such—even though at this moment nearly two in three federal judges were appointed by Republican Presidents. Federal courts are conservative in the old fashioned sense of the word: they are not likely to change anything in any radical way any time soon. They prefer the status quo and generally avoid issuing socially disruptive rulings. *Heller* is of a piece.

This is the final paradox of the decision. For a landmark ruling with a revolutionary new reading of the Second Amendment, almost nothing has changed. The D.C. law has been invalidated, but it never really disarmed the citizens of the District anyway and was rarely enforced against law-abiding citizens. A few additional extreme laws will be invalidated under the reinvigorated Second Amendment, but these, like the D.C. law in *Heller*, are likely to be outliers. For all the passion that has been devoted to the debate over the meaning of the Second Amendment, the practical matter of what laws are and are not permissible under that provision remains more or less the same. In short, the meaning of the Second Amendment has changed a lot, but its impact on gun control has not.

The militia theory of the Second Amendment is dead. Long live gun control. Somewhere, the ghost of Joseph Heller is smiling.

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134. See TOM W. SMITH, 2001 NATIONAL GUN POLICY SURVEY OF THE NATIONAL OPINION RESEARCH CENTER 34 (2001), available at <http://www.mindchanging.com/politics/guncontrolsurvey.pdf>. Some studies find somewhat greater support for a handgun ban, although the position consistently has less than majority support. See Vernick et al., *supra* note 133, at 206.

135. See SMITH, *supra* note 134, at 2; accord Vernick et al., *supra* note 133, at 201–05.