THE *HELLER* PARADOX

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In this Article, I argue that the Heller *majority, in discovering a new Second Amendment right to possess guns for personal self-defense, engaged in an unprincipled abuse of judicial power in pursuit of an ideological objective. The ideological nature of Justice Scalia's opinion is revealed in his inconsistent brand of textualism, in which Scalia's own longtime insistence on the importance of context is cast aside as he interprets "the right of the people to keep and bear Arms" by divorcing it from its particular context in the Second Amendment. The majority's ideological approach is further revealed by Scalia's selective manipulation of the relevant historical record, particularly his dismissal of key elements of the Amendment's legislative history, misleading account of analogous state right-to-bear-arms guarantees, and misunderstanding of the "well regulated Militia." I find the majority opinion a paradox. Although its interpretation of the Second Amendment is driven by ideology, the opinion nevertheless is unlikely to pose a substantial constitutional threat to gun regulation and may actually weaken the Second Amendment as an argument against the adoption of new gun control laws. Finally,* Heller*, by taking a general gun ban "off the table" as a policy option, may eventually weaken the gun lobby's use of the slippery slope argument to frame the gun control debate in cultural terms, allowing a greater focus on the public safety benefits of specific reforms designed to reduce access to guns by dangerous persons.*

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INTRODUCTION

Charlton Heston was nearing the end of his rousing speech to the 2000 National Rifle Association (NRA) Convention in Charlotte, North Carolina, where he accepted a third term as the group's president. After decrying "the divisive forces that would take freedom away,"[1] he hoisted in one hand, high above his head, a colonial-era musket, symbol of rebellion against the powerful to ensure American liberty. Then, in his booming baritone, Heston issued his trademark challenge to the faithful gathered to heed the call: "From my cold, dead hands!"[2]

Heston's musket drew a direct, visible link between the fight against tyranny that gave birth to our nation and the NRA's fight against the perceived tyranny of gun control. Patriots then and patriots now. For the committed NRA activist, moreover, Heston was symbolically drawing a connection to the Founding Fathers that is real, eternal and indelibly written into the charter of our freedoms—the Bill of Rights.

For the gun rights partisan, the Second Amendment is the trump card in the gun debate, the argument of last resort. The gun control advocate can talk about the far greater lethality of guns versus other weapons,[3] the thirty thousand Americans killed by gunfire every year,[4] and the need to regulate guns at least as much as other dangerous products like automobiles. But these arguments invariably draw the response that guns aren't like other dangerous products because the right to possess guns is uniquely protected by the Constitution.

There has, however, always been a problem with the NRA's use of the Second Amendment: Its words don't quite fit the NRA's narrative. If its intent was to guarantee a right to possess guns for private purposes like self-defense and hunting, its words seem oddly chosen:

> 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.[5]

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1. Charlton Heston, Opening Remarks to Members at the NRA Annual Meeting in Charlotte, North Carolina (May 20, 2000), *available at* http://www.nra.org/Speech.aspx?id=6044.

2. *Id.*

3. For a discussion of the differential lethality of guns, see FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 113–18 (1997).

4. *See* Nat'l Ctr. for Injury Control & Prevention, Ctr. for Disease Control, WISQARS Injury Mortality Reports, 1999–2005 (2005), http://webapp.cdc.gov/sasweb/ncipc/mortrate10_sy.html (select "Firearm" radio button under the section entitled "What was the cause or mechanism of the injury;" then press "submit request" button).

5. U.S. CONST. amend. II.

The gun rights community has always been somewhat vexed by the language about the "well regulated Militia" and its necessity "to the security of a free State." What are such words doing in a provision that guarantees the right to have guns to defend one's home and family? What is their function? Even the phrase "keep and bear Arms" seems strange. The Framers could have written something like: The right of the people to possess and use guns shall not be infringed. Why didn't they?

For many years, the NRA's primary strategy for dealing with the troublesome language about the "well regulated Militia" was to pretend it isn't there. The NRA headquarters building on Thomas Circle in Washington, D.C. long featured a heavily edited version of the Second Amendment on its façade. The first thirteen words were omitted.

Until its recent decision in *District of Columbia v. Heller*,[6] the U.S. Supreme Court had been unwilling to interpret the Second Amendment by ignoring half of its text. In fact, in *United States v. Miller*,[7] the Supreme Court's only extensive discussion of the Amendment prior to *Heller*, the Court assigned decisive importance to the militia language. In *Miller*, a unanimous Court held that the "obvious purpose" of the guarantee of the people's right to "keep and bear Arms" was "to assure the continuation and render possible the effectiveness" of state militia forces, and that the Amendment "must be interpreted and applied with that end in view."[8] Indeed, in *Miller*, the Court upheld the defendants' indictment for transporting a sawed-off shotgun across state lines without complying with the National Firearms Act because there was no evidence that such a gun could have a "reasonable relationship to the preservation or efficiency of a well regulated militia."[9] The Court further noted that it could not simply take judicial notice "that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense."[10] The *Miller* Court found no reason to even address the question whether such a gun could have utility for self-defense or some other nonmilitia activity.

Prodigious historical research into the origins of the Second Amendment confirms that it was intended to address the distribution of military power in society, not the need to have guns for self-defense or other private purposes.[11]

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6. 128 S. Ct. 2783 (2008).
7. 307 U.S. 174 (1939).
8. *Id.* at 178.
9. *Id.*
10. *Id.*
11. The historical case supporting the militia-purpose view was persuasively presented in a brief of *amici curiae* filed in *Heller* by fifteen academic historians. *See* Brief of Amici Curiae Jack N. Rakove et al., in Support of Petitioners, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290). Only one professional historian—Professor Joyce Lee Malcolm of George

The Anti-Federalists, who opposed the Constitution as written and sought the addition of a Bill of Rights, were deeply worried that the Constitution had given Congress the power to raise a standing army (meaning a professional military force) that many feared would become a tool of federal tyranny, while also giving Congress excessive power over the state militias. The state militias were nonprofessional military forces composed of ordinary citizens and were regarded as a strong check on the power of a federal standing army.

Leading Anti-Federalists argued that the Constitution's grant of power to Congress to organize and arm the militia amounted to an exclusive power to do so, thus rendering the state militias vulnerable to federal hostility or neglect. For example, Anti-Federalist George Mason argued during the Virginia ratification debates that Congress' new power would allow Congress to destroy the militia by "rendering them useless—by disarming them . . . . Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive power to arm them."[12]

Historians tell us that the Second Amendment was an effort by the Federalist defenders of the Constitution to allay these concerns by making the keeping and bearing of arms in a state militia a "right of the people," not dependent on federal action.[13] The Second Amendment was passed as a fail-safe provision, ensuring that the state militias would be armed, even if Congress abandoned them. In the words of Professors H. Richard Uviller and William Merkel, the Amendment was "concerned with federalism, and the preservation of states' capacities to defend themselves against disorder, insurrection, and invasion whenever the national government should refrain from acting, or find itself unable to act under the federal military or militia powers."[14]

For decades after *Miller* the lower courts consistently held that the Second Amendment guarantees the people the right to be armed only in

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Mason University Law School—filed a brief in *Heller* presenting historical arguments opposing the militia purpose view. *See* Brief of the CATO Institute and History Professor Joyce Lee Malcolm as Amici Curiae in Support of Respondent, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290).

12. District of Columbia v. Heller, 128 S. Ct. 2783, 2833 (2008) (Stevens, J., dissenting) (quoting 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 379 (Jonathon Elliot ed., 2d ed., Buffalo, Hein 1863)).

13. For a discussion of the militia purpose view of the Second Amendment from some of the leading historical texts, *see generally* SAUL CORNELL, A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA (2006); THE SECOND AMENDMENT IN LAW AND HISTORY (Carl Bogus ed., 2000); H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT (2002).

14. UVILLER & MERKEL, *supra* note 13, at 105.

connection with service in an organized state militia.[15] Since the state militia of the founding era—a system of compulsory military service imposed on much of the adult, male population—had long ago disappeared into the mists of time, the courts routinely upheld gun control laws of every conceivable variety against Second Amendment challenge. Indeed, the judicial consensus on the meaning of the Amendment had grown so strong that, in 1990, former Nixon Administration Solicitor General and Harvard Law School Dean Erwin Griswold wrote, "that the Second Amendment poses no barrier to strong gun laws is perhaps the most well-settled proposition in American constitutional law."[16] A year later, former Chief Justice Warren Burger—a gun owner himself—accused the NRA of perpetrating a "fraud on the American public" by insisting that the right to be armed existed apart from service in an organized militia.[17]

Then in 2008, by a 5–4 vote, with Justice Scalia writing for the majority, joined by Justices Thomas, Kennedy, Roberts and Alito, the Supreme Court wiped away the consensus militia-purpose view in *District of Columbia v. Heller*. In striking down the District of Columbia's handgun ban, the Court found that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[18] The Court gave the NRA and its allies the interpretation of the Second Amendment they had long sought. The constitutional right to own guns for personal use—an article of faith for those who cheered Charlton Heston's upraised musket—was now a legal reality. Many observers treated the ruling as an unqualified victory for the opponents of gun control. Yet was it?

Heller is, in fact, the new paradox of the gun control debate. In *Heller*, the conservative majority on the Supreme Court did, indeed, make history by creating a new Constitutional right to be armed. It did so, however, only by engaging in an unprincipled abuse of judicial power in the pursuit of an ideological objective. Not quite *Bush v. Gore*,[19] but close. Yet, as argued below, *Heller* is

15. *See Heller*, 128 S. Ct. at 2823 (Stevens, J., dissenting) ("Since our decision in *Miller*, hundreds of judges have relied on the view of the Amendment we endorsed there . . . .").

16. Erwin N. Griswold, *Phantom Second Amendment 'Rights'*, WASH. POST, Nov. 4, 1990, at C7.

17. *See The MacNeil/Lehrer Newshour: Nuclear Nightmare?* (PBS television broadcast Dec. 16, 1991).

18. *Heller*, 128 S. Ct. at 2821.

19. 531 U.S. 98 (2000). The description by Professor Alan Dershowitz of the Supreme Court's ruling in *Bush v. Gore,* in which a different conservative majority, in a 5–4 vote, ended the 2000 Presidential election by stopping the hand recount of Florida ballots, invokes a theme of unprincipled inconsistency also applicable to the *Heller* majority opinion: "[T]he disturbing aspect of this decision—the element that makes it different from any decision previously rendered by the Supreme Court—is that the justices were willing not just to *ignore* their own long-held judicial philosophies but to *contradict* them in order to elect the presidential candidate they preferred."

likely to have relatively little impact as a legal weapon against other current and future gun laws. Indeed, and of even greater significance, it is likely to alter the public debate over gun control so as to weaken, not strengthen, the gun lobby's power to block sensible gun control proposals that will dominate the debate in the future.

To understand just how confounding the *Heller* paradox may turn out to be, we should begin by understanding how indefensible the decision is as a matter of Constitutional law.

I. *HELLER* AS IDEOLOGY

A. Text Without Context

We have seen that the NRA has conformed the Second Amendment's text to its own constitutional preconceptions by simply pretending that its first thirteen words were never written. Justice Scalia's majority opinion in *Heller* similarly obliterates half of the Amendment, but is somewhat more sophisticated in attempting to disguise its editing of the Constitution.

Justice Scalia is well known for his insistence that the text of the Constitution is of primary importance in deciding constitutional questions, not the search for the intent of the Framers[20] and not changes in society since the Constitution was drafted.[21] Yet the brand of textualism he uses to interpret the Second Amendment is inconsistent and artificial, showing little respect for the words the Framers actually wrote and ratified.

Scalia's overarching inconsistency is his highly selective use of context to inform meaning. The core of his textual argument is devoted to listing various eighteenth and nineteenth century uses of the phrases "keep arms" and "bear arms" to refer to a right to be armed unrelated to militias. For example, he cites a 1734 text providing, "[y]et a Person might keep Arms in his House, or on his Estate, on the Account of Hunting, Navigation, Travelling, and on the Score of Selling them in the way of Trade or Commerce, or such

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ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000, at 93 (2001).

20. In discussing statutory construction, Scalia approvingly quotes this remark of Justice Holmes: "Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean." ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22–23 (1997). He applies the same principle to constitutional interpretation. *See id.* at 37–38.

21. Justice Scalia is a sharp critic of the idea of a "Living Constitution." *See id.* at 41–47.

Arms as accrued to him by way of Inheritance."[22] In this instance, the use of "keep Arms" does appear to refer to the possession of arms for private purposes unrelated to militias. But how do we know this? Only because the context in which the phrase appears suggests that it refers to nonmilitia activities.

To take another of Scalia's examples, he cites various state constitutional provisions, all enacted after the ratification of the Second Amendment, that guarantee "every citizen a right to bear arms in defence of himself and the State."[23] We know "bear arms" includes a nonmilitia right in those provisions only because of the context in which the phrase appears, particularly the phrase "defence of himself," suggesting private self-defense, not community defense as part of an organized militia. Scalia's own examples demonstrate that context is critical to meaning. As he wrote on another occasion, "[i]n textual interpretation, context is everything . . . ."[24]

When it comes to the Second Amendment, however, Scalia interprets the phrase "keep and bear Arms" by ripping the phrase out of context; that is, by artificially separating the phrase from the words that precede it about ensuring "a well regulated Militia . . . necessary to the security of a free State" and determining its meaning without reference to the militia language.[25] Thus, the *Heller* majority arrives at the conclusion that the right guaranteed is "the individual right to possess and carry weapons in case of confrontation," prior to addressing the meaning of the militia language.[26]

The issue is not, however, whether the phrases "keep Arms" and "bear Arms" could have nonmilitia meanings in other contexts. The issue is the meaning of the phrase "keep and bear Arms" as it is used in the context of a provision of the Constitution declaring the importance of a "well regulated Militia to the security of a free State." Justice Scalia proudly points to the "many sources" presented in his opinion in which "bear arms" was used in "nonmilitary contexts,"[27] but ignores the particular context in which the phrase appears in the Second Amendment. Moreover, Scalia's move to address the meaning of the right apart from its context is problematic even under his own definition of originalism. At the outset of his opinion, he defines the interpretive task as determining the "normal meaning" of the text

22. *Heller*, 128 S. Ct. at 2792 n.7 (citing JOHN AYLIFFE, A NEW PANDECT OF ROMAN CIVIL LAW 195 (London 1734)).

23. *Id.* at 2793 (citing CONN. CONST. of 1818, art I, § 17, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 538 (Francis N. Thorpe ed., 1909)) [hereinafter Thorpe].

24. SCALIA, *supra* note 20, at 37.

25. *See Heller*, 128 S Ct. at 2789–90.

26. *Id.* at 2797.

27. *Id.* at 2795.

"to ordinary citizens in the founding generation."[28] Even assuming this to be the proper definition of the Court's task, the issue should be: What would such ordinary citizens have understood to be the "right of the people to keep and bear Arms" in the context of the militia language?

Justice Scalia's opinion also notably insists on interpreting the phrase "keep and bear Arms" by slicing and dicing it into the phrases "keep Arms" and "bear Arms," before presenting multiple examples of the use of each phrase, in isolation from the other, in nonmilitia contexts. Only in passing does the opinion note the Massachusetts Declaration of Rights of 1780,[29] in which the two phrases appear joined together as "the right to keep and to bear arms," much as they appear in the Second Amendment. It is worth quoting the Massachusetts provision in its entirety, which Scalia does not do:

> The people have a right to keep and to bear arms for the common defense. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.[30]

Can there be any doubt that, in this provision, context establishes that the phrase "right to keep and to bear arms" refers entirely to military matters and has nothing whatever to do with private self-defense? The provision guarantees "a right to keep and to bear arms *for the common defense*," and is followed by an articulation of the dangers of standing armies and the need for civilian control of the military. It is hardly surprising that the Supreme Judicial Court of Massachusetts has held, in *Commonwealth v. Davis*,[31] that this provision is directed at "service in a broadly based, organized militia," and not "guaranteeing individual ownership or possession of weapons."[32] The militia language of the Second Amendment functions in the same way to elucidate the meaning of a similar phrase as referring to military matters.

Incredibly, though, the *Heller* majority claims, without even acknowledging the *Davis* case, that the state's highest court has determined that the Massachusetts right is not confined to a state-organized militia.[33] While ignoring the controlling authority of *Davis*, the *Heller* opinion instead relies on an 1825 libel case, *Commonwealth v. Blanding*,[34] in which the scope of the

28. *Id.* at 2788.
29. *See id.* at 2803.
30. MASS. CONST. of 1780, pt. 1, art. XVII, *reprinted in* 3 Thorpe, *supra* note 23, at 1892, 1892.
31. 343 N.E.2d 848 (Mass. 1976).
32. *Id.* at 849.
33. *See* 128 S Ct. at 2803.
34. 20 Mass. (3 Pick.) 304 (1825).

"right to keep and to bear arms" was not even before the Court and which suggests only that the right to be armed does not extend to those who use arms irresponsibly.[35] The Scalia majority opinion in *Heller* thus concludes that, in the Massachusetts provision, the right is not confined to militia service, but rather "secured an individual right to bear arms for defensive purposes."[36] This implausible reading of the Massachusetts language strongly suggests that Justice Scalia would find that the right to "keep and bear Arms" has a nonmilitia meaning in *every* possible context. What became of Scalia's conviction that in interpreting Constitutional text, "context is everything"?[37] When it comes to the Second Amendment, context apparently is nothing. Rather, the imperative to discover a right to be armed for self-defense is everything.

Justice Scalia's majority opinion disguises its unprincipled discarding of context through the sleight-of-hand of referring to the militia language as merely "prefatory" as opposed to the other "operative" language of the Amendment. It is critical to Scalia's argument that the importance of the militia language be diminished by labeling it as a "preface" or a "preamble." It allows him to marshal the support of various rules of statutory construction regarding the limited role of such prefatory language. For example, he argues that although a prefatory clause may be used to resolve ambiguity in an operative clause, "a prefatory clause does not limit or expand the scope of the operative clause."[38] Moreover, according to Scalia, "the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms."[39] But, of course, the issue at hand is whether one can properly determine the meaning of the right guaranteed by the Second Amendment—and therefore determine whether the phrase "right of the people to keep and bear Arms" is ambiguous or clear—without first taking the militia language into account. Simply attaching the label "prefatory" or "preamble" to the militia language should not be sufficient to resolve that issue.[40]

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35. *See id*. at 313–14.

36. *Heller*, 128 S. Ct. at 2803.

37. SCALIA, *supra* note 20, at 37.

38. *Heller*, 128 S. Ct. at 2789.

39. *Id*. at 2789 n.3 (quoting 2A J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 146 (Norman J. Singer ed., 5th ed. 1992) (1943)).

40. Justice Scalia concedes that it "might be argued, we suppose, that the prologue itself should be one of the factors that go into the determination of whether the operative provision is ambiguous—but that would cause the prologue to be used to produce ambiguity rather than just to resolve it." *Id*. at 2790 n.4. Again, this begs the question at hand: whether the militia language of the Second Amendment is appropriately consigned to secondary status as a mere prologue, or whether it should be regarded as providing the context necessary to determine the meaning of the right guaranteed. Scalia attempts to diminish the importance of the issue by claiming that "even if we considered the prologue *along with* the operative provision we would reach the same result we do

Scalia's argument for interpreting the meaning of the right without regard to the militia language turns largely on what he seems to consider a self-evident analogy between the militia language of the Second Amendment and nonoperative "whereas" clauses in legislation, as well as an analogy to the nonoperative language in the preamble to the Constitution itself.[41] It is true that statutory language often is preceded by a series of "whereas" clauses discussing the problem the legislation is designed to address and stating its purpose, but having no independently enforceable effect as law. But the analogy of these "whereas" clauses to the militia language of the Second Amendment is invalid. The portion of the Constitution analogous to statutory "whereas" clauses is the Constitution's own preamble which, in language that speaks to the ages, sets out the broad values that "We the people" sought to pursue in establishing the new government—"to insure domestic Tranquility," and "to secure the Blessings of Liberty to ourselves and our Posterity"—but is not independently enforceable as law.[42] The first thirteen words of the Second Amendment, however, are less operative than the remainder of its text only because five Justices of the Supreme Court have now decreed it to be so.[43]

Indeed, in his own writings, Justice Scalia has distinguished the Constitution's famous preamble from the remainder of the document, writing

today, since (as we explain) our interpretation of 'the right of the people to keep and bear arms' furthers the purpose of an effective militia no less than (indeed, more than) the dissent's interpretation." *Id.* (citation omitted). As explained *infra* pp. 1189–91, this assertion is based on a misunderstanding of the nature of the founding-era militia.

41. *See Heller*, 128 S. Ct. at 2789 n.3.

42. The sources cited by the *Heller* majority also address the effect of preambles to statutes, which are not independently enforceable because they are not considered part of the enactment, although they may furnish guidance in interpreting the words that are actually enacted into law. According to Sutherland, for example, "[a] preamble consists of statements which come before the enacting clause in a statute," which "[b]ecause of its position preceding the enacting clause, it has often been said that matter in the preamble, not having been 'enacted,' cannot be given any binding legal effect." SUTHERLAND, *supra* note 39, at 145 (citing Yazzo & M.V.R. Co. v. Thomas, 132 U.S. 174 (1889)). Statutory preambles, understood this way, may be analogous to the preamble to the United States Constitution, but not to the militia language of the Second Amendment, unless that language is regarded as distinct from that which was enacted by the ratifiers of the Bill of Rights. There is no reason to believe that the First Congress thought it was enacting into law only the last half of the Second Amendment. As discussed *infra* pp. 1182–83, it is highly relevant that the militia language began its life (in James Madison's initial proposal) following the language guaranteeing the people the right to keep and bear arms, not preceding it. It strains credulity to believe that the First Congress, by changing the positioning of the militia language within the Second Amendment, sought to separate that language from that which it was "enacting" as part of the Bill of Rights, thereby making the militia language analogous to statutory preambles.

43. I am not here arguing that rules of statutory construction are not relevant to constitutional interpretation, but rather that, even if they are, the militia language of the Second Amendment is not analogous to "whereas" clauses in the preambles of statutes.

that the preamble sets forth only the "[t]he aspirations of those who adopted it," while the "operative provisions of the document, on the other hand, *including the Bill of Rights*, abound in concrete and specific dispositions."[44] Yet in *Heller*, when the goal is to create, by all means necessary, a new right unrelated to the militia, the Amendment's first thirteen words become the only portion of the Bill of Rights that is not operative. Justice Scalia's textualism apparently allows him to select the words of the Constitution that are operative, at least when it becomes necessary to support his predetermined conclusion about what the Constitution means. And there can be no doubt that, at least as to Justice Scalia himself, the *Heller* conclusion was predetermined. Over a decade before *Heller*, Scalia wrote that the Second Amendment concerned a "right of self-defense" that was "absolutely fundamental."[45]

In deciding that some words of the Second Amendment are not operative, the *Heller* majority violated what the Supreme Court itself has called "the first principle of constitutional interpretation."[46] This principle—applied first in *Marbury v. Madison*[47]—holds that the Constitution must be interpreted such that "real effect should be given to all the words its uses"[48] and that interpretations rendering some of its words "mere surplusage" must be avoided.[49] This principle is based on the profound respect accorded the constitutional text by the courts. As the Supreme Court phrased it long ago:

> Every word appears to have been weighed with the utmost deliberation, and its full force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous . . . .[50]

Well, at least until *Heller*. The phrase "mere surplusage" nicely describes the militia language under the *Heller* majority's reading of the Second Amendment. Long before the *Heller* decision, Justice Scalia had written that "textualism is no ironclad protection against the judge who wishes to impose his will . . . ."[51] What better proof of this statement can be offered than his own majority opinion in *Heller*?

Justice Scalia's peculiar brand of textualism thus "elevates above all other interests the right of responsible citizens to use arms in defense of hearth and

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44. SCALIA, *supra* note 20, at 134 (emphasis added).
45. *Id.* at 43.
46. Wright v. United States, 302 U.S. 583, 588 (1938).
47. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).
48. Myers v. United States, 272 U.S. 52, 151–52 (1926) (citing Prout v. Starr, 188 U.S. 537, 544 (1903)).
49. *See Wright*, 302 U.S. at 588.
50. Holmes v. Jennison, 39 U.S. 540, 571 (1840).
51. SCALIA, *supra* note 20, at 132.

home"[52] in a text in which this interest is entirely hidden and in which the "security of a free State," not the security of "hearth and home" is the only expressed purpose of the guarantee.[53] This is ideology talking. It certainly is not constitutional interpretation.

B. Manipulating History

The *Heller* majority's arrogation of the power to edit the constitutional text is particularly disturbing in the case of the Second Amendment because the history of the Amendment's drafting by the First Congress demonstrates how important the Framers regarded the now-meaningless militia language. Indeed, the changes made in the Amendment's text by its ratifiers in the First Congress were made to the very language the *Heller* majority now has cast aside. Consider the text of the Amendment as originally drafted by James Madison and presented to the First Congress:

> The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.[54]

The First Congress made the following changes to the text before ratifying it: (1) the reference to "well armed" in the description of the militia was deleted; (2) the description of the militia as "being the best security of a free country" was changed to "necessary to the security of a free State"; (3) the language barring compelled military service of those "religiously scrupulous of bearing arms" was

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

53. It is notable that the *Heller* majority largely avoids invoking the "insurrectionist theory" of the Second Amendment long urged by the National Rifle Association (NRA) and other gun partisans, emphasizing instead the right to have guns for personal self-defense in the home. The notion that the Second Amendment guarantees a right to be armed for potential insurrection against the government likely proved far too frightening to command a majority of the Supreme Court. Nevertheless, Justice Scalia veers close to this theory when, in discussing why the militia might be regarded as "necessary to the security of a free state," he comments that "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Id.* at 2801. This observation occurs in a self-contradictory paragraph in which he also observes that the militia "is useful in repelling invasions and suppressing insurrections." *Id.* at 2800. Assuming that insurrection is the means by which the able-bodied men would resist tyranny, Scalia appears to be asserting that the militia is a means both to foment insurrection and suppress it. For a positive treatment of the insurrectionist theory, see generally Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989). For a critical treatment of the theory, see GARRY WILLS, A NECESSARY EVIL 207–21 (1999). *See also generally* Dennis Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991) (arguing that the text and history of the Constitution contradict the insurrectionist theory).

54. *Heller*, 128 S. Ct. at 2835 (Stevens, J., dissenting) (quoting THE COMPLETE BILL OF RIGHTS 169 (Neil H. Cogan ed., 1997)).

dropped; and (4) the position of the militia language in the Amendment was changed to make it *more* prominent. Other changes proved to be only temporary. For example, at one point in the process the words "composed of the body of the people" were inserted to describe the militia, but the phrase was deleted from the final version.[55]

The choice to begin the text with the militia language is particularly interesting because, without that change, Justice Scalia could not treat the militia language as merely prefatory, and therefore not operative. Under Madison's original version, there was nothing prefatory about the militia language; its placement in that version was itself inconsistent with its being a preface or prologue. Is it plausible that the First Congress sought to diminish the importance of the militia language by having it precede the guarantee of the right?

I will leave it to others to debate the significance of each of these changes in the Amendment's text. My point is only that they at least reflect the serious attention given by the Framers to the entire text of the Second Amendment, particularly the militia language. Why would the Framers have so actively edited these words if they, as does Justice Scalia, regarded them as merely aspirational (and thus analogous to the Constitution's preamble), having no effect whatever on the Amendment's meaning? Justice Scalia is well known for his view that constitutional interpretation should be governed by the "original meaning of the text, not what the original draftsmen intended."[56] Thus, he places little importance on the "legislative history" of the Constitution, including its drafting history and the statements made by those involved in writing and ratifying the Constitution. The *Heller* opinion is a strong example of how his disdain for legislative history leads him to distort the "original meaning" of the text.

One aspect of the legislative history deserves special attention: the conscientious objection clause that appeared in Madison's draft but was deleted by the First Congress. The clause provided that "no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." The appearance of the provision in Madison's original version provides yet more context establishing that the right to "keep and bear Arms" had to do exclusively with military service.

The conscientious objector clause should end all doubt as to the meaning of the phrase "bear Arms" in the Amendment. Unless one subscribes to the absurdity that "bear arms" and "bearing arms" had different meanings within

55. For an insightful history of the consideration of the Second Amendment by the First Congress, see UVILLER & MERKEL, *supra* note 13, at 97–106.

56. SCALIA, *supra* note 20, at 38.

Madison's original proposal, the conscientious objection clause establishes forcefully that "bear Arms" in the Second Amendment refers to rendering military service. Justice Scalia responds by arguing that, since Quakers opposed not just military service, but the use of arms for any reason, the clause should be read to mean that "those opposed to carrying weapons for potential violent confrontation" would not be compelled to render military service in which such carrying of weapons would be required.[57] For Scalia, therefore, the conscientious objection clause is compatible with the view that "bear Arms" in the Amendment means to "carry Arms." Of course, under Scalia's account, it would make far more sense for the conscientious objection clause to refer to persons "religiously scrupulous of *keeping* Arms," rather than "*bearing* Arms," unless we are to believe that a Quaker's religious objection is not to having arms, but rather to physically carrying them.

In any event, Justice Stevens' dissent destroys Scalia's speculation by quoting a similar conscientious objection clause from the Constitutional amendments proposed by Virginia's ratifying convention, in which Madison was an important participant. Two of the Virginia proposals had a transparently obvious influence on the text of the Second Amendment:

> 17th, That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State. That standing armies are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and be governed by the civil power.
>
> 19th, That any person religiously scrupulous of bearing arms ought to be exempted, *upon payment of an equivalent to employ another to bear arms in his stead*.[58]

Two points are important here. First, as demonstrated by the second sentence, the seventeenth proposal clearly uses the phrase "right to keep and bear arms" in an entirely military context. Second, the nineteenth proposal, by specifying that conscientious objectors must pay a fee to avoid military service, unequivocally uses "bear arms" to mean compelled military service, not the voluntary carrying of arms for self-defense. The notion that Madison

57. *Heller*, 128 S. Ct. at 2796.

58. *Id.* at 2833 (Stevens, J., dissenting) (quoting 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 12, at 659) (emphasis added).

was using "bearing arms" to have an entirely different meaning in his Second Amendment conscientious objector language is completely implausible.[59]

Even if Scalia's account of "bearing Arms" in the conscientious objector language were correct, the appearance of the clause in Madison's initial proposal would still be inexplicable under the *Heller* majority's view of the Second Amendment. Under that view, the original meaning of the Amendment was to guarantee individuals the right to choose to have a gun for private purposes or, presumably, to choose not to have a gun. If this was the meaning, why would it have ever occurred to Madison to include a clause allowing conscientious objection to compelled military service? Indeed, under this meaning, the internal logic of Madison's proposal would collapse. Madison's inclusion of a conscientious objector clause is comprehensible only if the right to "keep and bear Arms" in its text refers to the right to be armed in connection with service in the militia—service which, as we will see below, was compulsory, not a matter of choice. As Justice Stevens observed in dissent, "The State simply does not compel its citizens to carry arms for the purpose of private 'confrontation,' or for self-defense."[60]

Justice Scalia's opinion cautions against reliance on text that was deleted from the Second Amendment,[61] but the legislative history, by illuminating why the conscientious objector provision was deleted, also undercuts Scalia's argument. The core objection to the clause was that it would be used to weaken the militia. Representative Elbridge Gerry argued, for example, that the clause would enable the government to "declare who are those religiously scrupulous, and prevent them from bearing arms."[62] Gerry continued, "What, sir, is the use of the militia? It is to prevent the establishment of a standing army, the bane of liberty."[63] It is certainly reasonable to assume that the clause was deleted because of this anticipated effect on the militia. On the other hand, one might also argue that it was deleted because it was unnecessary, indeed nonsensical, to have a conscientious objector exception in a provision having

59. It also is worth noting that in the seventeenth Virginia proposal, as in Madison's original proposal to the First Congress, the militia language does not precede, but rather follows, the guarantee of the right. This forecloses Justice Scalia's gambit of diminishing the importance of the militia language by suggesting an analogue to statutory preambles. The text of the Virginia proposal underscores the point that it is highly unlikely that the Framers regarded the militia language in the Second Amendment as analogous to a statutory preamble, rather than simply viewing it as providing the necessary context in which to understand the meaning of the right being guaranteed, whether in the seventeenth Virginia proposal or in the Second Amendment.

60. *Heller*, 128 S. Ct. at 2836 (Stevens, J., dissenting) (citation omitted).

61. *See id.* at 2796 (majority opinion).

62. *Id.* at 2836 (Stevens, J., dissenting) (quoting CREATING THE BILL OF RIGHTS 182 (Helen E. Veit et al. eds., 1991)).

63. *Id.* at 2836 n.25 (quoting CREATING THE BILL OF RIGHTS *supra* note 62, at 182).

only to do with guaranteeing individuals the freedom to possess guns for private, nonmilitia use. However, there is certainly no evidence that this was the case.

According to Justice Scalia, the "most prominent" founding-era examples of the "unambiguous" use of "bear arms" to have a nonmilitia meaning were state constitutional provisions enshrining a right of citizens to "bear arms in defense of themselves and the state," or "bear arms in defense of himself and the state."[64] As noted above, the latter formulation provides a context for "bear arms" entirely different than the Second Amendment, since "defense of himself" strongly suggests a nonmilitia self-defense use. Moreover, all the examples of this formulation postdate the ratification of the Bill of Rights and could be regarded as efforts by states to grant a private, nonmilitia right entirely distinct from the militia-related right already granted by the federal Constitution. As to state declarations of rights in existence at the time of the framing, only two—Pennsylvania and Vermont—had right to bear arms provisions using the phrase "in defense of themselves and the state."[65] Thus, even if Scalia is correct in his interpretation of this language, it would mean that, at the time of the ratification of the Second Amendment, only two states granted a right to bear arms for nonmilitia purposes. Moreover, even if Scalia is properly reading these two state provisions, it is certainly relevant that the language they used, "in defense of themselves," does not appear in the Second Amendment.[66]

However, strong evidence exists—entirely ignored by Justice Scalia (and by the dissenters as well)—that neither Pennsylvania's nor Vermont's guarantee had anything to do with private self-defense. Both the Pennsylvania and Vermont Constitutions at the time also had conscientious objection clauses similar to that in Madison's draft Second Amendment, in which the phrase "bearing arms" referred exclusively to military service. The Pennsylvania clause read: "Nor can any man who is conscientiously scrupulous of bearing arms be justly compelled thereto, if he will pay such equivalent."[67] The Vermont version was identical.[68] Language in these clauses allowing those "conscien-

64. *Id.* at 2793 (majority opinion) (citing various state constitutions from the eighteenth and nineteenth centuries).

65. *See* PA. CONST. of 1776, DECLARATION OF RIGHTS, § VIII, *reprinted in* 5 Thorpe, *supra* note 23, at 3083; VT. CONST. of 1776, ch. 1, § X, *available at* http://avalon.law.yale.edu/18th_century/vt02.asp.

66. Justice Stevens, in dissent, appears to agree with the majority that the Pennsylvania and Vermont provisions confer a nonmilitia right, but notes the "contrast between those two declarations and the Second Amendment." *See Heller*, 128 S. Ct. at 2825–26 (Stevens, J., dissenting).

67. PA. CONST. of 1776, DECLARATION OF RIGHTS, § VIII, *supra* note 65, at 3083.

68. VT. CONST. of 1776, ch. 1, § X, *available at* http://avalon.law.yale.edu/18th_century/vt02.asp.

tiously scrupulous" of bearing arms to escape service by paying its "equivalent" (similar to the Virginia proposal discussed above) establishes that "bearing arms" referred to military service, not simply the carrying of guns. Thus, Scalia's interpretation of the right granted by Pennsylvania and Vermont requires the unlikely conclusion that their Constitutions used "bearing arms" to have a military meaning in one part of the document, and "bear arms" to have a nonmilitary meaning in another part of the same document. Given that "bear arms" had a military meaning, the reference to "defence of themselves" should thus be taken to concern defense of the community, an idea distinct from "defense of the state," which is a reference to a governmental entity.[69]

Scalia also avoids quoting the entirety of the Pennsylvania and Vermont provisions in which the "right to bear arms" appears. Pennsylvania's provision states as follows:

> That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.[70]

Vermont's provision is similar:

> That the people have a right to bear arms for the defence of themselves and the State; and as standing armies, in the time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power.[71]

By failing to quote the entirety of these provisions, the *Heller* majority again avoids the impact of context which, in these provisions, strongly suggests that their subject matter entirely concerned military affairs. Moreover, considerable historical scholarship, available to but ignored by the *Heller* Court,[72] indicates that the phrase "defence of themselves" in the Pennsylvania provision was addressed entirely to community, not personal, defense.[73]

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69. As to the *Heller* majority's contention that "free State" in the Second Amendment really means "free country," 128 S. Ct. at 2800 (citations omitted), it is surely relevant that the First Congress altered Madison's proposal to change "being the best security of a free country" to "necessary to the security of a free State." If the First Congress had meant to say "free country," why did it change that very phrase? This is yet another example of how Justice Scalia is led astray by his refusal to examine legislative history.

70. PA. CONST. of 1776, DECLARATION OF RIGHTS, § XIII, *supra* note 65, at 3083.

71. VT. CONST. of 1777, ch. 1, art. 16, *reprinted in* 6 Thorpe, *supra* note 23, at 538.

72. *See generally* Brief of Amici Curiae Jack N. Rakove, et al. in Support of Petitioners, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290) (providing an historical analysis supporting the position that the framers did not intend the Second Amendment to confer an individual right to bear arms).

73. *See* Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 STAN. L. & POL'Y REV. 571,

What, therefore, do state constitutions at the time of the framing tell us about the Second Amendment? Contrary to Justice Scalia's suggestion that they "unambiguously" used "bear arms" to have a nonmilitia meaning, the weight of the evidence is that not a single state constitution at the time of the framing of the Second Amendment guaranteed a right to possess guns for personal self-defense. Moreover, the Massachusetts Declaration of Rights, as we have seen, guaranteed the "right to keep and bear Arms" entirely for community defense. One other state constitution—North Carolina's—gave the people "a right to bear arms for the defense of the State," in a provision similar to those in Massachusetts, Pennsylvania and Vermont, addressing the dangers of standing armies and the need for civilian control of the military.[74] The North Carolina provision is entirely ignored by Justice Scalia.

Given the preexisting state guarantees of a right to be armed for the common defense, and the relevant legislative history of the Second Amendment, it is entirely natural to read the Amendment as guaranteeing a right confined to militia service, having nothing to do with individual self-defense. Just as telling, though, is the Framers' failure to adopt an alternative version, based on other proposals made at the time, that would have guaranteed an individual right for private, nonmilitia purposes.

We have seen that Madison's original proposal bore a striking resemblance to the militia-based proposed amendment of the Virginia ratification convention. Justice Stevens' dissenting opinion cites proposals originating in other states that guaranteed the right to be armed, with no reference to the militia.[75] For example, the New Hampshire proposal read: "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." Another proposal, rejected by the Pennsylvania ratifying convention, read:

> That the people have a right to bear arms for the defense of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals . . . .[76]

578–81 (2006). *See generally* Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 38 RUTGERS L.J. 1041 (2007) (arguing that the Pennsylvania provision guaranteed neither a personal individual right nor a state right, but rather mandated that individual citizens bear arms so that they could participate in a militia in order to protect the public).

74. N.C. CONST., DECLARATION OF RIGHTS, § XVII, *reprinted in* 5 Thorpe, *supra* note 23, at 2788.

75. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2834–35 (2008) (Stevens, J., dissenting).

76. *Id.* at 2834 (quoting The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents (1787), *in* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS 665 (1971)).

Like the Virginia proposal, this language was then followed by expressions of the dangers of standing armies and the need for civilian control of the military. But the reference to "killing game" and the far-reaching prohibition on disarming law-abiding citizens, indicate that the "right to bear arms" in the defeated Pennsylvania proposal was not confined to militia service. No such language appeared in the Virginia proposal and nothing like it appears in the Second Amendment.

Justice Stevens' dissent points to another proposal, which failed to muster a majority in the Massachusetts ratification convention: "[T]hat the said Constitution never be construed to authorize Congress to . . . prevent the people of the United States, who are peaceable citizens, from keeping their own arms."[77] It is surely instructive that this broader formulation was rejected by the Massachusetts Convention, while the narrower "common defense" language was already part of the Massachusetts Constitution and remains in that Constitution to the present day. These broader formulations of the right to be armed presumably were known by Madison and the First Congress.[78] The *Heller* majority offers no explanation for the Framers' failure to adopt such language, if their intent was to guarantee a broad, personal right.

If the *Heller* majority's reading of the Second Amendment is right, then Madison and the First Congress sought to guarantee a nonmilitia right by choosing language emphasizing the importance of a "well regulated Militia," while avoiding other available formulations making no reference to the militia at all. Unlikely, to say the least.[79]

In place of the well established principle that the Constitution must be interpreted to give each word meaning and effect, Justice Scalia's opinion

77. *Id.* at 2834–35 (quoting Proposal from the Massachusetts State Convention (Feb. 6, 1788), *in* THE COMPLETE BILL OF RIGHTS, *supra* note 54, at 181).

78. Justice Scalia also places great weight on Article VII of the English Bill of Rights of 1689, *see id.* at 2798–99 (majority opinion), which reads "That the subjects which are protestants may have arms for their defense suitable to their condition and as allowed by law." Bill of Rights, 1689, 1 W. & M., c. 2, § 7 (Eng.). However, Article VII functions as yet another example of a right to be armed expressed in a text that, as Justice Stevens notes, was "framed in markedly different language" than the Second Amendment, *Heller*, 128 S. Ct. at 2838 (Stevens, J., dissenting), yet was well known to the Framers of the American Bill of Rights.

79. Justice Scalia responds by insisting that Justice Stevens' view must be wrong because it "relies on the proposition, unsupported by any evidence, that different people of the founding period had vastly different conceptions of the right to keep and bear arms." *Heller*, 128 S. Ct. at 2804. One would have thought that, to a self-described textualist like Justice Scalia, the most powerful evidence that different people had different conceptions of the right to be armed would be the vastly different ways in which the right was expressed in various texts written by different people. But, in a boldly circular argument, Justice Scalia insists that this cannot possibly be the case since "the Bill of Rights codified venerable, widely understood liberties," *id.*, which he assumes included only the personal right to be armed for self-defense.

substitutes a new principle—for which he cites no support in prior Supreme Court cases—that the only requirement is that there be a "logical connection" between words and phrases in the Constitution.[80] Having determined, without reference to the militia language, that the Second Amendment guarantees a right to have arms for self-defense, Scalia then finds that the only remaining task is to ensure that this right "is consistent with the announced purpose" expressed in the militia clause.[81] He finds this consistency by asserting that the right to be armed for self-defense "furthers the purpose of an effective militia no less than (indeed, more than) the dissent's interpretation."[82] However, Justice Scalia is reduced to arguing for a disconnect between the "central component" of the Second Amendment right—which he says is "self-defense"—and the entirely separate reason the right was "codified"—which he says was "to prevent elimination of the militia."[83] Scalia offers no justification for reading the Amendment in a manner which creates a dissonance between the nature of the right and the reason the right was written into the Constitution. The idea of such a disconnect simply demonstrates the lengths to which the *Heller* majority was willing to go to resist a natural and internally consistent reading of the Second Amendment. In any event, the majority's own requirement that there at least be a logical connection between the militia language and the right to be armed for self-defense is not met under its reading of the Amendment.

Scalia's claimed logical connection is based on a gross misunderstanding of the nature of the "well regulated Militia" and how it was armed. In the Founding Era, the militia was not, as Justice Scalia seems to presume, simply an unorganized "pool" of "able-bodied men" from which the Congress had the power to organize an effective fighting force.[84] By its very nature, a militia existed only to the extent that it was organized. Indeed, the definition of "militia" in Noah Webster's famous dictionary—cited by Scalia himself[85]—undercuts the concept of an unorganized militia: "The militia of a country are the able bodied men organized into companies, regiments and brigades . . . and required by law to attend military exercises on certain days only, but at other times left to pursue their usual occupations."[86]

Justice Scalia is correct in observing that the militia existed prior to the Constitution, but he is wrong in asserting that it was an unorganized collection

80. *See id.* at 2789–90.
81. *Id.* at 2790.
82. *Id.* at 2790 n.4.
83. *See id.* at 2801.
84. *See id.* at 2799–2800.
85. *Id.* at 2799.
86. *Id.* (quoting N. WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Philip Babcock Gove ed., Merriam-Webster 1989) (1828)).

of individuals. The state militias existing at the time of the Constitution were creatures of state law. As discussed in Justice Stevens' dissent, these preexisting state militia statutes imposed extensive requirements on those enrolled in the militia. Of greatest significance for Second Amendment purposes was the common requirement that militiamen "keep arms" in their homes for use when called to militia duty. Stevens quotes the Virginia militia law requiring militiamen to "'constantly *keep* the aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for by his commanding officer.'"[87] In fact, one year after the Constitution was ratified, Congress enacted the Second Militia Act of 1792, requiring that each militiaman, "within six months" after enrollment in the new federally-organized militia, "provide himself with a good musket or firelock."[88] Thus, not only was the militia inherently organized, but the arming of the militia was a matter of government command, not simply reliance on the individual choices of militiamen to acquire guns.

Justice Scalia describes the militia at the time of ratification as "the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty."[89] He fails to mention that these militiamen were required by law to keep militia weapons at home. As Justice Stevens comments, "'keep and bear arms' thus perfectly describes the responsibilities of a framing-era militia member."[90]

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87. *Id.* at 2830 (Stevens, J., dissenting) (quoting Acts Passed at a General Assembly of the Commonwealth of Virginia, ch. 1, § 3, at 2 (1785)).

88. Ch. 33, 1 Stat. 271 (repealed 1903). This statute was responsive to the Anti-Federalist fear that animated the push for the Second Amendment, namely that Congress would fail to exercise its new power to organize and arm the militia. As noted at *supra* p. 1174, the Second Amendment was designed as a fail-safe measure to protect the citizen militia against the possibility of federal destruction through hostility or neglect. This is not, as suggested by the *Heller* majority, inconsistent with the division of federal and state authority over the militia in Article I, § 8 of the Constitution. *See Heller*, 128 S. Ct. at 2802 & n.17. Rather, the Second Amendment contemplates the possibility that Congress would not exercise its new constitutional authority to organize and arm the militia. In that eventuality (which did not arise), the Second Amendment bars Congress from taking action to prevent the people from keeping and bearing arms in state militias. *See* Dennis A. Henigan, *Self-Inflicted Wounds: The D.C. Circuit on the Second Amendment*, 18 GEO. MASON U. CIV. RTS. L.J. 209, 222 n.69 (2008).

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

90. *Id.* at 2830 (Stevens, J., dissenting). In response, Justice Scalia insists that using the early militia statutes to give a militia meaning to "keep Arms" "is rather like saying that, since there are many statutes that authorize aggrieved employees to 'file complaints' with federal agencies, the phrase 'file complaints' has an employment-related connotation. 'Keep arms' was simply a common way of referring to possessing arms, for militiamen *and everyone else*." *Id.* at 2792 (majority opinion). This is yet another illustration of Justice Scalia's misidentification of the issue. The Second Amendment issue is analogous to determining the meaning of the term "file complaints" in a hypothetical statute providing that "aggrieved employees of federal agencies may file complaints to seek relief." The phrase "file complaints" certainly has an employment-related meaning in that context, although its meaning may be unrelated to employment in other contexts.

Once the founding-era militia is properly understood as a government-organized system of compulsory armed service involving much of the adult male population, it becomes plain that there is no logical connection between the militia and a guaranteed right to possess guns for purposes unrelated to militia service. Nor is there any logic to the inclusion of language about the importance of the militia in a provision guaranteeing the right to possess guns "in defense of hearth and home."[91]

According to Justice Scalia, reading the Second Amendment as protecting only the right to "keep and bear Arms" in an organized militia "fits poorly" with the description of the "the people" as the holder of the right.[92] But the fit is poor only if it is assumed that the right is unrelated to militia service, which, of course, is precisely the issue at hand. If "the people" have the right to be armed only to the extent that they are armed in connection with militia service, then there is no awkwardness of fit between "the people" and the nature of the right. There is no question that the Second Amendment right is granted to "the people." The issue is the nature and scope of the right granted to "the people."[93]

Nor does Justice Scalia's insistence that the Second Amendment guarantees a preexisting right help to decide the issue. As we have seen, the militia system as an institution of state government preexisted the Constitution; indeed, the Articles of Confederation had required that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents and a proper quantity of arms, ammunition and camp equipage."[94] Moreover, as we also have seen, state constitutions predating the Second Amendment had referred to the people's "right to keep and bear arms for the common defence"[95] and to the people's "right to bear arms

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Similarly, the "right of the people to keep and bear Arms" cannot be determined apart from its particular context as part of a provision recognizing the importance of the militia, although in other contexts the phrase "keep Arms" may have a nonmilitia meaning.

91. *Id.* at 2821.

92. *Id.* at 2791.

93. Nor is there any force to Justice Scalia's argument that since the right is granted to "the people," it means that all the people must be able to exercise the right, regardless of their participation in a militia. *See id.* at 2790–91. As Justice Stevens points out in dissent, even the majority view of the Second Amendment concedes that some of "the people" are disqualified from asserting the right—that is, those who are not "law-abiding, responsible citizens." *See id.* at 2827 (Stevens, J., dissenting).

94. ARTICLES OF CONFEDERATION, art. VI.

95. *Heller*, 128 S. Ct. at 2802 (quoting MASS. CONST. of 1780 pt. 1, Art. XVII, *reprinted in* 3 Thorpe, *supra* note 23, at 1888, 1892).

for the defence of the State."[96] There is no basis for Justice Scalia's assumption that a preexisting right to be armed could not be militia related.[97]

A principled approach to interpreting the Second Amendment—that is, one not determined, by hook or by crook, to arrive at a predetermined conclusion—would surely look to the Amendment's text as an integrated whole, reading each word in context and giving each a functional meaning. Instead, the *Heller* majority's slice and dice approach—surgically removing the second half from its connection to the first half, then carving up the phrase "keep and bear Arms"—gives the Amendment a meaning that would have been foreign to those who ratified it. Moreover, Justice Scalia's opinion is devoid of any evidence that ordinary citizens in the founding generation would have interpreted the Amendment by blinding themselves to its first thirteen words, then attaching separate meanings to "keep Arms" and "bear Arms," before ensuring a logical connection between the various words of the Amendment. In showing the folly of the Court's approach, I cannot improve on Justice Stevens' analogy to the parable of the six blind men and the elephant. He applied the parable to what he called "the Court's atomistic, word-by-word approach":

> In the parable, each blind man approaches a single elephant; touching a different part of the elephant's body in isolation, each concludes that he has learned its true nature. One touches the animal's leg, and concludes that the elephant is like a tree; another touches the trunk and decides that the elephant is like a snake; and so on. Each of them, of course, has fundamentally failed to grasp the nature of the creature.[98]

In approaching the meaning of the words and phrases of the Second Amendment in isolation from one another, the *Heller* majority, too, failed to grasp the nature of the Amendment as a whole.

It is not surprising that the *Heller* majority opinion has been the subject of scathing scholarly attack for its results-oriented approach. Indeed, some of the sharpest criticism has come from conservative legal theorists with a long

96. *Id.* (quoting N.C. CONST. DECLARATION OF RIGHTS § XVII, *reprinted in* 5 Thorpe, *supra* note 23, at 2787, 2788).

97. Justice Scalia dismisses reliance on the legislative history of the Second Amendment as "dubious" because the "text was widely understood to codify a pre-existing right, rather than to fashion a new one." *Id.* at 2804. Apart from citing no evidence that the Second Amendment was so widely understood, Scalia furnishes no explanation for why it would not be useful to examine legislative history to determine whether those who wrote and ratified the Second Amendment thought it codified a preexisting right, as well as to determine the content and scope of the right.

98. *Id.* at 2831 n.14 (Stevens, J., dissenting) (citing JOHN GODFREY SAXE, THE POEMS OF JOHN GODFREY SAXE 135–36 (Boston, James R. Osgood and Co. 1873)).

history of opposition to judicial activism.[99] In an extraordinary article disclosing his own family's gun violence tragedy some years ago, Pepperdine University law professor Douglas Kmiec, who once shared an office with Samuel Alito in the Reagan Justice Department, praised Justice Scalia's career of "reminding his fellow judges how important it is not to read their own personal experiences or desires into the law."[100] But Kmiec found that principle dishonored in Scalia's *Heller* opinion. "From their high bench on that morning," he wrote, "it would not be the democratic choice that mattered, but theirs. Constitutional text, history, and precedent all set aside."[101]

Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit, undoubtedly the most prolific conservative legal thinker of our time, found the *Heller* decision to be "evidence that the Supreme Court, in deciding constitutional cases, exercises a freewheeling discretion strongly flavored with ideology."[102] Commenting on the sheer length of Scalia's majority opinion (almost twenty thousand words), Posner found it "evidence of the ability of well-staffed courts to produce snow jobs."[103]

A third broadside has come from Judge J. Harvie Wilkinson III of the U.S. Court of Appeals for the Fourth Circuit, who was on the short list for the Supreme Court throughout the George W. Bush Administration. Judge Wilkinson is somewhat more charitable than Kmiec and Posner to the evidence offered by the *Heller* majority. Nevertheless, he sees *Heller* as improper "judicial lawmaking" in defiance of conservative legal principles counseling restraint and deference to the judgments of popularly elected legislatures.[104] "In fact," Wilkinson writes, "*Heller* encourages Americans to do what conservative jurists warned for years they should not do: bypass the ballot and seek to press their political agenda in the courts."[105] Wilkinson especially singles out Justice Scalia for committing the same sins of judicial activism in *Heller* that Scalia has spent a career denouncing in *Roe v. Wade*.[106]

99. *See* Adam Liptak, *Ruling on Guns Elicits Rebuke From the Right*, N.Y. TIMES, Oct. 21, 2008, at A15.

100. Douglas W. Kmiec, *Guns and the Supreme Court: Dead Wrong*, THE-TIDINGS.COM, July 11, 2008, http://www.the-tidings.com/2008/071108/kmiec.htm.

101. *Id.*

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

103. *Id.* at 35.

104. *See* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 273–76 (2009).

105. *Id.* at 254.

106. *See id.* at 256–57.

II. *HELLER* AS A LEGAL WEAPON TO ATTACK GUN CONTROL LAWS

As internally inconsistent, manipulative, and ideologically driven as the *Heller* majority opinion is in manufacturing a new right to have handguns in the home, the majority's discussion of the implications of this right is likely to make it a less-than-potent legal weapon against other gun laws.

Section III of the majority opinion features some extraordinary language suggesting that a wide range of gun control laws do not violate the new right: "Like most rights, the right secured by the Second Amendment is not unlimited."[107] According to the Court, "[T]he right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[108] It is highly unusual for a court, in interpreting the Constitution, to comment on the constitutionality of laws not before it, particularly when it is not citing prior court rulings on the issue. The *Heller* majority, however, goes out of its way to offer the assurance that "nothing in our opinion should be taken to cast doubt" on a wide range of gun control laws, which the Court said remain "presumptively lawful" under the Court's ruling.[109] These include:

- "[L]aws imposing conditions and qualifications on the commercial sale of arms" (a category broad enough to include background checks, waiting periods, licensing, registration, safety training, limits on large-volume sales, etc.);
- "[P]rohibitions on [gun] possession by felons and the mentally ill;"
- "[P]rohibitions on carrying concealed weapons" (a more restrictive policy than simply requiring a license to carry concealed weapons);
- "[L]aws forbidding the carrying of firearms in sensitive places such as schools and government buildings;" and;
- Bans on "dangerous and unusual weapons" (which could include machine guns and assault weapons).[110]

As if this list were not enough to make the NRA squirm, the Court added that these "presumptively lawful regulatory measures" are given "only as examples" and that the list "does not purport to be exhaustive."[111]

The Court also stated that its analysis does not "suggest the invalidity of laws regulating the storage of firearms to prevent accidents,"[112] which presumably

107. *Heller*, 128 S. Ct. at 2816.
108. *Id.*
109. *Id.* at 2816–17, 2817 n.26.
110. *Id.* at 2816–17.
111. *Id.* at 2817 n.26.
112. *Id.* at 2820.

would include laws against leaving loaded guns accessible to children.[113] It is equally significant that the Court, in commenting on the many cases in which gun laws have been upheld against Second Amendment challenge under the militia-purpose view, cautioned that "it should not be thought that the cases decided by these judges would necessarily have come out differently under a proper interpretation of the right."[114]

Why did the *Heller* majority so gratuitously suggest that its historic ruling recognizing a constitutional right to be armed for self-defense may have only a limited practical impact on gun control laws? What effect is Section III likely to have on national gun policy?

First, it seems reasonably clear that these comments function as a direct response to the dissenters' argument that the *Heller* majority has launched the Supreme Court on an endless and treacherous adventure in making life-and-death policy decisions about guns. Justice Stevens' dissent charges the majority with improperly entering a "political thicket" and warns that the District of Columbia's law "may well be just the first of an unknown number of dominoes to be knocked off the table."[115] Justice Breyer's dissent predicts that the *Heller* ruling "will encourage legal challenges to gun regulation throughout the Nation . . . , will leave the Nation without clear standards for resolving those challenges," and will threaten "to leave cities without effective protection against gun violence and accidents during that time."[116] "As important," writes Justice Breyer, "the majority's decision threatens severely to limit the ability of more knowledgeable, democratically elected officials to deal with gun-related problems."[117] Read in the context of these critiques, the majority's discussion of other gun laws can be seen as effectively moving other dominoes away from the edge of the table, thus ensuring that gun policy issues will continue largely to be decided by elected officials, free of activist second-guessing by federal courts.

Second, it is not unreasonable to speculate that much of the Section III language was inserted as the price of getting four other Justices to join Justice Scalia's opinion. Intuitively, it seems unlikely that such language originated with Justice Scalia (one of former Vice President Dick Cheney's hunting

113. Twenty-seven states have statutes imposing some form of criminal or civil liability for leaving guns accessible to children. *See* LEGAL CMTY. AGAINST VIOLENCE, REGULATING GUNS IN AMERICA 234–35 (2008). These laws are easily distinguishable from the District of Columbia gun storage law struck down in *Heller*, which the majority interpreted as requiring "that firearms in the home be rendered and kept inoperable at all times" thus making "it impossible for citizens to use them for the core lawful purpose of self-defense . . . ." *Heller*, 128 S. Ct. at 2818.

114. *Heller*, 129 S. Ct. at 2815 n.24.

115. *Id.* at 2846 & n.39 (Stevens, J., dissenting).

116. *Id.* at 2868 (Breyer, J., dissenting).

117. *Id.*

buddies and an obvious gun enthusiast), rather than being a concession by him to other Justices. The language strongly indicates that one or more of the Justices in the majority were willing to join Scalia's opinion only if it allowed substantial continued deference to legislative decisionmaking on gun policy. Such deference is of substantial benefit to public safety, given the strong evidence that even modest gun control laws can be successful.[118]

Third, although the Court did not expressly adopt a constitutional standard for the future evaluation of gun laws, its discussion of other presumptively constitutional laws surely must be read as a rejection of the strict scrutiny standard used in certain First Amendment cases and urged on the Court by the respondent.[119] Such a standard would have required courts reviewing gun laws to determine whether the law being challenged is "narrowly tailored to achieve a compelling government interest."[120] Though the prevention of death and injury from gunfire would seem to qualify as a compelling government interest, the requirement that the law be narrowly tailored would invite activist judges to decide that gun control laws they don't like are insufficiently narrow in their impact on gun rights. Whereas strict scrutiny would have erected a strong presumption against the constitutionality of gun control laws, requiring narrow tailoring to overcome the presumption, the *Heller* majority described a lengthy list of gun control measures as

118. For example, during the first ten years of the Brady Act, over 1.2 million criminals and other prohibited purchasers were blocked from buying guns from licensed dealers, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BACKGROUND CHECKS FOR FIREARM TRANSFERS, 2005, at 2 (2006), and the evidence suggests that the statute contributed to a historic decline in gun crime. During that same period, gun homicides dropped 37 percent, *see* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, KEY FACTS AT A GLANCE, CRIMES COMMITTED WITH FIREARMS, 1973-2006, MURDERS, ROBBERIES, AND AGGRAVATED ASSAULT IN WHICH FIREARMS WERE USED, NUMBERS OF OFFENSES AND RATES PER 100,000 POPULATION, 1973–2006, *available at* http://www.ojp.usdoj.gov/bjs/glance/tables/guncrimetab.htm (last visited, May 26, 2009), driving a 34 percent decline in all homicides, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES, LONG TERM TRENDS, HOMICIDE VICTIMIZATION 1950–2005, *available at* http://www.ojp.usdoj.gov/bjs/homicide/tables/totalstab.htm (last visited May 26, 2009), and nonlethal gun crimes plummeted an astounding 73 percent. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, KEY FACTS AT A GLANCE, NONFATAL FIREARM-RELATED VIOLENT CRIMES, 1993–2005, *available at* http://www.ojp.usdoj.gov/bjs/glance/tables/firearmnonfataltab.htm (last visited May 26, 2009). In the five years preceding Brady, the percentage of violent crimes committed with firearms had increased every year. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, KEY FACTS AT A GLANCE, CRIME COMMITTED WITH FIREARMS, 1973–2006, PERCENT OF MURDERS, ROBBERIES, AND AGGRAVATED ASSAULTS IN WHICH FIREARMS WERE USED, 1973–2006, *available at* http://www.ojp.usdog.gov/bjs/glance/tables/guncrimetab.htm (last visited May 26, 2009).

119. *See* Respondent's Brief at 54–62, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290).

120. *Heller*, 128 S. Ct. at 2851 (Breyer, J., dissenting) (quoting Abrams v. Johnson, 521 U.S. 74, 82 (1997)).

presumptively lawful. As Justice Breyer accurately noted in dissent,[121] the *Heller* majority thus implicitly rejected strict scrutiny.

Although the *Heller* majority makes some comparison of its new Second Amendment right to our First Amendment rights,[122] the majority's surprising Section III commentary on gun control laws, and failure to invoke strict scrutiny, suggest that at least some Justices in the majority understand that the right to possess handguns in the home is materially different in nature from our First Amendment rights. As interpreted by *Heller*, the Second Amendment, unlike the First Amendment, guarantees a right to possess a lethal weapon. It should be obvious, but bears saying anyway, that the right to possess lethal weapons affects the public's interest in safety and security more directly than the right to express oneself about lethal weapons (among other topics). Researchers have found, for example, a strong association between gun prevalence and high homicide rates, suggesting that "an increase in gun prevalence causes an *intensification* of criminal violence—a shift toward greater lethality, and hence greater harm to the community."[123] Pro-gun advocates will continue to make indefensible analogies to the First Amendment, like David Kopel of the libertarian Independence Institute who asserts that "[g]uns are like books or churches."[124] But it is hard to maintain that the *Heller* decision treats guns like books or churches.

It is unclear how the majority derived its categories of presumptively lawful gun control measures. Although the majority seems to attach great importance to whether the gun restrictions at issue are longstanding, the opinion leaves unclear how longstanding they must be.[125] It also is unclear whether a specific restriction (such as a waiting period) must be longstanding, or whether the specific restriction must be part of a category of restrictions (such as laws imposing conditions and qualifications on the sale of arms) that is longstanding. Some initial lower court rulings applying *Heller* reject the idea that the

121. *Id.*

122. *See id.* at 2821 (majority opinion).

123. Philip J. Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, 90 J. PUB. ECON. 379, 387 (2006); *accord* Matthew Miller et al., *Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988–1997*, 92 AM. J. PUB. HEALTH 1988, 1989 (2002); Matthew Miller et al., *State-level Homicide Victimization Rates in the US in Relation to Survey Measures of Household Firearm Ownership, 2001–2003*, 64 SOC. SC. & MED. 656, 660–61, 663 (2007).

124. James Oliphant, *Gun-rights Ruling Could Ricochet Across Nation*, CHI. TRIB., Mar. 16, 2008.

125. Given that the *Heller* majority invokes post-Civil War commentary to inform our understanding of the Second Amendment, *see Heller*, 128 S. Ct. at 2811–12, it would seem arbitrary for the Court to require that gun regulations have historical antecedents dating to the founding era to qualify as longstanding.

specific restriction at issue must have historical antecedents, requiring only that the specific restriction be of the kind found presumptively lawful in *Heller*.[126]

But even granting its uncertain scope, the Section III discussion is nonetheless of great significance to the constitutional assessment of other gun laws. It is likely to be interpreted by the lower federal courts as indicating a sharp and decisive distinction between laws (like the District of Columbia law at issue in *Heller*) that function to ban guns commonly possessed in the home for self-defense, and other laws that regulate guns, even strictly, yet allow individuals, not governments, to make the ultimate decision about gun ownership. Such a distinction should serve to frustrate efforts to expand the scope of the right beyond the possession of guns for self-defense in the home, as well as to make it difficult to successfully challenge regulations that affect the right, but do not unduly burden its exercise. Although some will dismiss the Court's discussion of other gun laws as dicta, it is likely to be among the most influential dicta in the Court's history.

The *Heller* ruling is already prompting an avalanche of Second Amendment lawsuits and legal claims. The NRA's Wayne LaPierre called the ruling "the opening salvo," telling his members that the fight "is just beginning."[127] Within forty-eight hours of the *Heller* decision, the NRA and its allies filed six lawsuits against local jurisdictions with handgun bans.[128] Within months of *Heller*, the NRA was talking about the need to "expand its reach."[129] *Heller* has also been embraced by criminal defense lawyers anxious to challenge the

126. *See, e.g.*, United States v. Luedtke, 589 F. Supp. 2d 1018, 1021 (E.D. Wis. 2008) ("[T]he Court's examples are best understood as representing the *types* of regulations that pass constitutional muster."); United States v. Booker, 570 F. Supp. 2d 161, 163 (D. Me. 2008) (finding a statute barring gun possession by persons convicted of misdemeanor crimes of domestic violence to be sufficiently similar to prohibitions on possession of guns by felons and the mentally ill to be included in list of "longstanding prohibitions" surviving Second Amendment scrutiny under *Heller*).

127. Wayne LaPierre, *An Individual Right Affirmed*, AM.'S 1ST FREEDOM, Aug. 2008, at 8.

128. These challenges to local handgun ban laws raise the threshold issue of whether the new private right to possess handguns applies to states and the cities and counties that derive their existence from states. Because the District of Columbia is a federal district, with a hybrid of local and federal legislative authority, the *Heller* Court did not address whether the new right to be armed applies as a limit on state and other local gun laws. *See Heller*, 128 S. Ct. at 2813 n.23. This raises the issue of "incorporation" of the Bill of Rights; that is, whether the Bill of Rights, though originally applicable only as a restraint on federal laws, has been "incorporated" against the states and their localities through the post-Civil War enactment of the Due Process Clause of the Fourteenth Amendment. Supreme Court precedent dating to the 1870s holds that the Second Amendment applies only to Congress, not the states. *See* Presser v. Illinois, 116 U.S. 252, 265 (1886); United States v. Cruikshank, 92 U.S. 542, 553 (1876). The incorporation issue is beyond the scope of our discussion here. But, as argued in the text, the *Heller* opinion suggests that, even if the post-*Heller* Second Amendment eventually is held to be incorporated against the states, most state and local gun laws short of a handgun ban will likely survive constitutional challenge.

129. Chris Cox, *The Court Speaks, and the Fight Goes On*, AM.'S 1ST FREEDOM, Sept. 2008, at 51.

gun laws under which their clients are being prosecuted.[130] Indeed, the vast majority of legal claims based on *Heller* likely will arise in criminal cases.

There is no question that there is greater uncertainty about the constitutionality of gun regulation after *Heller*. It is also regrettable that government lawyers will need to consume public resources to fend off efforts to persuade courts to use *Heller* to second-guess the wisdom of judgments about gun policy made by elected officials. Moreover, future changes in the Supreme Court's composition may well affect the strength of the new right to be armed as a legal weapon against gun control laws. Based on the *Heller* decision alone, however, it seems likely that the vast majority of gun laws will ultimately survive the post-*Heller* attacks.[131] When the constitutional dust settles, the legal significance of our newly found constitutional right to have handguns in the home may prove to be more symbol than substance.

III. *HELLER* AND THE SECOND AMENDMENT AS AN ARGUMENT AGAINST GUN CONTROL

We have seen that *Heller* may pose only a limited threat to the future constitutionality of gun laws less restrictive than a broad gun ban. Although the legal risk to gun laws may be low, there is yet another possible impact of *Heller* to consider. *Heller* gives guns a protected constitutional status enjoyed by no other product. Doesn't that special status help the gun lobby to argue forcefully against analogies between guns and other dangerous products for which government regulation is commonplace and widely accepted?

For example, one might draw an analogy between guns and automobiles. Our nation has long been comfortable with laws requiring that drivers be licensed, that they demonstrate basic competency before being given a license, that the government retain records of sales transactions involving autos, and that autos meet minimum safety standards. The argument could be made that guns should be subject to at least these kinds of regulations.

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130. *See e.g. Luedtke*, 589 F. Supp. 2d at 1020 and cases cited therein.

131. This is particularly likely since the federal courts will be considering the constitutionality of gun control laws under *Heller* against the backdrop of decades of unsuccessful challenges to state gun laws brought under state "right to bear arms" provisions that have been interpreted to guarantee a personal right unrelated to the militia. As Professor Adam Winkler has demonstrated, forty-two states apply their "right to bear arms" as a personal, nonmilitia right, yet "[o]nly a fraction of state gun laws have been invalidated on the basis of the right to bear arms since World War II." Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL'Y REV. 597, 599 (2006). *Heller*'s Section III comments will likely be used by the lower federal courts to support deferential Second Amendment review of gun laws similar to that employed by state courts under state constitutional provisions.

The cars/guns analogy may draw the response that the Constitution guarantees a right to possess guns, but not cars. Before *Heller* it was possible to dispute this asserted constitutional protection for guns. Not so after *Heller*. We have seen that, from a strictly legal standpoint, *Heller* does not seem to create a new presumption against gun control laws generally. But does it create a new presumption against gun control in the public's mind, placing a greater burden on gun control advocates to justify their proposals as sound policy?

Heller would appear to have this impact on the gun control debate if support for gun control before *Heller* were dependent, to a substantial extent, on the public's belief that the Second Amendment guarantees only a militia-related right. Public opinion polls show that super-majorities of the public have long supported a broad gun control agenda, the only exception being a ban on handguns. For example, a recent poll shows that 87 percent of those surveyed favor requiring background checks on all private sales at gun shows.[132] Registration of handguns is supported by 75 percent of Americans.[133] If this support were somehow premised on the public's conviction that the Constitution does not protect a right to gun ownership for private purposes, then *Heller*, by destroying that premise, could be expected to shake the foundation of the public's support for gun control.

But, in fact, public opinion surveys have long shown that the public believes that the Second Amendment is concerned with personal rights, not militias. A 1995 *U.S. News & World Report* poll reported that 75 percent of Americans believe that "the Constitution guarantees you the right to own a gun."[134] On the day *Heller* was argued in the Supreme Court, the *Washington Post* released a nationwide poll showing that 72 percent of those surveyed believe the Second Amendment "guarantees the right of individuals to own guns," while only 20 percent said it guarantees "only the right of the states to maintain militias."[135] On the day the *Heller* ruling was issued, a Gallup Poll was released asking the question, "Do you believe the Second Amendment to the U.S. Constitution guarantees the rights of Americans to own guns, or do you believe it only guarantees members of state militias such as National

132. Press Release, Greenberg Quinlan Rosner Research and The Terrance Group, Americans Support Common Sense Measures to Cut Down on Illegal Guns (Apr. 10, 2008), *available at* http://www.mayorsagainstillegalguns.org/downloads/pdf/polling_memo.pdf.

133. DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH 163 (2004).

134. Gordon Witkin et al., *The Fight to Bear Arms*, U.S. NEWS & WORLD REP., May 22, 1995, at 28, 28.

135. *The Washington Post Poll: Most Say Amendment Covers Individuals and Militias*, WASH. POST, Mar. 16, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/graphic/2008/03/16/GR2008031600072.html?sid=ST2008031502430.

Guard units the right to own guns?"[136] Seventy-three percent of those surveyed chose the individual rights option, while only 20 percent said the right was confined to militias.[137] While one could quarrel with the wording of some of these poll questions, they do suggest that the militia-purpose view—long dominant in the courts—has not seriously penetrated the public's consciousness in the modern era.

This means that a large majority of Americans believes simultaneously in a broad gun control agenda and in a broad interpretation of the Second Amendment. For the general public, the *Heller* ruling is consistent with what it already understood to be true: The Second Amendment guarantees a right to have guns, but that right is not absolute and is subject to sensible restrictions.

Given the public's longstanding view of how the Second Amendment affects gun control, *Heller* may actually weaken the argument that gun control proposals should be rejected because the Constitution guarantees a right to possess guns.

Before *Heller*, there were two primary responses to the Second Amendment argument available to gun control advocates. First, they could argue that the courts had already determined that the Second Amendment relates only to the militia and thus was no barrier to gun control laws. Although this argument was true, it did not conform to the public's beliefs about the Amendment's meaning—beliefs that were difficult to alter given the constant din of gun lobby propaganda on the constitutional issue, the fact that courts don't issue press releases about their rulings, and the strangeness to modern ears of the words "well regulated Militia."[138] Second, gun control advocates could assert that even if the Second Amendment extended beyond militia service, no rights are absolute and the right to be armed surely should be subject to reasonable restrictions. This argument had substantial persuasive appeal before *Heller* because it was consistent with public attitudes. It has even greater appeal after *Heller*, given the *Heller* Court's reassuring language about the presumptive constitutionality of gun regulation. When pro-gun partisans trot out the Second Amendment—joyfully citing *Heller*—they can now be met with the response that the *Heller* opinion itself—written by one of the most conservative and

136. *See* Jeffrey M. Jones, *Americans in Agreement With Supreme Court on Gun Rights*, GALLUP, June 26, 2008, http://www.gallup.com/poll/108394/Americans-Agreement-Supreme-Court-Gun-Rights.aspx.

137. *Id.*

138. Of course, in 1791, the public would have had no difficulty understanding the concept of a "well regulated Militia" in which the people have a right to keep and bear arms in defense of the community.

gun-loving Justices in recent history—found no inconsistency between the Second Amendment and a host of gun regulations.

Barack Obama's message about guns during the 2008 campaign took full advantage of *Heller* in successfully overcoming the NRA's virulent opposition (and his own reference to "bitter" people who "cling to guns").[139] Obama constantly emphasized his support for the Second Amendment—and, specifically, for the *Heller* interpretation—while not backing down from his record of support for reasonable gun laws.[140] His message was consistent with *Heller* and reflected the views of most Americans.

As we have seen, the public's support for gun control in the modern era has not been premised on a belief that the Second Amendment guarantees only a militia-related right. The polling data suggest that the views of most Americans about gun control are not dependent on their beliefs about the Second Amendment. Indeed, it is more true to say that most Americans simply accommodate their views about the Second Amendment to their views about gun control. If they think gun control is sound public policy, they will conclude that it is not prohibited by the Constitution.

Putting the point another way, few Americans who believe that gun control laws save lives will nevertheless oppose them because they think they violate the Second Amendment. And because most Americans support gun control laws, they believe the Second Amendment to be of secondary importance. For many years, the Pew Research Center has asked Americans whether they think it is more important to "protect gun owners' rights" or "control gun ownership."[141] In April 2008, 58 percent of those surveyed said it was more important to "control gun ownership," while only 37 percent said it was more important to "protect gun owners' rights."[142] The results were virtually identical in 1993, fifteen years before.[143]

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139. *See* BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, GUNS & THE 2008 ELECTIONS: COMMON SENSE GUN LAWS WON, THE NRA LOST, & WHAT IT MEANS 8, 13 (2008), *available at* http://www.bradycenter.org/xshare/pdf/reports/guns-2008election.pdf.

140. On the day of the *Heller* ruling, Obama released a statement saying, "I have always believed that the Second Amendment protects the right of individuals to bear arms, but I also identify with the need for crime-ravaged communities to save their children from the violence that plagues our streets through common-sense, effective safety measures." Press Release, Sen. Barack Obama, Statement of Barack Obama on Supreme Court decision in District of Columbia v. Heller (June 26, 2008), *available at* http://my.barackobama.com/page/community/post/stateupdates/gG5NxL. In that same statement, he reiterated his support for "closing the gun show loophole and improving our background check system, so that guns do not fall into the hands of terrorists or criminals." *Id.*

141. Press Release, Pew Research Ctr. for the People & the Press, Public Continues to Oppose Banning Handgun Sales (May 14, 2008), *available at* http://people-press.org/reports/pdf/419.pdf.

142. *Id.*

143. *See id.*

For all the Second Amendment's symbolic and emotional importance to the NRA, the gun lobby has never convinced the public that gun control violates our constitutional values. By both recognizing gun rights and, at the same time, confirming the public's long-held belief that gun regulation is entirely compatible with those rights, *Heller* is likely, over the long term, to further diminish the importance of the Second Amendment argument as a barrier to the enactment of strong gun laws.

IV. *HELLER*, THE SLIPPERY SLOPE, AND THE GUN CONTROL DEBATE

A common refrain of gun control opponents is that even modest regulation of guns is but the first step down a slippery slope toward more draconian gun restrictions. Indeed, there may be no other public policy issue where the slippery slope argument is as frequently used.[144] Wayne LaPierre of the NRA invoked the argument as a key reason to oppose a waiting period for handgun purchases:

> This brings us back to the real intent behind waiting periods. Waiting periods are only a first step. Regardless of what they promise to do or not to do, they are nothing more than the first step toward more stringent "gun control" measures.
>
> Some people call it "the camel's nose under the tent," some call it "the slippery slope," some call it a "foot in the door," but regardless of what you call it, it's still the same—the first step.[145]

The NRA has made it clear what it sees at the bottom of the slippery slope—the end of private ownership of firearms: "The plan is now obvious to all who would see: First Step, enact a nationwide firearms waiting period law. Second Step, when the waiting period doesn't reduce crime, and it won't, enact a nationwide registration law. Final Step, confiscate all the registered firearms."[146]

Although slippery slope arguments are commonly used in other public policy debates, they are especially important to the gun lobby for several reasons.

First, because it is difficult for the pro-gun forces to persuasively argue that such reasonable and popular measures as waiting periods, background checks, licensing and safety training, registration of gun sales, curbs on large-volume gun sales, and mandatory consumer safety standards are objectionable

144. For example, Professor Volokh frequently uses gun-related arguments in his general discussion of slippery slope arguments in Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

145. WAYNE LAPIERRE, GUNS, CRIME AND FREEDOM 48 (1994).

146. Nat'l Rifle Ass'n Inst. for Legislative Action, Firearms Registration: New York City's Lesson (Jan. 27, 2000), http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=41.

in their own right, it becomes essential to argue that they will ultimately lead to policies that have far less popular support and may be more difficult to justify. For example, given the reality that gun traffickers buy large numbers of handguns from dealers and that few law-abiding gun owners really need to buy more than one handgun per month, the benefits of a national law restricting large volume sales appear to substantially outweigh any inconvenience to ordinary gun owners.[147] For this reason, the NRA's strategy is to suggest that the real problem with such laws is that they set a dangerous precedent that would lead to far greater restrictions in the future. Thus, the NRA argues that "one-gun-a-month" could be changed to "one-per-year," "one-per-lifetime" or "none-ever".[148] This is classic slippery slope argumentation. Since the NRA knows it is on weak ground if the issue is whether large-volume handgun purchases should be prohibited, it recasts the issue to be whether the government should have the power to ban all gun purchases.

Second, the NRA must sell the slippery slope argument to convince gun owners and sportsmen that they have an important stake in the gun control fight. Polls consistently show that gun owners, and even those who identify themselves as members of the NRA, actually support the gun control proposals that are anathema to the gun lobby's leadership. 61 percent of gun owners favor registration of handguns, while 62 percent favor requiring a police permit to purchase a handgun.[149] Even most self-identified NRA members support handgun registration and mandatory safety training before purchasing a firearm.[150] This must be quite discomfiting to the NRA. If the NRA's core constituency does not view gun control as a threat to gun ownership, the foundation of the organization's political power will weaken. It is essential to the NRA's long-term viability that any gun control proposal be viewed by millions of Americans as an attack on guns as valued personal possessions. Indeed, the NRA's strategy is to go even further—to portray even modest gun control as an attack on a way of life for which the gun is both an important tool and, more importantly, a powerful symbol. Charlton

147. Three states—Virginia, Maryland, and California—have enacted laws prohibiting the purchase of more than one handgun in any thirty-day period. *See* LEGAL CMTY. AGAINST VIOLENCE, *supra* note 113, at 140. Virginia's law has dampened the flow of handguns from Virginia dealers into the illegal market in the Northeast. *See* Douglas S. Weil & Rebecca C. Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 J. AM. MED. ASS'N 1759, 1760 (1996).

148. Nat'l Rifle Ass'n Inst. for Legislative Action, One Gun a Month: Rationing a Constitutionally-Protected Right (Mar. 9, 2000), http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=140.

149. Tom W. Smith, Public Opinion on Gun Control 53 (Dec. 2003) (unpublished manuscript, on file with author).

150. Douglas S. Weil & David Hemenway, *I am the NRA: An Analysis of a National Random Sample of Gun Owners*, 8 VIOLENCE & VICTIMS 353, 361 (1993).

Heston spoke to the 2000 NRA Convention of the "sacred stuff" that "resides in that wooden stock and blued steel."[151] "When ordinary hands can possess such an extraordinary instrument," he said, "that symbolizes the full measure of human dignity and liberty."[152]

Framing the gun issue as one of cultural values immediately elevates the stakes in the gun debate because it suggests that gun control proposals may be seen as attacks on a set of core beliefs that define many Americans, particularly those in rural areas for whom guns embody important values of self-reliance and personal liberty. For the gun lobby, it is strategically critical that the debate be conducted in these terms. If the gun debate is seen as addressing only the efficacy of specific, practical proposals to reduce death and injury, then the NRA is on shaky ground, because even its own members do not have strong objections to many such proposals. However, if the gun debate is seen as fundamentally about larger issues involving the value systems of millions of gun-owning Americans, then the NRA is able to radicalize and mobilize those Americans who see their values as under attack. Gun control is then seen as an attack on gun-owning Americans and how they live their lives.

The NRA's Congressional allies understand well the importance of making the gun issue about culture and values. In the summer of 2006, House Republicans unveiled their legislative priorities, calling them the "American Values Agenda."[153] One of the bills would have made it more difficult for the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to revoke the licenses of gun dealers who violate the law.[154] How, it may be asked, is protecting lawless gun dealers an American value? I'm not sure how the House Republicans would respond, but it seems clear that they would go to great lengths to cast the debate as about gun ownership as a core American value, not about whether it makes sense to curb the power of the ATF to crack down on lawbreaking dealers. The NRA issued a press release applauding the Republican leadership for including gun ownership rights in its American Values Agenda.[155]

For the gun lobby, then, the gun debate needs to be a debate about banning all guns. The slippery slope argument is the NRA's primary means

151. Heston, *supra* note 1.

152. *Id.*

153. *See* Mark Preston, *House GOP Promotes Its "American Values Agenda,"* CNN.COM, June 28, 2006, http://www.cnn.com/2006/POLITICS/06/28/mg.thu.

154. Bureau of Alcohol, Tobacco, Firearms, and Explosives (BAFTE) Modernization and Reform Act of 2006, H.R. 5092, 109th Cong. (2006)).

155. Press Release, Nat'l Rifle Ass'n Inst. for Legislative Action, NRA Applauds Congressional Leaders for Including Gun Ownership Rights in Their "American Values Agenda" (June 29, 2006), *available at* http://www.nraila.org/GrassrootsAlerts/Read.aspx?ID=344.

of achieving this goal. As writer Osha Gray Davidson put it, "the religious fervor of many gunowners when it comes to firearms restrictions also has its roots in a less mystical and more pragmatic concern: the fear that all gun-control laws lead inexorably to the complete confiscation of all firearms."[156]

After *Heller*, however, an obvious question comes to mind. If a ban on private ownership of guns is now unconstitutional under *Heller*, to what extent has the slippery slope argument been deprived of its power to inspire opposition to more modest gun regulations?

Even after *Heller*, there is no doubt that the gun lobby will try to frame gun control as a cultural issue, portraying gun control advocates as elitists who have nothing but contempt for gun owners and their values. But it is difficult to believe that this message will resonate with the same force among gun owners in the post-*Heller* era, in which the legal system has erected a new constitutional barrier to a general gun ban by declaring gun ownership for self-defense a constitutional right. The NRA will not stop insisting that the real agenda of gun control advocates is to ban all guns, but the reality is that such an agenda is now, in Justice Scalia's words, "off the table."[157]

After *Heller*, we may see the slippery slope argument assume a somewhat different form. Instead of arguing that regulation of guns will lead to eventual confiscation, the gun lobby may assert that each new restriction will lead to another restriction, which will lead to another restriction, and so on, until the burden and expense of gun ownership will be so great as to amount to a de facto gun ban, even if no law banning guns is ever passed.

It is hard to imagine that this "de facto gun ban" argument will ever generate the emotional response from gun owners that the gun lobby has long provoked with the "slippery slope to confiscation" argument. For one thing, Americans, including gun owners, have personal experience with extensive regulation of dangerous products—such as automobiles, pharmaceuticals, and alcohol—that has not amounted to a de facto ban on the products. Second, in states with extensive laws regulating the sale and possession of guns, such as California and New Jersey, there are still lots of guns and gun owners. Some of those gun owners no doubt complain about overregulation, but they have no argument that the existing restrictions amount to a de facto gun ban. Third, the *Heller* decision itself suggests a constitutional limit on the burdens that can be placed on gun possession. After *Heller*, opponents of gun laws will be free to argue to courts that the particular law at issue, judged in the

156. OSHA GRAY DAVIDSON, UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL 44 (1993).

157. District of Columbia v. Heller, 128 S. Ct. 2783, 2822 (2008).

context of other preexisting regulation, puts such a severe incremental burden on gun possession for self-defense in the home that it infringes the *Heller*-created right.

Over the long term, therefore, *Heller* should lead to a weakening of gun owner activism against the gun control proposals likely to dominate the debate in the foreseeable future, such as mandating background checks on private gun sales at gun shows and elsewhere, or curbs on large-volume handgun sales. Indeed, at least one prominent figure in the gun rights movement has acknowledged this likely effect. In a revealing discussion on Los Angeles public radio a few days after the *Heller* ruling, Chuck Michel, a California lawyer who has long represented the NRA and other pro-gun groups, was asked about *Heller*'s effect on gun registration and licensing. Here's what he said:

> The problem has always been that registration and licensing led to confiscation and I . . . still think registration and licensing is . . . problematic in multiple respects . . . , but I think that now . . . there are a lot of people in the gun control movement who are really gun . . . banners. They're in favor of civilian disarmament. These folks are never going to get their way now as a result of this [Heller] opinion, so *I think licensing and registration is . . . going to be . . . tougher to criticize*.[158]

In a startling moment of candor, Mr. Michel had admitted that, because *Heller* has taken a general gun ban off the table, the slippery slope argument has lost power, making it more difficult for the NRA to successfully argue against licensing and registration.

By the same token, *Heller* may enhance the efforts of gun control advocates to frame the debate in terms of public safety, not cultural norms. It will help them force their opponents to explain why reforms like background checks for private sales, curbs on multiple sales, greater enforcement power for ATF, and consumer safety standards for guns can't work, or cause greater problems than they solve. If the debate can focus on the pros and cons of

158. Paul Helmke, President, Brady Campaign to Prevent Gun Violence, *NRA: Gun Licensing and Registration "Tougher to Criticize" Now*, BRADY BLOG, July 3, 2008, http://www.bradycampaign. org/blog (quoting *To the Point: Does Gun Control Have a Future?* (Public Radio International broadcast July 1, 2008)) (emphasis added). Moments later, Michel realized the implications of what he had said:

> Well, let me just first clarify, so I don't get overly criticized by the members of the NRA that may be listening, you can't license a civil right. So, I'm not talking about a license to own a gun or to have a gun. There are certain types of licensing which will survive and others that won't . . . .

Id. Though a noble attempt at self-preservation, this is hardly enough to negate Michel's acknowledgement of the unintended impact of *Heller* on the slippery slope argument.

specific proposals, free from the distraction of the gun ban issue, gun control may well be on a new path to victory.

Heller also may make it harder, over the long run, for politicians to hide behind the slippery slope argument when opposing sensible gun laws. The argument has long furnished easy political cover for politicians anxious to curry favor with the gun lobby by opposing even modest reforms. *Heller* may put greater pressure on legislators to explain their opposition to such measures without resorting to imaginary threats of gun confiscation.

CONCLUSION: *HELLER* AS A PARADOX

From this writer's particular vantage point as a gun control advocate, before the *Heller* ruling was handed down, the prospect of the Supreme Court addressing the constitutionality of a broad gun ban under the Second Amendment seemed loaded with an odd mixture of risk and promise.

The risk, of course, largely had to do with constitutional law. There was a concrete risk that the Court would issue the kind of ruling long sought by the gun lobby and radical libertarians—a ruling that would declare a personal right to gun possession closely analogous to our First Amendment rights, inviting courts to render their own judgments on the wisdom of laws enacted by our elected officials. Under the militia-purpose view of the Second Amendment, the disappearance of the citizen militia meant that gun control laws were virtually immunized from successful Second Amendment challenge. This, of course, guaranteed that the difficult policy and empirical issues raised by the gun control debate would be resolved in the legislative and political arenas where they belong. The *Heller* case could have resulted in a radically different constitutional regime under which supporters of sensible gun laws, having won necessarily hard-fought legislative victories (thereby allowing the public's views to prevail) against a disproportionately influential gun lobby, would be faced with having to prove the case for stronger laws yet again before the federal judiciary.

In *Heller*, this did not happen. Although the Supreme Court defied constitutional text and history to create a new private right to be armed, it proceeded not only to limit its scope, but also to make it clear that a wide swath of gun control is entirely compatible with the new right. Put simply, the potential in *Heller* for grave legal risk to gun control likely was not realized. Moreover, in the public debate over gun control, advocates of stronger gun laws now can rely on an opinion written by Justice Antonin Scalia, and joined by four other solid conservatives, for the proposition that reasonable regulation of guns is consistent with the Second Amendment.

Though seldom discussed, before *Heller* it was possible to anticipate that a Supreme Court ruling taking broad gun bans off the table would have considerable benefits for gun control advocates long burdened by the slippery slope argument and its use to frame the issue as about cultural norms, not public safety and health. It is intriguing to wonder if the NRA's leadership may also have understood this before *Heller*, though it could never have publicly acknowledged it. From a pre-*Heller* perspective, however, the potential risk of a new constitutional barrier to gun laws, at least to many gun control supporters, seemed to outweigh the potential benefits from flattening the slippery slope. After the ruling, it is now possible to see *Heller* as perhaps the worst possible result for the gun lobby and the best possible result for gun control advocates. *Heller* seems unlikely to create substantial additional legal risk to other gun laws, while it deprives the gun lobby and its supporters of perhaps their most potent argument against stronger gun laws. The gun control movement may be somewhat embarrassed to benefit from a ruling that is so constitutionally indefensible, but a little embarrassment will be a small price to pay for stronger laws and countless lives saved.

So we return to the paradox of the *Heller* ruling. In *Heller* the gun rights advocates achieved vindication for their view of the meaning of the Second Amendment, though the Supreme Court had to abandon every pretense of devotion to neutral, principled constitutional adjudication to give them that victory. There is, however, good reason to believe that *Heller* may prove sharply disappointing to the gun lobby as a legal weapon against gun control laws short of a handgun ban, while weakening both the slippery slope argument and the constitutional argument itself as reasons to oppose gun regulation.

Viewing *Heller* from the perch of the NRA's leadership, an old expression comes to mind: Be careful what you wish for. It could come true.