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Why So Silent? The Supreme Court and the Second Amendment Debate After *DC v. Heller*

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Abstract:

In *District of Columbia v. Heller* (2008) the Supreme Court appeared to give to gun rights activists what they had campaigned for since the 1970s: a ruling that the Second Amendment encompassed an individual right to bear arms for the purposes of self-defence. But as the debate about gun rights returned to the top of the political agenda in the United States as a result of a series of high profile mass shootings in 2015 and the death of Justice Antonin Scalia in 2016, two things became clear: that *Heller* had not ended the political or legal debate about Second Amendment rights and that the Supreme Court had been noticeably absent from the debate since applying the *Heller* ruling to the states in *McDonald v. Chicago* in 2010. This article argues that, far from the success claimed by gun rights supporters, the consequences of *Heller* fundamentally undermined some of their key arguments and forced a shift in the nature of the debate. Both worked to keep the Supreme Court away from the debate at a time when greater clarity about the meaning of *Heller* was needed.

Article:

The unexpected death of Justice Antonin Scalia in February 2016 led to much speculation about the impact of his death on the Court and its jurisprudence. Perhaps unsurprisingly given his close association with the issue, the Second Amendment was part of that debate.¹ However, the United States' relationship with guns was already high on the nation's political agenda after a year which, according to some studies, saw almost equal numbers of "mass shooting" events and days, and which saw a series of high profile events including shootings in Charleston, South Carolina and San Bernadino, California.² The month before Scalia's death, President Obama announced executive action to strengthen the nation's gun laws and expressed his frustration that Congress had taken no action on this issue: "[T]he gun lobby may be holding Congress hostage right now, but they can't hold America hostage. We do not have to accept that carnage is the price of freedom."³ The response to what were, in reality, mild changes strengthening the enforcement of already existing gun laws in the US revealed clearly that the culture war over guns in the US remained deeply embedded in the nation's politics: virtually every Republican candidate for their party's presidential nomination vowed to overturn the actions should they be elected, while Democratic candidates Bernie Sanders and Hillary Clinton both emphasised the importance of public safety to the debate over guns.⁴

In *District of Columbia v. Heller* in 2008, Scalia, writing for a five-Justice majority, held that the Second Amendment embodied an individual right to bear arms for the purpose of self-defence. Two years later in *McDonald v. Chicago*, the Court applied the *Heller* reasoning to the states. Both *Heller* and *McDonald* appeared to give gun rights supporters what they had advocated for decades: a ruling that the Second Amendment protected an individual right to gun ownership. Conservatives were additionally pleased that in *Heller* Scalia took an originalist approach to interpreting the Second Amendment, asserting that the provision meant what it was understood to mean in 1791, no more and no less. But by the

time of Scalia's death in early 2016, it was clear that *Heller* had not brought either exactly what they had hoped. Instead, the *Heller* legacy included heightened controversy over Second Amendment originalism, interpretations of *Heller* by lower courts that drew heavily on the limits to gun ownership recognised by the majority, an increasingly bitter political divide over the meaning of the Second Amendment, and the Supreme Court's consistent refusal to hear argument (to "grant certiorari") in subsequent gun rights cases.

As the Court's most vocal defender of originalist judicial philosophy and the individual right to bear arms, Justice Scalia was a significant part of recent Second Amendment history: his passing represents a symbolic moment in Second Amendment jurisprudence. This article explores the surprising and unexpected legal legacy of *Heller* from the Court's ruling to Scalia's death. It argues that the legal, historical, and political reaction to the Court's handling of originalism ultimately weakened its usefulness in the Second Amendment context. This required gun rights advocates to seek new arguments, shifting the nature of the debate. At the same time, while *Heller* upheld an individual right it also recognised limits to that right, opening new areas of debate that gun rights and gun control advocates could use to support their position. Both developments shifted the political debate about guns and complicated the legal arguments about the Second Amendment. But just as guidance from the Court became necessary, the shifting legal and political debate worked to keep the Court away, leading to further confusion and division. Thus, far from resolving the debate over the Second Amendment, *Heller* ultimately deepened it. Irrespective of any changes to the Court's jurisprudence in the wake of the appointment of Scalia's successor to the Court, the history of the debate about the Second Amendment in the years between *Heller* and the death of the opinion's author is important for understanding both the contemporary debate about guns in the US and the history of the Court and the Second Amendment.

1. The Battle Over Originalism

In the pages of *Heller* played out one of the most significant Court-related culture wars battles: that of constitutional interpretation. The growth of conservatism in the late 1960s and 1970s was built, in part, on conservative criticism of rulings by the Warren Court which massively expanded the rights of the individual against the power of the state. Particularly unhappy with rulings that protected the rights of criminal suspects, conservatives turned to an older debate. The counter-majoritarian difficulty, a term coined by Alexander Bickel in his 1962 book, *The Least Dangerous Branch*, described the problem of an unelected Court in a democratic system, arguing that judicial review was illegitimate since it undermined the power and authority of democratically-elected lawmakers.⁵ Such anti-democratic dangers were only compounded, conservatives argued, when activist judges interpreted the text of the Constitution in ways seemingly unsupported by the text or history. Accepting judicial review as an established part of the constitutional system, conservatives including Richard Nixon argued that judges should be committed to “judicial restraint.”⁶ Such individuals should remain committed to the text of the Constitution and not seek to expand it into areas and subjects upon which it did not speak. Judicial restraint would thus limit the anti-democratic implications of the counter-majoritarian difficulty and ensure rulings politically favourable to conservatives.

Judicial restraint only solved part of conservatives’ problem with the judiciary however. While it made it likely that the Warren Court’s “rights revolution” would not be expanded, judicial restraint, with its implicit commitment to the principle of *stare decisis*, or the role of precedent, did little to roll back the implications and effects of liberal judicial rulings. Beginning in the late 1970s, conservatives developed the theory of original intent, a methodology that asserted that the meaning of the Constitution was to be found in the intent of those who created it.⁷ Alternative methods of interpretation which asserted the

Constitution was a living document whose principles needed to be adapted to changing times and circumstances, were simply the counter-majoritarian difficulty in another form. The only democratically legitimate way to understand the Constitution was in the terms with which the Founders would have been familiar. Originalism offered supporters not only the justification of a direct link to the thoughts of the nation's founders, but a justification for conservative judicial activism in overturning precedent: if past rulings did not fit with an originalist understanding they could be overturned and on grounds other than preferred policy outcomes.⁸ Influenced in part by the application of the methods of social history to legal and constitutional history, however, historians and legal scholars began to see problems in seeking the "intent" of the Framers. Scholarly criticism of the methods of original intent led to the development of what came to be known as "original public meaning."⁹ The approach placed less emphasis on the intentions of those who created the Constitution and more on the way in which the provisions would have been understood by ordinary Americans at the time. Judges remain constrained by the historical meaning of the constitutional provision, but without the methodological difficulties that inhered in original intent.

Original public meaning dominated Justice Scalia's majority opinion in *Heller* leading many to see in the opinion the triumph of originalism.¹⁰ "[T]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning," Scalia began, announcing his intentions from the start.¹¹ Making use of the federal Constitution, state constitutional provisions, state legislation, dictionaries, and English case law and legal writings, the majority discussed at length the 18th Century meaning of "the people," "arms," "keep arms," "bear arms," "keep and bear arms," and "a free state." Their conclusion was that, combined, these phrases "guarantee the individual right to possess and carry weapons in case of confrontation."¹² Original public meaning saw a common law right to self-defence embedded in the Second

Amendment. The majority also concluded that the prefatory clause (“A well regulated militia, being necessary to the security of a free State ...”) did not, as so many had previously claimed, limit the right to militia service but simply “announce[d] the purpose” for which the Amendment was written: “to prevent the elimination of the militia” by ensuring that individual Americans could not be disarmed.¹³ Turning to consider 18th and 19th Century commentaries on the meaning and scope of the right encapsulated in the Amendment, the majority concluded, “virtually all interpreters of the Second Amendment in the century after its enactment interpreted the Amendment as we do.”¹⁴ In effect, they argued any alternative reading of the history of the Founding period contradicted the weight of historical evidence both from the time and from subsequent discussion of the Amendment’s meaning.

Justice John Paul Stevens’ primary dissent for himself and Justices Stephen Breyer, Ruth Bader Ginsburg, and David Souter, also made extensive use of history. Not an originalist by judicial philosophy, Stevens’ apparent use of the originalist methodology added to the impression of originalism’s triumph in *Heller*. Accepting that the right to bear arms was an individual right, Stevens argued that this was the beginning and not the end of the discussion: where, he asked, between the clearly legitimate purpose of gun ownership for military purposes and the equally clearly illegitimate purpose of gun ownership to rob a bank lay the proper line?¹⁵ Beginning, as did the majority, with the wording of the Amendment, Stevens’ dissent argued that the majority failed to give proper weight to the prefatory clause. Using similar sources to the majority, Stevens argued that protection of the militia right was not just the “purpose” of the Amendment but the primary motivating factor. In support he pointed to language expressing the self-defence reading in some state constitutions but its noticeable absence in the Second Amendment; sources contemporaneous with the Amendment which read “keep and bear arms” to have military connotations; and interpretations of “the people” which suggested the right applied not to all but to a clear subset of the population. In

addition, Stevens asserted the significance of debates in the early nation about the proper division of power between the states and the federal government, arguing that this context was more important than the majority admitted. In this context, the role of the militia as an organ of state not federal power became significant and reinforced a reading of the Second Amendment as primarily concerned with a military, rather than an individual, right. Stevens gave short shrift to the significance of 18th and 19th Century commentaries on the Amendment's meaning, arguing, "All of these sources shed only indirect light on the question before us, and in any event offer little support for the Court's conclusions."¹⁶ The majority's ruling, Stevens asserted, was thus not simply the imposing of an original reading of the history of the Second Amendment but a creation of a new right, influenced by an "overwrought and novel" reading of the relevant history.¹⁷

While the substantive content of Stevens' dissent sparked extensive comment, the deliberate structure of the opinion was also significant: it worked to strengthen the impression that originalism could not achieve its stated goals. Stevens followed almost exactly the structure of the majority opinion, beginning with reading the text of the amendment itself, then considering the history of the ratification period, judging the validity of post-enactment legal commentary and, finally, considering the legislative and legal background to the issue. Not only did the opinion offer a point-by-point rebuttal of the majority's position, by using the majority's framework as well as many of the same sources, the dissent made all the clearer its position as a fundamentally different reading of Second Amendment history. Scalia and Stevens might both have been equally correct in their readings, just as they might be equally wrong, but both were *reasonable* understandings of the history revealed in their sources. While perhaps unsurprising to historians, when read together the two opinions offered a fundamental challenge to originalism's claim to limit the role of judicial discretion in constitutional interpretation: because judgment is crucial to historical enquiry, turning to

history in constitutional interpretation might provide some limit judicial discretion, for example in terms of policy-oriented decision-making, but fail to limit judicial discretion entirely.¹⁸ This is not to suggest that such complexities discredit originalism's role in or contribution to constitutional interpretation, only to indicate that they undermine any claim for *Heller* as a "triumph" of originalism.

Claims of originalism's triumph in *Heller* were also weakened by the mountain of scholarship exploring the historical roots of the Second Amendment. Historians offered both support for and criticism of the historical readings offered by Scalia and Stevens, examining almost every aspect of the colonial and early American experience with guns and leaving little of the relevant history unexamined. State constitutional requirements both contemporaneous with and subsequent to ratification of the Second Amendment, the drafting history of the Second Amendment and the relative importance of language ultimately discarded by the First Congress, the exemption of Quakers and the debate over conscientious objection, the Pennsylvania Constitution, English common law, and 19th Century sources explicating the meaning of the Second Amendment all received scholarly attention. Studies offered competing views of the proper role of preambles generally and the Second Amendment's prefatory clause in particular while providing contradictory readings of key Second Amendment phrases "the people," "arms," and "keep and bear arms," following the template established by Scalia and Stevens.¹⁹ The complexity of the history surrounding the nation's early relationship with guns and gun laws challenged the apparent simplicity offered by both Scalia and Stevens, leaving the impression that it could only be so simple if "inconvenient" elements of that history were overlooked.

Historians and legal scholars alike openly charged the Justices and each other with picking and choosing historical facts to support their case. Criticisms of so-called "law office history," defined as "a results oriented methodology in which evidence is selectively gathered

and interpreted to produce a preordained conclusion,” became common in Second Amendment scholarship.²⁰ Such criticisms were designed, in part, to de-legitimise the conclusions reached by Scalia and Stevens in *Heller* while also challenging the growing body of legal and historical scholarship with which the authors disagreed. Collectively, the complexity of the historical picture and the methodological criticisms inherent in claims of “law office history” implied, and sometimes explicitly stated, that despite the Court’s claims for an originalist approach to the Second Amendment, the Justices were simply playing politics with history.

Equally damaging for *Heller*’s originalist legacy was that a number of leading conservatives also criticised the ruling. Federal judge Richard Posner decried Scalia’s “faux originalism” in an article for the *New Republic* just two months after *Heller* was decided.²¹ In a speech before the Federalist Society in November, leading conservative law professor Nelson Lund took Scalia to task for his poor and inconsistent use of history and for ignoring original meaning.²² The following year, Judge J. Harvie Wilkinson offered arguably the most stinging rebuke to the *Heller* majority by comparing it to conservatives’ *bête noir*: the Court’s 1973 abortion ruling in *Roe v. Wade*. Not only did the ruling fail to adhere to a conservative judicial methodology, according to Wilkinson, it actually “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.”²³ On the surface, *Heller* represented the epitome of originalism that conservative legal scholars had been advocating for more than two decades; conservative critics asserted that surface was as deep as it went and that the *Heller* majority had singularly failed to correctly adhere to an originalist methodology. Not only was *Heller* not good originalism but, according to Wilkinson, it revealed exactly what liberal critics of the approach claimed: that it “is not determinate enough to constrain judges’ discretion to decide cases based on the outcomes they prefer.”²⁴

Criticism of the Court, whether from academics, practitioners of law, or the public, has historically had little influence in keeping the Court away from particular issues. *Roe v. Wade* and the abortion debate is only one example. But the criticisms of *Heller* challenged not only the result but the majority's entire methodology. Scalia described *Heller* as the greatest "vindication of originalism," and commentators have consistently recognised the importance of originalism for *Heller* and the significance of *Heller* for originalism.²⁵ But the combined response to *Heller* ensured it was far from the triumph that Scalia claimed. The conflict within its pages between the history offered by Scalia and Stevens revealed clearly that reaching back into the past and finding the relevant history might not, by itself, provide the necessary answers, especially when that history is contested. The subsequent historical scholarship only confirmed the complexity of Second Amendment history, and complexity made it possible that judgment, whether deliberate or inadvertent, played a role in *Heller*, in contradiction to originalism's stated intentions. Scalia himself appeared to recognise that the combination of Stevens' dissent and the weight of subsequent scholarship had weakened the rationale in *Heller* when he commented to Marcia Coyle in 2011 that, "We won't apply that reasoning in the next case. Very disappointing."²⁶ The irony of *Heller* for conservatives and originalists, then, is that the case which in its fundamental approach appeared to be the epitome of originalist jurisprudence ultimately weakened originalism in its Second Amendment context, requiring gun rights supporters to look for alternative justifications for their policy positions.

2. An Individual Right

Before *Heller*, one of the leading debates about the Second Amendment involved questions about its scope: did it, as gun rights advocates asserted, protect a broad individual right to bear arms, or, as gun control advocates claimed, did the prefatory clause establish a limited collective right linked to participation in the militia or its modern equivalent? In a

hugely influential 1989 *Yale Law Journal* article, Sanford Levinson argued that the Second Amendment embodied an individual right to bear arms, and that this was “embarrassing” to liberals who failed to take this meaning seriously.²⁷ Levinson’s article sparked an enormous wave of Second Amendment legal and historical scholarship, most of it supportive of the individual rights view. So dominant was the view that the Amendment protected an individual right that in 1995 Glenn Harlan Reynolds coined for it the term “Standard Model” and in 2000 Nelson Lund declared over the intellectual debate about individual versus collective rights in the Second Amendment.²⁸ The individual rights position of the Standard Model gained increased support as gun rights advocates, seeking to liberalise state and national gun laws, drew on its positions for intellectual legitimacy in the political realm. As the nation became more politically conservative, gun rights advocates saw the potential for success in an argument which emphasised the role of the individual and limited government and tied both to the nation’s founding. But claims by Lund and others that the Standard Model had won out came notwithstanding the significant scholarship which challenged the individual rights position and offered alternatives in the form of collective or civic rights arguments.²⁹ Equally supported by strong historical and legal scholarship, such views were not, as the “Standard” Model implied, intellectual outsiders, although supported by fewer scholars. By the time of *Heller*, all theories continued to attract support within the legal, academic, and political realms.

On the surface, as with originalism, the *Heller* majority appeared to give gun rights supporters exactly what they had campaigned for: recognition that the Second Amendment guaranteed an individual, not a collective, right to gun ownership.³⁰ The National Rifle Association, the nation’s largest gun rights organisation, clearly interpreted *Heller* in this way. “The Second Amendment as an individual right now becomes a real permanent part of American constitutional law,” declared Executive Vice President Wayne LaPierre.³¹ The

Association's chief lobbyist, Chris Cox, echoed the sentiment, calling *Heller* a "monumental decision ... This has put politicians on notice that this is a fundamental right ... It can't be rationed. It can't be unduly restricted on the whims of local officials."³² Cox's comments hinted at another position that many gun rights supporters saw as reinforced by *Heller*: that the individual right protected by the Second Amendment was absolute and inviolable. One does not necessarily have to agree with Patrick Charles' 2015 assessment that, "it was not until after *Heller* that the absolutist view of the Second Amendment became a fixture within the political discourse," to agree that many nonetheless used *Heller*'s emphasis on an individual right to defend an absolutist position.³³ Speeches by leading conservatives, including Mitch McConnell, Rick Santorum, and Sarah Palin emphasised such arguments and the 2012 Republican National Platform asserted that gun licences and registration, limited capacity magazines, and regulation of ammunition must be opposed with equal force as attempts to ban outright certain classes of weapons.³⁴

However, the *Heller* opinion included a significant caveat that limited gun rights advocates' ability to link *Heller*'s support for an individual right to an absolutist interpretation of the Second Amendment. "Like most rights," Scalia wrote for the majority, "the right secured by the Second Amendment is not unlimited." In a passage that has confused many scholars, infuriated some gun rights supporters, and given hope to many gun control advocates, the opinion continued: "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."³⁵ Criticised by liberals and conservatives alike as inconsistent with an originalist interpretation of the Second Amendment and as lacking discussion within the pages of the

opinion, the majority's recognition of the constitutional legitimacy of some regulations on gun ownership represented a significant limitation to the scope of the individual right.

Why in an opinion so self-consciously originalist and so clearly committed to an individual right to bear arms did the majority offer exceptions that potentially limited both? The rationale for the list of acceptable gun regulations is unclear from the pages of *Heller*, but can be understood in the context of the general working of the Court. First, the position was consistent with the Court's understanding of limits to other fundamental rights.³⁶ The Court has never found any right to be absolute in any and all circumstances. Second, it is possible that the language was inserted to gain or keep the five-Justice majority. While Justices Scalia and Clarence Thomas had been consistent advocates for an originalist perspective, Chief Justice John Roberts and Justices Alito and Anthony Kennedy often looked to other sources and may not have been entirely convinced by an entirely originalist argument.³⁷ As Adam Winkler commented, "the originalists on the Court had to sell their originalist souls to survive."³⁸ Third, the comments can be read as a response to the dissenters' concerns about the potential dangers of an unlimited right to gun ownership.³⁹ Challenged by claims that the Court's ruling would lead to inconsistent decisions, policy-making by judges, and increased danger to law-abiding Americans, the majority sought to defend their approach and dispel such claims by indicating limits to the scope of their holding. Fourth is the question of public legitimacy. The exact relationship between public opinion and the Supreme Court is unclear but most scholars agree that the Court is rarely out of line with public opinion for long and the Justices are aware that the Court's institutional legitimacy is threatened when making decisions which challenge public opinion.⁴⁰ Studies suggest that most Americans support both an individual right to own guns for self-defence and reasonable gun regulations; thus a ruling challenging either of these might lead to a public backlash against the Court.⁴¹ A rational actor, seeking to preserve their influence in

the most effective way, might judge that conceding on the issue of reasonable, already-existing regulations while pressing a preferred reading of the broad right in general, might offer the best way to ensure continued legitimacy and the opportunity to revisit the issue at a later date.

The full significance of the *Heller* majority's acceptance of limits on gun ownership became clearer with subsequent events. The vast majority of courts that upheld gun regulations against legal challenges did so using the list of acceptable restrictions offered by Scalia. By March 2015, more than nine hundred cases had been heard at state and federal level and, while not all laws survived the challenge, the vast majority were upheld by the courts.⁴² Among the laws upheld were those restricting gun ownership by convicted felons, drug addicts, those with a history of mental illness, and individuals convicted of domestic violence charges; restricting access to "unusual" weapons including sawed-off shotguns, machine guns, grenades, pipe bombs, and assault weapons; preventing carrying of guns in sensitive places such as schools, parks, and government buildings; requiring gun owners to obtain a licence and permitting restrictions on issuing of such licences; regulating storage of weapons; requiring background checks before the sale of firearms; and outlawing the sale of firearms to minors.⁴³ On the few occasions when federal courts struck down gun regulations, the level of commentary indicated their unusual nature.⁴⁴ Thus while they were no more than dicta, legal writings with no binding force, subsequent Second Amendment litigation partially bore out the 2009 prediction made by Denis Henigan, then Vice President for Law and Policy of gun control advocacy group the Brady Center to Prevent Gun Violence, that Scalia's "laundry list" of potentially acceptable regulations were "likely to be among the most influential dicta in the Court's history."⁴⁵ Although in a 2013 petition to the Supreme Court, the National Rifle Association claimed that lower federal courts had been engaging in "massive resistance" to the Court's rulings in *Heller* and *McDonald*, their argument

overlooked the fact that the foundation of the majority of lower court decisions upholding restrictions on gun ownership and use rested explicitly on the reasoning offered by the majority in *Heller*.⁴⁶ *Heller* itself then undermined the ability of gun rights advocates to equate an individual right with an unlimited right.

The listed exceptions in Scalia's majority opinion had something in common: they were all designed to protect the vulnerable in society from the danger inherent in firearms when misused. As such they bore a striking similarity, in impact if not in approach, to the reasoning offered by Justice Breyer in dissent. Curiously absent from the initial debate about *Heller*, drowned out by "the titanic clash of the competing historical visions" offered by Scalia and Stevens, Breyer offered a clear, compelling alternative way of understanding the Court's role in interpreting the Second Amendment.⁴⁷ That role, Breyer asserted, was to balance the interests of gun owners against the interests of states in protecting their populations from danger, "with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter."⁴⁸ In emphasising a public safety rationale, Breyer drew on an argument at least as old as the Second Amendment: the so-called police powers doctrine recognises as important and legitimate the state interest in protecting the health, safety, and welfare of its citizens. Discussing in some detail the statistics on gun crime and gun deaths considered by the District of Columbia, in particular statistics about gun crime in urban areas, Breyer presented the challenged law as a reasoned and reasonable action by the District in response to a particular local problem deemed to threaten public safety. Reasonable people might disagree about the proper approach to that problem, argued Breyer, but it was not the Court's job to judge whether the path chosen was correct or otherwise, only whether it fell within the legislature's authority. Because studies on gun control could neither show such laws were

entirely ineffective nor that the legislative judgments were “incorrect,” the District’s reasoning was entitled to considerable weight when judging the law’s constitutionality, something, Breyer argued, the majority had failed to adequately consider.⁴⁹ Dismissed by Scalia’s majority opinion, Breyer’s rationale in defence of the state’s police powers nevertheless provided a clear framework for assessing the public safety rationale that was implicit in the majority’s list of acceptable gun control regulations.

The frequency of mass shooting events in the US after *Heller* gave added force to an approach which read Breyer’s public safety rationale into the gun regulations accepted by the *Heller* majority. In defending its 2013 assault weapons ban against a legal challenge by the NRA, the town of Highland Park, Illinois explicitly drew on recent events. Directly referencing the 2012 cinema shooting in Aurora, Colorado, the January 2013 shooting of Congresswoman Gabrielle Giffords in Casas Adobes, Arizona, and the shootings at Santa Monica College, California in June the same year, the city’s brief to the Court argued: “Highland Park is a vibrant, suburban community with a number of locations and events susceptible to a mass shooting ... The record below established that mass shootings incidents occur too frequently in the United States, and that it is reasonable for a municipality susceptible to such events to want to avoid even a single one.”⁵⁰ Both the mayor and the chief of police testified that such events played a role in the discussion of the city’s ordinance, evidenced in the language of the ordinance itself: “recent incidents in Aurora, Colorado; Newtown, Connecticut; Tucson, Arizona; and Santa Monica, California demonstrate that gun violence is not limited to urban settings, but is also, tragically, a reality in many suburban and small town locations as well.”⁵¹ Thus subsequent events gave greater force and resonance to the public safety rationale that was only implicit in *Heller* but to which the majority’s recognition of some restrictions opened the door.

Heller's impact on the debate over guns in American society extended well beyond the courts, however. The question of limits to the Second Amendment right continued to cause controversy. A 2013 article written by Dick Metcalf for *Guns and Ammo* magazine which criticised the absolutist view resulted in his firing and the subsequent resignation of the magazine's editor-in-chief. The same year Colorado Senators John Morse and Angela Giron were subject to recall elections as a result of their support for tougher gun regulations in the aftermath of the shootings in Aurora and Newtown.⁵² The absolutist view was also apparent in the responses by Republicans to President Obama's 2016 executive actions to strengthen the nation's gun laws. Texas Senator Ted Cruz called the actions unconstitutional and explicitly linked gun control to "government control," Speaker of the House, Paul Ryan accused Obama of "undermin[ing] liberty," and almost every Republican presidential candidate asserted that the actions violated the Second Amendment.⁵³ Such absolutism was not shared by all Republicans or by all gun rights supporters but it was increasingly common in the public and political debate about guns in the US. And it was, in part, based on *Heller*'s assertion of an individual right in the Second Amendment, shifting the debate from individual versus collective rights to a focus on the extent of the individual right. It was a misinterpretation since *Heller* also permitted reasonable restrictions on gun ownership, but it was an argument made available by the *Heller* majority.

Echoing Wilkinson's 2009 comparison of *Heller* and *Roe v. Wade*, just as anti-abortion campaigners found great success in targeting legislatures, so too the gun rights lobby's greatest successes came in using the individual rights argument outside of the nation's courts. Encouraging or pressuring legislatures to repeal existing gun laws to make gun ownership and use easier has a major procedural advantage: advocates of stricter gun laws cannot bring Second Amendment lawsuits which claim that gun laws are not strict enough, thus effectively limiting access to the courts as a remedy. Gun rights advocates found particular success in

the area of weapons outside the home which became a particular focus after *Heller*. At least twelve states extended and expanded laws to permit the open or concealed carry of weapons in public, including in areas such as schools and parks that might conceivably fall under the “sensitive places” exception accepted in *Heller*.⁵⁴ While courts continued to frustrate gun rights advocates’ attempts to create an almost unlimited right to gun ownership, in the legislative and public arena advocates had much more success with an individual rights argument.

The irony of this is that legislative action is what Breyer had supported in dissent in *Heller*. Breyer’s approach allowed for the kind of deference to legislative decision-making that in Michigan and Iowa and a dozen other states led to the loosening of restrictions on carrying weapons in public. While gun rights supporters may not have liked the conclusion to which he came in relation to the District’s laws, the same reasoning defended the actions of those states which moved towards greater accessibility and whose actions the NRA and others lauded.⁵⁵ Justice Stevens also indicated the importance of the role of the political process. “[N]o-one has suggested,” he wrote, “that the political process is not working exactly as it should in mediating the debate between the advocates and opponents of gun control.”⁵⁶ Gun rights and gun control advocates who continued their political and legislative battle to define the proper reach of the Second Amendment were thus supported, in significant part, by the dissenters in *Heller*.

3. The Supreme Court

In 1989, Sanford Levinson argued that the “Supreme Court has almost shamelessly refused to discuss the issue” of the Second Amendment.⁵⁷ Between the Court’s 2010 application of *Heller* to the states in *McDonald v. Chicago* and Scalia’s death in February 2016, the Justices seemed equally reluctant to get involved in the ongoing Second

Amendment debate. Given that the *Heller* majority made clear that it did not address all issues relating to gun rights and the Second Amendment and that, irrespective of their view of *Heller*'s merits, most commentators agreed that significant future litigation would be required to develop the full meaning of the Court's ruling, the Court's absence requires some consideration.⁵⁸

Although there are no definitive rules regarding when the Supreme Court will agree to hear a case, one major guide has traditionally been a disagreement among the lower courts regarding the proper interpretation of federal legislation or provisions of the Constitution.⁵⁹ In such a situation, laws intended to apply to all citizens are interpreted in different ways in different places undermining the intent of equal application. Arguably the simplest explanation, then, for the Court's continued refusal to hear argument in the gun rights cases appealed to it was that no such split existed among the lower courts. In states and localities where stricter gun laws were enacted, legal challenges were largely rejected by courts relying specifically on the wording of *Heller*.⁶⁰ Although such rulings might be criticised for reading the letter and not the spirit of *Heller*, an approach described as courts "narrowing from below," the consistent reference to *Heller* and the narrow reading of its holding meant little disagreement among lower state and federal courts across the US.⁶¹ In the absence of a major split between lower courts in different parts of the country, the Justices were less likely to feel compelled to intercede.

Considered from a different perspective, however, the combination of legal and political battles over the extent of the Second Amendment right led to a patchwork of regulations across the country. While places such as the District of Columbia, suburban Chicago, and San Francisco enacted strict gun control measures which were upheld by the courts, many states, including Texas, Tennessee, and Oklahoma, passed legislation easing older restrictions on owning, carrying, and using firearms. Both options were justified by references to *Heller*.

On one hand this could be argued as the essence of federalism in action, allowing states and localities the freedom to experiment with local laws and regulations best suited to their circumstances.⁶² It might also be interpreted as an example of judicial restraint: the Court recognising that the broad parameters of *Heller* permitted some degree of divergence among local regulations. On the other hand, the practical result, of fewer regulations in some parts of the country and stricter regulations in others, looked a lot like the result that might emerge from a disagreement among the lower courts, suggesting the absence of a circuit court split may not be the only reason for the Court's reluctance to intervene.

A second common reason for the Court to hear a case is confusion over an important area of law. Unquestionably the Second Amendment is such an area, and in 2015 Justices Thomas and Scalia made clear that they saw danger in the Court's inaction on such cases. Dissenting from the Court's refusal to hear argument in cases from San Francisco and Highland Park, Illinois, they argued that the lower courts were causing confusion by failing to adhere to the central precepts of *Heller*. "The decision of the Court of Appeals is in serious tension with *Heller* ... something was seriously amiss in the decision below," Thomas wrote in *Jackson v. City and County of San Francisco*.⁶³ *Jackson* involved a city ordinance which required owners to either wear their guns while in their home or keep their gun in a locked container or disabled with a trigger lock, requirements with clear echoes of the District of Columbia law struck down in *Heller*.⁶⁴ *Friedman v. City of Highland Park, Illinois* saw a challenge to the city's ordinance banning ownership of assault weapons and high-capacity magazines within the city limits. As in *Jackson*, the Court's refusal to hear the case left the law intact. In *Friedman*, Thomas accused lower courts of "noncompliance with our Second Amendment precedents" and described the Seventh Circuit's rationale as a "crabbed reading" of *Heller* "relegating the Second Amendment to a second-class right."⁶⁵ Given the concern

expressed by Thomas and Scalia that lower courts were causing confusion by ignoring *Heller* and *McDonald*, why did the Court remain silent?

Scalia's 2011 comment to Marcia Coyle that the Court would be unlikely to use the *Heller* reasoning again hinted at one reason.⁶⁶ Under the Court's rules it requires only four Justices to vote to hear a case, although five are ultimately needed for a majority to decide a case. Of the *Heller* and *McDonald* majorities, only Scalia and Thomas were open, consistent supporters of the originalist approach so central to both cases, reflected in their joint dissents in *Jackson* and *Friedman*. Chief Justice Roberts and Justices Alito and Kennedy had in their respective careers inclined towards the use of history when necessary without being bound to it. In the aftermath of *Heller* in particular, the avalanche of criticism from liberals and conservatives alike, as well as the voluminous historical work which made the question of Second Amendment history so problematic for the Court, it is at least possible that the Court's non-originalists became less sure of its usefulness or value in future Second Amendment cases. Among the dissenters, Breyer obtained the support of Justices Ginsburg, Souter, and Stevens, providing a possible four votes to grant a hearing in a future Second Amendment case until Souter and Stevens retired in 2009 and 2010 respectively. The lack of action after *McDonald* indicated either that Justices Elena Kagan and Sonia Sotomayor did not subscribe to the views offered by Breyer or that there was no sense that they could attract the necessary fifth vote from among the former *Heller* and *McDonald* majority. Either way, the Court's continued silence on the Second Amendment suggested that no theory of interpretation attracted a clear majority on the Court. Since a fractured opinion would potentially do more harm than good, to Second Amendment jurisprudence and to the Court's reputation, the Justices' silence might best be interpreted less as a "shameless refusal" to discuss the issue but as an exercise in necessary judicial restraint.

While the eight years between the ruling in *Heller* and the death of the majority opinion's author is not a particularly long time for the Court to remain away from the debate, its consistent refusal to hear another Second Amendment case in that period is at least notable. First, the Court itself agreed that *Heller* and then *McDonald* were only the start of the process of Second Amendment interpretation hinting, although not suggesting outright, that continued engagement with the issue in the near future was likely. The Court's subsequent silence stood in contrast to the hint of future action. Second, although there was no division between lower courts on fundamental principles of law, in practice differences in legal and legislative approaches across the country resulted in a patchwork of Second Amendment interpretation that looked very similar to something a circuit split might create. At the very least it suggested that *Heller* had been interpreted in different ways in different parts of the country. Third, Thomas and Scalia's 2015 dissents from denial of certiorari, combined with objections from gun right supporters including the NRA and the variety of actions taken on gun laws across the country, suggested that the legacy of *Heller* was, if not outright confusion, then at least deepening divides over the key issues it raised, issues which the Court was uniquely placed to address. That it chose to remain outside of the debate, despite conditions which suggested it might take action, is both important and one of the more surprising legacies of *Heller* and *McDonald*.

4. Conclusion

In 2007, the year before the Supreme Court agreed to hear *Heller*, Mark Tushnet argued that "the Constitution can't end the battle over guns."⁶⁷ The aftermath of *Heller* proved him right. No Court scholars would expect that a ruling from the Court in a culture wars case would end the debate over a given issue but the impact of *Heller* on Second Amendment debates was particularly surprising. Offering, on the surface, exactly what gun rights

advocates had campaigned for, *Heller* led to the limiting or undermining of key tenets of the gun control argument, whether as a result of the debates about the use of history by Scalia and Stevens or in *Heller*'s recognition that an individual right to bear arms for self-defence could be legitimately limited in a number of important ways. Such results were not only surprising but had significant implications for Second Amendment debates.

Of the Court's absence from the debate over the Second Amendment before *Heller*, Adam Winkler wrote: "the result was anything but a gradual move towards consensus. Instead, the Court's absence allowed the forces of unreason to command the field ... extremists were free to cast the Second Amendment in their own preferred terms ... Neither side felt the need to compromise because total victory was still possible."⁶⁸ Charles' observations of the rise of Second Amendment absolutism in the political realm suggested the Court's absence from the debate resulted in the same polarization post-*Heller* that Winkler identified in pre-*Heller* politics. The response to President Obama's January 2016 executive orders only reinforced Charles' conclusions. The result of *Heller* was not, as Winkler hoped, a more reasonable discussion about reducing gun violence in the US, but instead continued, and perhaps more extreme, polarization.⁶⁹ Those differences were increasingly reflected in the nation's patchwork of gun laws, only further emphasising differences between red and blue states or even, in the case of San Francisco and Highland Park, between red and blue towns and counties. In such a context, the vast majority of courts which upheld gun control laws using *Heller* as a foundation appeared to be, or could be portrayed as, making decisions based less on legal principles and more on political grounds clothed in the language of the law. Both only intensified the battle.

Meanwhile, the shifting politics and the controversy over *Heller*'s legal foundations appeared to be keeping the Court, arguably the only institution able to clarify the meaning of *Heller*, out of the debate. Despite the appeals by Thomas and Scalia in 2015, the Court's

majority remained unwilling to re-enter a debate for which it was partly responsible. The exact reasons for the Court's absence remain obscure, and are likely to remain so until the papers of the current Justices are made available to scholars, an event several decades in the future. But to those familiar with the Court, knowledge of its usual working practices provide some hints. The signs are that no theoretical or jurisprudential approach drew a majority of the Justices. The significant criticism of the approaches taken by Scalia and Stevens in *Heller*, the alternative offered by Breyer, and subsequent personnel change on the Court played a role in shifting the Justices' alliances. Nothing, from the Court's perspective, was to be gained by entering the debate without a clear majority for a particular approach. Equally, in the absence of a split between the lower courts, nothing compelled the Justices to become involved either.

At the time of writing (November 2016), the future direction of Second Amendment jurisprudence remains unclear. Donald Trump promised in his election campaign to appoint justices who supported Second Amendment rights; with the Senate under Republican control a successful nomination seems likely. But the impact that person might have on the Court's Second Amendment jurisprudence remains in the realms of speculation and is likely to do so for some time.⁷⁰ The unanimous *per curiam* opinion in *Caetano v. Massachusetts*, handed down by the Court a month after Scalia's death, indicated eight Justices were committed to *Heller* as precedent, but, as the experience of the lower courts indicates, *Heller* can mean different things to different people and could just as easily result in a broad or narrow reading of Second Amendment rights.⁷¹ *Caetano*, striking down a Massachusetts law banning possession of stun guns, provided little indication of future action by the Justices since the Supreme Judicial Court of Massachusetts so clearly employed a rationale rejected in *Heller*. While a greater attention to history in law may well be one of Scalia's greatest legacies, originalism remains a controversial judicial philosophy and one that does not appear to

command a majority on the Court, a situation unlikely to change as the result of the appointment of one additional Justice. Which approach does eventually draw together a new majority will be crucial for the future direction of the Second Amendment. As and when the Court does grant certiorari in a new gun rights case, whether prompted by a circuit split or by the emergence of a consensus within the Court, the ruling will be handed down in a situation that is arguably even more polarised as a result of the debate over *Heller*. Thus any decision is even less likely to end the battle over the Second Amendment.

That the debate over the meaning of the Second Amendment will change and develop over time is unquestioned, that the Court will eventually rejoin the debate assured, although whether that is sooner or later remains to be seen. But irrespective of the long term legacy of *Heller* and *McDonald*, the early responses to both mark a particular moment in the debate about the extent of gun rights and the scope of the Second Amendment in the United States in the early 21st Century, one which shows that the impact of a Court decision may not always be the one that is most expected.

Keywords: Second Amendment, Supreme Court, gun rights, gun control, originalism, *District of Columbia v. Heller*, *McDonald v. Chicago*, individual v. collective rights,

Names: Barack Obama, Antonin Scalia, John Paul Stevens, Samuel Alito, Stephen Breyer

Notes:

¹ See, for example, Michele Gorman, “Death of Justice Scalia Puts Supreme Court’s Stance on Guns into Question,” *Newsweek*, 15 February 2016 (<http://www.newsweek.com/justice-scalia-death-supreme-court-gun-stance-question-426564>, accessed 16 February 2016); Lois Beckett, “Antonin Scalia’s Death Calls Supreme Court Gun Rights Stance into Question,” *The Guardian*, 13 February 2016 (<http://www.theguardian.com/law/2016/feb/13/antonin-scalia-justice-dead-supreme-court-gun-rights>, accessed 1 March 2016).

² See Christopher Ingraham, “Shooting in Oregon: So Far in 2015 We’ve Had 274 Days and 294 Mass Shootings,” *Washington Post*, 1 October 2015 (<https://www.washingtonpost.com/news/wonk/wp/2015/10/01/2015-274-days-294-mass-shootings-hundreds-dead/>, accessed 3 October 2015); “1052 Mass Shootings in 1,066 Days: This is What America’s Gun Crisis Looks Like,” *The Guardian*, 3 December 2015 (<http://www.theguardian.com/us-news/ng-interactive/2015/oct/02/mass-shootings-america-gun-violence>, accessed 4 December 2015). The numbers are contested, however. See Mark Follman, “How Many Mass Shootings Are There, Really?” *New York Times*, 3 December 2015.

³ “Remarks by the President on Common-Sense Gun Safety Reform” (available at <https://www.whitehouse.gov/the-press-office/2016/01/05/remarks-president-common-sense-gun-safety-reform>, accessed 8 January 2016). “Obama Admits US Gun Laws Are His ‘Biggest Frustration’,” *BBC*, 24 July 2015 (<http://www.bbc.co.uk/news/world-us-canada-33646704>, accessed 10 August 2015).

⁴ Dan Roberts, David Smith, and Ben Jacobs, “Tearful Obama Tightens Gun Control and Tells Inactive Congress: ‘We Can’t Wait’,” *The Guardian*, 5 January 2016; Jennifer Hansler and Paola Chavez, “2016 Candidates React to Obama’s Gun Control Measures,” *ABC News*,

5 January 2016 (<http://abcnews.go.com/Politics/2016-candidates-react-obamas-gun-control-measures/story?id=36097217>, accessed 6 January 2016).

⁵ Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indiana: Bobbs-Merrill Company, Inc., 1962).

⁶ Conservatives were particularly concerned that the Justices had, or would, decide cases based on their personal political and policy preferences rather than strictly on the dictates of the law. For a good introduction to the role of personal policy preferences see Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002).

⁷ It has been argued that the concept of originalism dates back long before the end of the 20th Century: “[T]he first statute ever enacted within an English-speaking jurisdiction on the subject of statutory construction – dating from the 15th Century – forbade any approach other than originalism ... [Originalism is] an example of a ‘retronym,’ a word invented to account for an age-old thing when some new-fangled thing has emerged. Nobody referred to landlines until wireless technology came around; before that all telephone lines were landlines ... So it was with originalism: That was the only method that existed until the mid-20th century.” Bryan Garner, “A Tribute to Nino,” *ABA Journal* (April 2016): 26-8. It is clear, however, that in the 1970s conservatives began to more clearly articulate and expand upon earlier jurisprudential methods to create a distinctive methodology referred to as “original intent.”

The literature on originalism is extensive. For an introduction, see Raoul Berger, *Government By Judiciary: The Transformation of the Fourteenth Amendment* (London: Harvard University Press, 1977); Robert Bork, “Neutral Principles and Some First Amendment Problems,” *Indiana Law Journal* 47 (Fall 1971): 1-35; Edwin Meese III, “Toward a Jurisprudence of Original Intent,” *Harvard Journal of Law and Public Policy*

(Winter 1988): 5-12; Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57 (1989): 849-865; and *Fordham University Law Review* 65 (March 1997): 1247-1818 (Symposium: Fidelity in Constitutional Theory). For an overview of the debates, see Daniel Farber, "The Originalism Debate: A Guide For the Perplexed," *Ohio State Law Journal* 49 (1989): 1085-1106.

⁸ For a good discussion of how conservatives developed and used such an argument, see Reva Siegel, "Dead or Alive: Originalism as Popular Constitutionalism in *Heller*," *Harvard Law Review* 122 (November 2008): 191-245, especially 215-166.

⁹ See, for example, Randy Barnett, "An Originalism For Nonoriginalists," *Loyola Law Review* 45 (Winter 1999): 611-645; Richard Kay, "Original Intention and Public Meaning in Constitutional Interpretation," *Northwestern University Law Review* 103 (Spring 2009): 703-726, at 703-714; Keith Whittington, "The New Originalism," *Georgetown Journal of Law and Public Policy* 2 (Summer 2004): 599-613; and *Fordham University Law Review* 82 (November 2013): 371-826 (Symposium: The New Originalism in Constitutional Law).

¹⁰ The definition of "triumph" is the act or condition of being victorious; "victory" is defined as a success attained in a contest or struggle over an opponent, obstacle, or problem, or final and complete superiority in a war. I therefore take assertions of originalism's "triumph" in *Heller* to mean its successful challenge to other methods of interpretation and, in some cases, its ultimate defeat of those methods. This definition underpins the following discussion.

On the "triumph of originalism," see Randy Barnett, "News Flash: The Constitution Means What It Says," *Wall Street Journal*, 27 June 2008; National Rifle Association, "*Heller*: The Supreme Decision," 27 June 2008 (<https://www.nraila.org/articles/20080627/heller>, accessed 1 June 2015); Alan Gura, "*Heller* and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvey Wilkinson," *UCLA Law Review* 56 (June 2009): 1127-1169, at 1129. For those noting the

importance of originalism without hailing the decision, see Debra Cassens Weiss, “Second Amendment Ruling is Justice Scalia’s Originalism ‘Legacy,’” *ABA Journal*, 27 June 2008 (http://www.abajournal.com/mobile/article/second_amendment_ruling_is_justice_scalias_originalism_legacy, accessed 1 June 2015); J. Harvie Wilkinson, “Of Guns, Abortion, and the Unravelling Rule of Law,” *Virginia Law Review* 95 (April 2009): 253-323, at 256; Jeffrey Toobin, *The Oath: The Obama White House and the Supreme Court* (New York: Doubleday, 2012), 111-112; Mark Tushnet, *In The Balance: Law and Politics on the Roberts Court* (New York: W.W. Norton & Co., 2013), 149, 185.

However, see Reva Siegel, “Dead or Alive.” Siegel argues that far from embodying the history of the eighteenth century, the majority’s use of originalism in *Heller* “takes guidance from the lived experience and passionate convictions of Americans in times since the founding” (192). Specifically, she argues, the arguments made by the majority were far more deeply influenced by the political debates about gun control that developed after *Brown v. Board of Education* than by the history of the eighteenth century. In essence, Siegel argues that, consciously or unconsciously, the *Heller* majority was influenced in its reading of history by recent or contemporary politics, a claim most historians would recognise as familiar in historical study. Without denying the validity of Siegel’s convincing argument, my interest here is not specifically in the history put forward in *Heller*’s various opinions, but in the debate sparked by that use of history and the consequences of that debate for originalism as a methodology.

¹¹ *District of Columbia v. Heller* 554 US 570, 576 (2008).

¹² *District of Columbia v. Heller* 554 US 570, 592 (2008).

¹³ *District of Columbia v. Heller* 554 US 570, 599 (2008). On collective rights, see the argument at n.29 and accompanying text.

¹⁴ *District of Columbia v. Heller* 554 US 570, 605 (2008).

¹⁵ *District of Columbia v. Heller* 554 US 570, 636-7 (2008) (Justice Stevens, dissenting).

¹⁶ *District of Columbia v. Heller* 554 US 570, 662 (2008) (Justice Stevens, dissenting).

¹⁷ *District of Columbia v. Heller* 554 US 570, 652 (2008) (Justice Stevens, dissenting).

¹⁸ As Mark Tushnet observed: “*Heller* was a test for conservative originalists’ claim that modern originalism’s exclusive focus on historical materials would keep judges from advancing their policy views while pretending to interpret the Constitution. Originalism didn’t quite fail the test, but it got a grade of C+ or so – pretty much the grade you’d give every other method of constitutional interpretation.” Mark Tushnet, *In The Balance: Law and Politics on the Roberts Court* (New York: W.W. Norton & Co., 2013), 168.

¹⁹ Most studies address more than one of these subjects. See, for example, Robert Churchill, “Gun Regulation, the Police Power and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment,” *Law and History Review* 25 (Spring 2007): 139-185; Saul Cornell, “*Heller*, New Originalism, and Law Office History: ‘Meet the New Boss, Same as the Old Boss’,” *UCLA Law Review* 56 (June 2009): 1095-1125; Saul Cornell, “Originalism on Trial: The Use and Abuse of History in *District of Columbia v. Heller*,” *Ohio State Law Journal* 69 (2008): 625-640; Dennis Henigan, “The *Heller* Paradox,” *UCLA Law Review* 59 (June 2009): 1171-1210; David Konig, “Arms and the Man: What Did the Right to ‘Keep’ Arms Mean in the Early Republic?” *Law and History Review* 25 (Spring 2007): 177-185; Joyce Lee Malcolm, “The Supreme Court and the Uses of History: *District of Columbia v. Heller*,” *UCLA Law Review* 56 (June 2009): 1377-1398; Robert Shalhope, “The Ideological Origins of the Second Amendment,” *Journal of American History* 69 (December 1982): 599-614. For a direct comparison of the sources used by Scalia and Stevens see Wilkinson, “Of Guns,” 267-272.

²⁰ Cornell, “New Originalism,” 1098. See, for example, Carl T. Bogus, “The History and Politics of Second Amendment Scholarship: A Primer,” *Chicago-Kent Law Review* 76

(2000): 3-25; Cornell, “New Originalism,” 1098; Henigan, “The *Heller* Paradox,”; Gura, “Originalist Judicial Engagement,” 1129; Don Kates, “A Modern Historiography of the Second Amendment,” *UCLA Law Review* 56 (June 2009): 1211-1232, at 1226-7; Sanford Levinson, “Some Preliminary Reflections on *Heller*,” *Balkanization*, 26 June 2008 (<http://balkin.blogspot.co.uk/2008/06/some-preliminary-reflections-on-heller.html>, accessed 30 June 2008); Jack Rakove, “Thoughts on *Heller* From a ‘Real Historian’,” *Balkanization*, 27 June 2008 (<http://balkin.blogspot.co.uk/search?q=rakove+heller>, accessed 30 June 2008); Mark Tushnet, “More on *Heller*,” *Balkanization*, 27 June 2008 (<http://balkin.blogspot.co.uk/2008/06/more-on-heller.html>, accessed 30 June 2008); Mark Tushnet, “*Heller* and the New Originalism,” *Ohio State Law Journal* 69 (2008): 609-624, at 610.

²¹ Richard Posner, “In Defense of Looseness: The Supreme Court and Gun Control,” *New Republic*, 27 August 2008.

²² Nelson Lund, “Civil Rights: The *Heller* Case – Minutes From a Convention of the Federalist Society,” *New York University Journal of Law and Liberty* 4 (2009): 293-329. See also, Adam Winkler, *Gun Fight: The Battle Over the Right to Bear Arms in America* (New York: W.W. Norton & Co., 2011), 281-288.

²³ Wilkinson, “Of Guns,” 254.

²⁴ Wilkinson, “Of Guns,” 257.

²⁵ Justice Scalia quoted in Marcia Coyle, *The Roberts Court: The Struggle for the Constitution* (New York: Simon & Schuster, 2013), 163.

²⁶ Coyle, *The Roberts Court*, 192.

²⁷ Sanford Levinson, “The Embarrassing Second Amendment,” *Yale Law Journal* 99 (1980): 637-659.

²⁸ Glenn Harlan Reynolds, "A Critical Guide to the Second Amendment," *Tennessee Law Review* 62 (Spring 1995): 461-512, at 463; Nelson Lund, "Book Review: Outsider Voices on Guns and the Constitution," *Constitutional Commentary* 17 (Winter 2000): 701-720, at 708. A small sample of the enormous literature espousing the individual rights position includes Stephen Halbrook, "What the Framers Intended: A Linguistic Analysis of the Right to 'Bear Arms'," *Law and Contemporary Problems* 49 (Winter 1986): 161-162; Don Kates Jr., "The Second Amendment and the Ideology of Self-Protection," *Constitutional Commentary* 9 (Winter 1992): 87-104; Malcolm, "The Supreme Court and the Uses of History." For a good analysis of the reasons for the rise of the individualist view from someone critical of it, see Robert Spitzer, "Lost and Found: Researching the Second Amendment," *Chicago-Kent Law Review* 76 (2000): 349-401.

²⁹ See, for example, Carl Bogus, "The Hidden History of the Second Amendment," *UC Davis Law Review* (Winter 1998): 309-408; Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (Oxford: Oxford University Press, 2008); H. Richard Uviller and William Merkel, *The Militia and the Right to Bear Arms Or, How the Second Amendment Fell Silent* (London: Duke University Press, 2002); and *Chicago-Kent Law Review* 76 (2000): 3-600 (Symposium: The Second Amendment: Fresh Looks).

³⁰ See quote at n.12.

³¹ Mary Lu Carnevale, "Gun Ruling Lets Both Sides Claim Victory," *Wall Street Journal*, 26 June 2008.

³² Dan Balz and Keith Richburg, "Historical Decision Renews Old Debate," *Washington Post*, 27 June 2008.

³³ Patrick Charles, "The Second Amendment in the Twenty-First Century: What Hath Heller Wrought?" *William and Mary Bill of Rights Journal* 23 (May 2015): 1143-1183, at 1179. For an alternative view see Joseph Blocher, "Gun Rights Talk," *Boston University Law*

Review 94 (May 2014): 813- 833, especially 820-828 (arguing that absolutism is deeply rooted in the American debate about guns).

³⁴ See, for example, the 2012 Republican National Platform (http://www.presidency.ucsb.edu/papers_pdf/101961.pdf, at 13); Charles, “What Hath Heller Wrought?,” 1153-65, 1148.

³⁵ *District of Columbia v. Heller* 554 US 570, 626-627 (2008).

³⁶ Freedom of speech is one example. As Justice Oliver Wendell Holmes wrote in a frequently misquoted 1919 majority opinion: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” *Schenck v. US* 249 US 47, 52 (1919). Individuals and groups may be restricted to airing their views at certain times of the day, in certain designated spaces, and certain modes of expression might be prevented (so-called “time, place, manner restrictions”) in order to protect public convenience, order, and safety.

³⁷ In 2013, Mark Tushnet confidently claimed that the list of exceptions was included to secure the vote of Justice Anthony Kennedy. Although plausible, Tushnet provides no definitive evidence for this. Tushnet, *In The Balance*, 182.

³⁸ Winkler, “*Heller*’s Catch-22,” 1565. See generally Reva Siegel “*Heller* and Originalism’s Dead Hand – In Theory and Practice,” *UCLA Law Review* 56 (June 2009): 1399-1424.

³⁹ Henigan, “The *Heller* Paradox,” 1196; Wilkinson, “Of Guns,” 273, 281.

⁴⁰ The literature on the Court and public opinion is voluminous. As a starting point see Christopher Casillas, Peter Enns, and Patrick Wohlfarth, “How Public Opinion Constrains the US Supreme Court,” *American Journal of Political Science* 55 (January 2011): 74-88; Lee Epstein and Andrew Martin, “Does Public Opinion Influence the Supreme Court? Possibly Yes (But We’re Not Sure Why),” *University of Pennsylvania Journal of Constitutional Law* 13 (December 2010): 263-281; Kevin McGuire and James Stimson, “The Least Dangerous

Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences,” *The Journal of Politics* 66 (November 2004): 1018-1035; William Rehnquist, “Constitutional Law and Public Opinion,” *Suffolk University Law Review* 20 (Winter 1986): 751-769.

⁴¹ Jeffrey Jones, “Americans in Agreement With Supreme Court on Gun Rights,” *Gallup*, 26 June 2008 (<http://www.gallup.com/poll/108394/Americans-Agreement-Supreme-Court-Gun-Rights.aspx>, accessed 3 June 2015); “Washington Post Poll: Most Americans Say Amendment Covers Individuals and Militias,” *Washington Post*, 16 March 2008 (<http://www.washingtonpost.com/wp-dyn/content/graphic/2008/03/16/GR2008031600072.html>, accessed 3 June 2015); Pew Research Center, “Public Continues to Oppose Banning Handgun Sales,” 14 May 2008 (<http://www.people-press.org/files/legacy-pdf/419.pdf>, accessed 3 June 2015); Siegel, “Dead or Alive,” 241-2.

⁴² Law Center to Prevent Gun Violence, “Post-*Heller* Litigation Summary: 31 March 2015,” 1 (<http://smartgunlaws.org/post-heller-litigation-summary/>, accessed 3 June 2015).

⁴³ See Adam Winkler, “*Heller*’s Catch-22,” *UCLA Law Review* 56 (June 2009): 1551-1577, at 1565-6; Allen Rostron, “Justice Breyer’s Triumph in the Third Battle Over the Second Amendment,” *George Washington Law Review* 80 (April 2012): 703-763, at 1725-56; Law Center to Prevent Gun Violence, “Post-*Heller* Litigation Summary: 31 March 2015”.

⁴⁴ See, for example, *Moore v. Madigan* 702 F.3d 533 (7th Cir. 2012), *Peruta v. San Diego County* 742 F.3d 1144 (9th Cir. 2014), and *Tyler v. Hillsdale County Sheriff’s Department* 775 F.3d 308 (6th Cir. 2014).

⁴⁵ Winkler, “*Heller*’s Catch-22,” 1564; Henigan, “The *Heller* Paradox,” 1199.

⁴⁶ *NRA v. Bureau of Alcohol, Tobacco, and Firearms*, docket no. 13-137, Petition for Writ of Certiorari, 1 (<http://sblog.s3.amazonaws.com/wp-content/uploads/2013/08/NRA-petition-13-137.pdf>, accessed 1 May 2015). In their brief to the Court the following year in *Jackson v. City and County of San Francisco*, the NRA again accused lower courts of “continued

resistance to *Heller* and *McDonald*.” *Jackson v. City and County of San Francisco*, docket no.14-704, Petition for Writ of Certiorari, 18 (<http://sblog.s3.amazonaws.com/wp-content/uploads/2015/04/2014-12-12-NRA-Jackson-Cert-Petition-FINAL-1.pdf>, accessed 1 May 2015).

⁴⁷ Linda Greenhouse, “‘Weighing Needs and Burdens:’ Justice Breyer’s *Heller* Dissent,” *Syracuse Law Review* 59 (2008): 299-308, at 299.

⁴⁸ *District of Columbia v. Heller*, 554 US 570, 689 (2008) (Justice Breyer, dissenting).

⁴⁹ *District of Columbia v. Heller* 554 US 570, 703 (2008) (Justice Breyer, dissenting).

⁵⁰ *Friedman v. City of Highland Park*, docket no. 15-133, Brief of Respondent in Opposition to Petition for Writ of Certiorari, 5-7 (<http://www.scotusblog.com/wp-content/uploads/2015/10/150807-for-filing.pdf>, accessed 4 January 2016).

⁵¹ Ordinance 68-13, An Ordinance Amending Chapter 134 of “The Highland Park Code of 1968,” As Amended, Regarding Assault Weapons (<https://www.ispfsb.com/Public/Firearms/Ordinances%5Chighlandpark.pdf>, accessed 4 January 2016).

⁵² Charles, “What Hath Heller Wrought?,” 1175, 1152.

⁵³ Eric Bradner, “GOP 2016 Candidates Bash Obama’s Gun Control Push,” *CNN*, 6 January 2016 (<http://edition.cnn.com/2016/01/05/politics/obama-gun-control-republican-reaction/>, accessed 6 January 2016); “US Republicans Attack Obama Gun Control Moves,” *BBC*, 6 January 2016 (<http://www.bbc.co.uk/news/world-us-canada-35239504>, accessed 6 January 2016); Rachel Van Dongen, “Republicans Take to Social Media to Bash Obama’s Gun Control Announcement,” *Washington Post*, 5 January 2016 (<https://www.washingtonpost.com/news/powerpost/wp/2016/01/05/republicans-take-to-social-media-to-bash-obamas-gun-control-announcement/>, accessed 6 January 2016).

⁵⁴ See Law Center to Prevent Gun Violence (<http://smartgunlaws.org/category/gun-laws-policies/new-gun-legislation/>, accessed 3 June 2015).

⁵⁵ This is not to say that Breyer would necessarily support those laws, only that under the reasoning he offered in *Heller* the states' reasoning would demand significant deference.

⁵⁶ *District of Columbia v. Heller* 554 US 570, 680 n.39 (Justice Stevens, dissenting).

⁵⁷ Levinson, "The Embarrassing Second Amendment," 654.

⁵⁸ See, for example, Lyle Dennison, "So, What's Next on Guns?", *SCOTUSBlog*, 26 June 2008 (<http://www.scotusblog.com/2008/06/commentary-so-whats-next-on-guns/>, accessed 17 May 2015); Nina Totenberg, "Supreme Court Strikes Down DC Handgun Ban," *NPR*, 26 June 2008 (<http://www.npr.org/templates/story/story.php?storyId=91934910>, accessed 1 May 2015); Balz and Richburg, "Historical Decision Renews Old Debate"; *SCOTUSBlog* online *Heller* symposium, June 2008 (<http://www.scotusblog.com/case-files/cases/dc-v-heller/>).

⁵⁹ For example, in January 2015 the Court granted certiorari in four same-sex marriage cases having turned down similar appeals in other cases less than three months earlier. In the interim, the Sixth Circuit had ruled, in November 2014, that a ban on same-sex marriage did not violate the Constitution, creating a split with other Circuit Courts which had held such bans did violate the Constitution. It seems likely that the Court accepted the later cases, which became *Obergefell v. Hodges*, as a result of the split that emerged as a result of the Sixth Circuit's ruling.

⁶⁰ See cases discussed at n.42-44.

⁶¹ Richard Re, "Is *Heller* Being Narrowed From Below?" *PrawfsBlawg*, 14 June 2015 (<http://prawfsblawg.blogs.com/prawfsblawg/2015/06/is-heller-being-narrowed-from-below.html>, accessed 23 June 2015).

⁶² The classic expression of this can be found in *New Ice Co. v. Liebmann* 282 US 262, 311 (1932) (Justice Brandeis, dissenting): "It is one of the happy incidents of the federal system

that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” Brandeis, however, went on to note that the Court had the right to limit such experimentation under the Due Process Clause of the Fourteenth Amendment.

⁶³ *Jackson v. City and County of San Francisco* 576 US __ (2015), docket no. 14-704 (Justice Thomas dissenting from denial of certiorari), 2, 3.

⁶⁴ There are differences between the laws at issue in *Heller* and those in *Jackson*. Most notably, DC barred the ownership of handguns while San Francisco did not and DC required guns to be disassembled or bound by a trigger lock whereas San Francisco only required that the guns be kept in a locked container if not being worn.

⁶⁵ *Friedman v. City of Highland Park, Illinois* 577 US __ (2015), docket no. 15-133 (Justice Thomas dissenting from denial of certiorari), 1, 4, 6.

⁶⁶ See n.26 and related text.

⁶⁷ Mark Tushnet, *Out of Range: Why The Constitution Can't End the Battle Over Guns* (Oxford: Oxford University Press, 2007).

⁶⁸ Winkler, *Gun Fight*, 294.

⁶⁹ Winkler, *Gun Fight*, 295.

⁷⁰ For early speculation from different political perspectives, see Alan Gura, “The Next “Conservative” Justice May Not Save the Second Amendment,” *SCOTUSBlog*, 6 September 2016 (<http://www.scotusblog.com/2016/09/the-court-after-scalia-the-next-conservative-justice-may-not-save-the-second-amendment/>, accessed 12 September 2016) and Adam Winkler, “Would a Liberal Supreme Court Overturn *Heller*?” *SCOTUSBlog*, 6 September 2016 (<http://www.scotusblog.com/2016/09/the-court-after-scalia-would-a-liberal-supreme-court-overturn-heller/>, accessed 12 September 2016).

⁷¹ *Caetano v. Massachusetts* 577 US __ (2016), docket no. 14-10078.

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