

**To endure for all time or to change with the times? The Supreme Court  
and the Second Amendment**

**Abstract**

In *District of Columbia v. Heller* (2008), the US Supreme Court ruled for the first time that the Second Amendment protects an individual right to bear arms. Gun rights supporters and conservative legal scholars hailed the decision as a triumph of originalism, the legal methodology which emphasises the importance of founding era history to constitutional interpretation. This article argues that, far from a triumph, *Heller* exposed the weaknesses of originalism in Second Amendment interpretation. The subsequent historical debate, inconsistencies within *Heller* itself, and the alternative approach offered in dissent by Justice Breyer combined to undermine claims that originalism triumphed in *Heller*.

## **Introduction**

In June 2008, the US Supreme Court handed down its decision in *District of Columbia v. Heller*, ruling for the first time that the Second Amendment to the US Constitution guaranteed an individual right to bear arms for the purposes of self-defence. Gun rights activists responded with joy that a majority of the Justices had endorsed a reading of the Amendment that they had advocated for nearly three decades. Gun control supporters expressed disappointment at the Court's ruling, which struck down what were the strictest gun laws in the nation, but also argued that *Heller* offered support for their position too. In fact, both leading presidential candidates, John McCain and Barack Obama, publicly offered their support for *Heller* (Balz and Richburg, 2008). How could both sides in the seemingly Manichaeian debate between greater gun rights and greater gun control claim support from the same ruling? Because, in reality, *Heller* offered something to both sides. While finding the Amendment protected an individual right to own firearms separate from militia participation, the Court also clearly stated that right was not unlimited and offered what one commentator called a "laundry list" of regulations on gun ownership and use that remained acceptable under the Second Amendment (Winkler, 2009: 1564). Thus in answering one question (the scope of the right protected by the Amendment), the Court's ruling in *Heller* offered up an array of others (exactly what regulations were permitted), guaranteeing continued debate about guns in American society that ensured the Second Amendment would remain relevant well into the 21<sup>st</sup> Century.

*Heller* also presented, in stark terms, a clash between two competing theories of constitutional interpretation: originalism versus living constitutionalism. Justice Antonin Scalia, who wrote for the five Justice majority in *Heller*, described the ruling as the greatest "vindication of originalism" (Coyle, 2013: 163). Emerging initially as a means by which

conservatives could criticise the liberal, individual-rights rulings of the Warren Court, originalists argued that the meaning of the Constitution should be found by seeking the “intent” of those who created it. Objecting to what they saw as activist judges ignoring the words and meaning of the Constitution in favour of writing their own personal policy preferences into law, advocates offered originalism as a method of restraining the judiciary and “returning” the Constitution to the meaning intended by the Founding Fathers. Scholarly criticism of the methods of original intent led to the development of what has come to be known as “original public meaning,” the version of originalism found in *Heller*. The approach places 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 eighteenth century Americans. Judges remain constrained by the historical meaning of the constitutional provision, but without the methodological difficulties that inhered in original intent.

Originalism is offered as an alternative to what is commonly referred to as “living constitutionalism.” A broad umbrella term which encompasses many differing methodologies, advocates generally adhere to Chief Justice John Marshall’s 1819 statement in *McCulloch v. Maryland* that the Constitution was “intended to endure for ages to come and, consequently, to be adapted to the various crises of human affairs” (407). To remain relevant, advocates assert, the words and phrases of the Constitution must be understood in their contemporary, not their historical, context. Guided by history, precedent, legislative action, scholarly works, and public opinion, living constitutionalism, advocates assert, is a framework for ensuring a document created more than two centuries ago does not become obsolete through irrelevance: a strong Constitution must change with the times. In *Heller*, the two jurisprudential theories competed for acceptance among the Justices.

Despite the complexity of the ruling, *Heller* has been hailed, particularly by conservatives, as a triumph of originalism.<sup>1</sup> Such claims appear based in large part on the fact that both Justice Antonin Scalia for the majority and Justice John Paul Stevens for the dissenters made extensive use of history and historical sources to build a case for their respective readings of the Second Amendment. That oral argument was dominated by discussions of the late eighteenth century, that Scalia, the long-time advocate of originalism on the Court, wrote the majority opinion, and that Stevens, not usually considered an originalist, responded on originalist grounds all supported the claim of originalism's success. But, in fact, *Heller* was not a triumph of Second Amendment originalism, nor even close to a triumph. It cannot be for three reasons that this chapter will explore. First, the history and historical methods of both the majority and the dissent have been subject to extensive criticism from historians and legal scholars alike. Second, the majority was inconsistent in its application of history to gun control laws, suggesting at the very least that original public meaning cannot answer every question raised by a Second Amendment challenge. And third, the largely overlooked dissent filed by Justice Stephen Breyer indicated that at least one alternative jurisprudential philosophy can effectively stand against the originalist approach.

### ***Heller* and History**

Original public meaning relies heavily on history and historical discussion dominated Scalia and Stevens' opinions in *Heller*. But historians and legal scholars have not been reticent in criticising the history employed by both the majority and the dissent. Stevens' historical readings have been variously described as "historically false or patently nonsensical," "nonsense on stilts," "pseudointellectual gibberish," (Kates, 2009: 1226-7) "idiosyncratic," "stingy [and] irrelevant," (Malcolm, 2009: 1383, 1385) and "fantastical academic constructs" (Gura, 2009: 1129). Alternatively, Scalia's history has been categorised as a "magician's

parlor trick,” (Cornell, 2008: 626) “historical ventriloquism,” (Cornell, 2011: 301) “methodologically irregular,” (Siegel, 2009: 1416) full of “logical flaws and inconsistencies,” (Winkler, 2008: 1551) as presenting a “Salvador Dali-like historical landscape,” (Cornell, 2013: 740) and like “Bach played on a kazoo” (Cornell, 2008: 632). Away from the colourful criticisms, however, a veritable cottage industry of Second Amendment scholarship with a historical focus has developed, sometimes to further illuminate our understanding of the issue of gun ownership and regulation in the early Republic, sometimes to praise or criticise a particular historical interpretation. Scholars themselves cannot seem to agree on whose interpretation has the most support. Don Kates (2009: 1231), one of the lawyers involved in the *Heller* litigation, argued in 2009 that “the overwhelming conclusion of legal and historical writers is that the Second Amendment preserves the right of all responsible, law-abiding adults to be armed for the defense of themselves, their homes and their families.” Legal scholar Cass Sunstein (2008: 255) noted, however, that “many historians have concluded and even insisted that the Second Amendment did not create an individual right to use guns for non-military purposes.”<sup>2</sup>

Little of the relevant history remains without discussion in some form, but for those not steeped in the history of the early American nation, the literature is both overwhelming and seemingly inconclusive. Scholarly studies have followed the template established by Scalia and Stevens in *Heller* and sought the “proper” meaning of key Second Amendment phrases “the people,” “arms,” and “keep and bear arms,” providing contradictory readings while criticising the historical understanding of those with whom they disagree. Others have fundamentally disagreed, as did Scalia and Stevens, about the proper role and understanding of preambles generally and the Second Amendment’s prefatory clause (“A well regulated militia, being necessary to the security of a free State ...”) in particular in the context of 18<sup>th</sup>

Century legal interpretation. In addition, a variety of different readings have been offered of the meaning and relevance of 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 19<sup>th</sup> Century sources in understanding the meaning of the Second Amendment.<sup>3</sup> And yet there are no clear or obvious conclusions to be drawn from this voluminous history, except perhaps for Richard Schragger's 2008 observation that "the meaning of the Second Amendment is complicated," (283) which, while accurate, provides little guidance in navigating through the proffered alternative readings. What this complexity does offer, however, is a major challenge to those who claim *Heller* was a triumph of originalism. If history is to play a major role in interpreting constitutional provisions, the debate among the Justices and within subsequent scholarship suggests the question of *which* history has yet to be discovered or decided.

A second major challenge to originalism, offered primarily by historians, is that the history employed by originalists does not meet the rigorous methodological requirements of professional history but is instead "law office history".<sup>4</sup> Such history has been defined as "a results oriented methodology in which evidence is selectively gathered and interpreted to produce a preordained conclusion" (Cornell, 2009: 1098). "There is a marked difference," Sunstein (2008: 256) wrote, "between the care, sensitivity to context, and relative neutrality generally shown by historians and the advocacy-oriented, conclusion-driven, and often tendentious treatments characteristic of academic lawyers ...." Criticisms of history used by lawyers and legal scholars as ideologically motivated or selectively chosen are not new, nor are they limited to any particular constitutional provision. They have, however, been

prevalent in Second Amendment scholarship.<sup>5</sup> In 2008, Professor Joyce Lee Malcolm praised Scalia's "carefully reasoned and scholarly opinion," which "painstakingly assessed both favorable and unfavorable historical evidence," while criticising Stevens for "disregard[ing] inconvenient facts and employ[ing] linguistic devices that distort the plain meaning of the original text" (1378). Saul Cornell has been arguably the most prolific and frequent critic of the *Heller* majority, and originalists generally, for their reading of early American history.<sup>6</sup> Criticising one group or another for participating in law office history has similarities to claiming that those same individuals are misreading history: it seeks to delegitimize the conclusions reached. In the latter, it does so by claiming those conclusions are wrong, in the former by holding that the methods employed are not sound. That the criticisms are aimed at all sides in the debates fundamentally weakens any claim for the "triumph" of originalism in *Heller*. If the history offered by lawyers and employed by the Justices in their opinions is all equally tainted by claims of results-orientation then the biggest loser of all is the methodology that encourages and draws on that history.

One need not be an expert in early American history, however, to see the problems inherent in originalism: the opinions in *Heller* exposed them clearly. Absent the restraint of significant precedent, the Justices were able to write on "as near a clean slate as modern constitutional law presents," (Greenhouse, 2008: 307) which only made more stark the limitations of originalism, at least on its own terms. The biggest problem, so clear to historians, is that *the* original meaning sought by originalists does not and cannot exist. While it is possible to criticise the methodology and readings of the history employed by Scalia and Stevens in their respective opinions, their clash of views revealed the fundamental problem of originalism, one which most historians would recognise: even using similar sources and methodologies, individuals can quite reasonably come to different conclusions

Emma Long

about the events portrayed in those sources. When those individuals start using different sources and employing methodologies which weight those sources differently then the possibility of different outcomes increases exponentially. Thus Scalia and Stevens might both be equally correct in their readings, just as they might be equally wrong, but both are *reasonable* understandings of the history revealed in their sources.

This is because history at its best is a work of interpretation. Historians, unlike law office historians, generally do not pick and choose their sources according to their preferred outcomes nor do they deliberately seek to reinforce a political agenda with the history they write. But historians do bring their own beliefs, experiences, opinions, and personalities to what they do, and with those things come choices, about which sources to trust, which are more or less reliable, which are more historically significant, which were more influential or representative. And such choices entail judgment, the very thing originalism claims to expunge from the process of judging. Scalia and Stevens' differing histories can be accounted for by differences in judgment just as much as strengths and weaknesses in their history. As Mark Tushnet (2013: 168) 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." The fact that Scalia and Stevens, ostensibly both taking an originalist approach, could ultimately come to different conclusions about the meaning of the Second Amendment was the simplest, clearest sign of the most significant weakness in originalism's methodology: historical scholarship requires judgment and, because of that, there is no "correct" or "true" history to be found. To the extent that originalists seek *the* historical meaning of constitutional provisions in a way that

prevents or limits judicial judgment, therefore, they seek something nonexistent. The danger then becomes that originalism presents itself as a neutral method of judicial interpretation while it is, in reality, a “theory no less subject to judicial subjectivity and endless argumentation than any other” (Wilkinson, 2009: 256).

### **Inconsistency and the Majority**

Originalists and non-originalists alike have offered a further critique of the originalism employed by Scalia for the majority: that it was inconsistent in addressing questions of possible limits to the Second Amendment right. “Like most rights,” Scalia stated in *Heller*, “the right secured by the Second Amendment is not unlimited.” Throughout the 19<sup>th</sup> Century, Scalia noted, courts and commentators recognised that “the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose” (626). Yet, as noted by Justice Breyer in dissent and by many commentators since, the majority offered no historical support for these exemptions.<sup>7</sup> After more than fifty pages of historical discussion of the meaning of the Second Amendment the lack of any such discussion on this point was notable and Scalia’s defence, that in the first case considering such a major issue not all possible areas of controversy could be discussed in detail, failed to address the inconsistency. The founding era offered many examples of gun regulations that the majority could have referenced. Scalia’s opinion dismissed those offered by Breyer as of minimal relevance but, those aside, the scholarly literature offered additional examples that the majority might have used as colonial era analogues of the modern gun control laws they found acceptable.<sup>8</sup> At the very least, the principle of regulations on gun ownership had been established. From an originalist perspective, however, such examples were problematic in that none offered direct equivalents to those listed in the majority opinion; making connections and finding equivalencies would require a degree of interpretation and judgment

that originalists decry. But providing no historical evidence for those limits accepted by the majority also contradicted an originalist approach and created an anomaly within the *Heller* majority opinion.

A second area of controversy has been the inconsistent treatment of handguns in the majority opinion. Reading the Court's own 1939 precedent, *US v. Miller*, as permitting restrictions on certain *types* of weapons, the *Heller* majority accepted that such a limitation "is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons." Thus, the weapons protected by the Second Amendment were those "in common use at the time" (627). Yet in discussing the specifics of the District's law later in the opinion, the majority noted, "handguns are the most popular weapons chosen by Americans for self-defense in the home" (629). The majority's language, the context of the discussion, and the lack of any historical references in this section combined to give the impression that this was a judgment based not on colonial era self-defence but on 21<sup>st</sup> Century choices. As Adam Winkler (2009: 1560) commented, "Scalia looks to the fickle dynamics of contemporary consumer choices. Handguns are protected because people today choose handguns for protection." In an opinion so self-consciously originalist, which criticised both dissents for poor history and a lack of proper historical grounding, the majority's apparent reliance upon current public opinion rather than historical understanding was jarring. The decision to follow, if not to actually make, a policy choice about the types of weapons protected under the Second Amendment potentially implied that the entire historical reading offered earlier in the opinion was equally influenced by policy choices. The lack of historical evidence and the apparent influence of contemporary decisions by ordinary Americans combined to offer a challenge to the majority's claimed originalism from within the opinion itself.

The majority's defence of gun regulations can be explained by a number of factors, all of which speak to the general working of the Court. First, remembering Justice William Brennan's "rule of five," it is possible that the language was inserted to gain or keep the five-Justice majority.<sup>9</sup> While Justices Scalia and Clarence Thomas had been consistent advocates for an originalist perspective, Chief Justice John Roberts and Justices Samuel Alito and Anthony Kennedy often looked to other sources and may not have been entirely convinced by an entirely originalist argument.<sup>10</sup> Second, the comments can be read as a response to the dissenters' concerns about the potential dangers of an unlimited right to gun ownership (Henigan, 2009: 1196; Wilkinson, 2009: 273, 281). 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 the limits to the scope of their holding. Third, the majority's discussion of handguns in particular spoke to the importance of *stare decisis* in light of the reference to *Miller*. Scalia (1989) had previously stated that he believed precedent might offer an acceptable exception to an originalist reading of a constitutional provision. Recognising that certain types of weapons may be eligible for regulation (and by implication, others may not) fitted with Scalia's own judicial philosophy. 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.<sup>11</sup> Studies suggest that most Americans support both an individual right to own guns for self-defence and reasonable gun regulations (Jones, 2008; Pew Research Center, 2008; *Washington Post*, 2008); thus a ruling challenging either of these might lead to a public backlash against the Court. 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. Or, in the words of one commentator, “the originalists on the Court had to sell their originalist souls to survive” (Winkler, 2009: 1565).

To Court scholars all of these explanations for the apparent contradiction between the self-confessed originalism of the majority’s approach and the acceptance of certain kinds of limits on gun ownership are reasonable; each speaks to an accepted understanding of the way in which the Court operates. In the context of *Heller*, however, the fact is that all of them undermine any claim to a “triumph of originalism.” Concessions to keep a majority, to maintain public support, to address or limit criticisms from dissenters, or to recognise the importance of *stare decisis* or other jurisprudential considerations, ensured the majority won the battle to define the overarching right embodied in the Second Amendment, but none of them rested on an historical interpretation of the original public meaning of the scope of the Second Amendment. Thus while *Heller* offered a showcase of what originalism could achieve, it also revealed clearly its limitations.

### **Justice Breyer and the Living Constitution**

Nothing shows how dominant has been the view that the importance of *Heller* lay in its originalism than the almost complete absence of any significant discussion of Justice Breyer’s dissent. Linda Greenhouse, former Supreme Court correspondent for the *New York Times*, noted this absence in 2009, offering her own interpretation of Breyer’s opinion as a “*mea culpa*” for giving “short shrift” to the opinion in her initial coverage for the *Times* (Greenhouse, 2008: 300). Yet discussion of Breyer’s dissent remains curiously absent from

the debate about *Heller*, drowned out by “the titanic clash of the competing historical visions” offered by Scalia and Stevens (Greenhouse, 2008: 299). The reasons for this are unclear. Breyer’s opinion, at forty-four pages, was only marginally shorter than Stevens’ dissent (forty-six pages) and was certainly no less detailed or effectively argued. It directly addressed and criticised the majority’s approach and offered alternative readings of key state provisions in terms of early American gun control legislation, criticisms to which Scalia responded. In addition, Breyer was seen as Scalia’s most frequent sparring partner on and off the Court in regards to methods of constitutional interpretation. The battle between the two was noted and commentated upon, making it all the stranger that its continuation in the pages of *Heller* has been so under-explored (Lithwick, 2006; Young, 2010; Seabrook, 2011).

One hint comes in Jeffrey Toobin’s 2012 study of the Roberts Court. Writing about *Heller*, he commented, “It was left to Breyer to write the kind of dissent that the justices used to produce” (112). From this perspective, the dominance of originalism in the majority opinion in particular was unusual and noteworthy, the first time the Court had so clearly and heavily made use of history to interpret a major provision of the Constitution; by contrast, Breyer’s approach represented something older, something more familiar, and therefore less striking. It is certainly true that Breyer’s jurisprudence was a version of living constitutionalism. The general failure to address Breyer’s *Heller* dissent may, therefore, be a simple case that familiarity breeds contempt. But this significantly underestimates the importance of Breyer’s particular approach to living constitutionalism and its role in *Heller*. In his dissent, Breyer offered a clear, compelling alternative way of understanding the Court’s role in interpreting the Second Amendment and a critique of some of originalism’s weaknesses, while also showing that living constitutionalism had not disappeared from the Court’s jurisprudential toolbox, no matter how much commentators would like to concentrate on originalism.

Like Scalia, Breyer began his opinion with history. His understanding, however, differed from that of the majority. Colonial history, he wrote, “offers important examples of the kinds of gun regulation that citizens would then have thought compatible with the ‘right to keep and bear arms’” (683). Boston, Philadelphia, and New York, Breyer noted, all had laws restricting the discharge of firearms within the city limits; in effect, laws governing the use of guns in urban areas. This would become crucial later in his opinion. In addition, several towns and cities regulated the storage of gunpowder for fire safety reasons. This had relevance for the District’s law in two particular ways according to Breyer. First, it prevented individuals from keeping loaded weapons in the house to use immediately against an intruder. Second, it prevented individuals carrying their guns in the city, unless they had no intention of entering a building or were willing to unload their weapon before going inside.<sup>12</sup> Dismissed by the majority as of minor relevance, Breyer’s argument was not that these laws were exact analogues of the District’s law but that they established, in principle, the fact that Americans of the colonial era were familiar with laws that burdened in several ways their ability to use and carry firearms, at home or in public.<sup>13</sup> Such laws might, as in the case of gunpowder storage, be motivated by concerns for public safety, indicating that any right to gun ownership was tempered by concerns for public welfare. Thus Breyer, as well as Stevens, offered a reading of history which challenged that offered by the majority. But for Breyer, history was not dispositive, it was only the beginning, not the end of the discussion. Having established that some restrictions on Second Amendment rights might be permissible, the question was at what point the acceptable became unconstitutional.

Assessing constitutionality according to Breyer required a balancing of interests, “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” (689). Far from being a novel approach to constitutional interpretation, the balancing of interests has traditionally been the way the Court has resolved such disputes.<sup>14</sup> Breyer, then, followed more closely than the majority the Court’s traditional path for adjudicating constitutional disputes. “[I]mportant interests lie on both sides of the constitutional equation,” (689) Breyer argued, offering in advance a challenge to critics who might be tempted to claim his approach failed to take seriously Second Amendment rights. Crucially, however, Breyer argued that more than simply Second Amendment rights were at stake and worthy of consideration.

In his 2005 book, *Active Liberty*, Breyer emphasised the importance of “the freedom of the individual citizen to participate in the government and thereby to share with others the right to make or control the nation’s public acts” (3). The views of the people, as expressed through their legislatures, are entitled to respect in a democratic system. While that does not mean the Court should always defer to legislative judgments, it does mean their views are entitled to a degree of consideration when their actions are challenged. “The majority’s view cannot be correct unless it can show that the District’s regulation is unreasonable or inappropriate in Second Amendment terms. This the majority cannot do,” Breyer asserted in *Heller* (681). Presenting in some detail statistical evidence on gun deaths and gun crime, Breyer showed the extent of the problem identified by the District. Discussing statistics on gun deaths generally, and accidental death and deaths of children in particular, as well as figures about gun crime in urban areas, Breyer presented the District’s law as a reasonable, common sense response to a growing problem. Recognising that debate existed about whether gun regulation actually reduced gun crime and gun death, Breyer nevertheless noted, “a legislature might respond, we want to make an effort to try to dry up that urban sea [of

guns], drop by drop. And none of the studies can show that effort is not worthwhile.” Indeed, not only did the studies fail to show the worth of the attempt, “they do not by themselves show that those judgments are incorrect ...” (703). While the statistics quoted by Breyer presented a picture of needless, tragic loss, his primary aim was to support his understanding of proper constitutional interpretation: “legislators, not judges, have primary responsibility for drawing policy conclusions from empirical fact. And, given that *constitutional allocation of decisionmaking* responsibility, the empirical evidence presented here is sufficient to allow a judge to reach a firm *legal* conclusion.”<sup>15</sup> Because the legislative judgment was based on a reasonable (even if not necessarily correct) interpretation of the information available to it, that judgment was entitled to considerable weight when judging the law’s constitutionality.

With his emphasis on public safety concerns, Breyer also drew on a constitutional understanding at least as old as the Second Amendment. Under the federal system, states maintained responsibility for protecting the health, safety, and welfare of their citizens: the so-called police powers of the states.<sup>16</sup> Long-recognised by the Court, police powers justifications offered a legitimate state interest, worthy of consideration. The role of police powers was evident in Breyer’s discussion of the statistics considered by the District in passing the challenged law but was even clearer in his analysis of whether the burdens placed on individuals’ self-defence rights by that law were the least-restrictive and proportionate to the aims sought. “[T]he very attributes that make handguns particularly useful for self-defense are also what make them particularly dangerous,” Breyer observed. As a result, “although there may be less restrictive, *less effective* substitutes for an outright ban, there is no less restrictive *equivalent* of an outright ban” (711-12). The District had reasonably judged that the lives and safety of its citizens were in danger from uncontrolled access to and

use of handguns and thus had sought to regulate that access and use; the District's interest in protecting the lives and safety of its citizens was legitimate; an alternative law could not achieve the same level of protection as the one passed by the District; thus, by implication, an alternative law would not permit the District to meet its police powers obligation. If taking police powers seriously the law should stand since it represented both a reasonable judgment and the only way in which the District's aims could be fully met and its duties fully discharged.

Breyer's opinion thus offered a significant challenge to both the outcome and the methodology of the majority. That he was only able to convince three colleagues to join him in *Heller* should not detract from the importance of his approach. Recognising the importance of the history of the founding era, Breyer nevertheless rejected undue deference to that history. The history he did provide supported the fact revealed by a comparison of the opinions of the majority and Stevens: that history may be read in many different ways and thus originalism's claim as a neutral method of constitutional interpretation could not be supported. Breyer made clear, however, that history should only be part of the enquiry, and not necessarily the definitive part. Instead, Breyer argued, the role of the Court was to balance the competing interests before it: the rights of citizens protected by the Second Amendment against the right and duty of states to protect their citizens under their police powers. In judging the correct balance, deference was due to the historical scope of the right but also to the policy decisions of democratically-elected legislatures in light of the evidence available to them. Acknowledging such an approach required an element of judicial judgment, Breyer nevertheless rejected the majority's characterisation of his approach as "judge-empowering" by asserting the limits placed on such judgment. In fact, he argued, his approach was far more transparent than that of the majority who made judgments about the

value of particular historical sources and debates without clearly showing either that they were doing so or why and who failed to provide any reasoning justified by their own methods for the gun regulations they accepted. Breyer thus offered both a critique of originalist methodology and a workable alternative approach that the Court could follow in future cases. Whether or not Breyer is able to convince his colleagues to adopt his approach at some future point, his contribution to the debate demands more attention than it has to date received.

### **Conclusion**

Frustrating gun rights supporters who saw in *Heller* an understanding of the Second Amendment that would free gun owners from most, if not all restrictions, lower courts have largely borne out Scalia's observation that Second Amendment rights are not unlimited. By March 2015, more than nine hundred gun-related cases had been heard at state and federal level and, while not all gun control laws survived the challenge, the vast majority were upheld by the courts (Law Center to Prevent Gun Violence, 2015). Significantly for originalism, most regulations were upheld under the "common use" doctrine or the list of possible exceptions offered by the *Heller* majority. Courts have shown little interest in following the historical approach to the Second Amendment laid out in *Heller* or the Supreme Court's 2010 ruling in *McDonald v. Chicago* which applied the earlier ruling to the states (Rostron, 2012: 709). The combination of heavy reliance on the non-originalist part of *Heller* and the relative absence of historical enquiry by lower courts challenges a reading of *Heller* as a triumph of originalism, suggesting instead that history remains only one of a number of factors taken into consideration by courts when assessing Second Amendment claims.<sup>17</sup> The Supreme Court's subsequent absence from the debate, rejecting review, as of the time of writing, in all Second Amendment cases since *McDonald*, in effect, permitted the continuation of such approaches and their gradual embedding into state and federal law.<sup>18</sup>

*Heller* was thus not the triumph of originalism that many claimed it to be. The conflicting histories offered by Scalia and Stevens revealed that originalism could not do what its advocates claimed and offer a way of understanding the Second Amendment free from judicial judgment. The fundamental nature of historical scholarship made this impossible. Thus the originalists in the majority failed to be clear about the judgments they were making and offered, at best, only partial explanations for their reasoning. The failure of lower courts to make extensive use of *Heller*'s originalist reading suggests the competing interpretations of Second Amendment history offered by Scalia and Stevens served only to confuse rather than clarify. Scalia's majority opinion, with its inconsistent use of history and failure to provide historical support for either its favouring of handguns or for regulations on gun ownership, indicated that originalism alone could not address all contemporary Second Amendment concerns. In addition, the focus on originalism overlooks Breyer's contribution to the debate which shows that there is a debate to be had, legally and politically. Legally, Breyer offered an alternative way to approach constitutional interpretation generally and Second Amendment jurisprudence specifically. And, as ongoing debates in the nation's legislatures show, the exact meaning of the Second Amendment remains an open question to be further explored: *Heller* did not and cannot end the debate. Gun rights and gun control supporters both point to the Constitution and to *Heller* in support of their position. Given this, the Second Amendment's relevance for 21<sup>st</sup> Century debates about guns and American society is assured.

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<sup>1</sup> See, for example, Justice Scalia quoted in Coyle (2013: 167); Barnett (2008); National Rifle Association (2008); Gura (2009: 1129). For those noting the importance of originalism without hailing the decision, see Cassens Weiss (2008); Wilkinson (2009: 256); Toobin (2012: 111-112); Tushnet (2013: 149, 185).

<sup>2</sup> Sunstein also noted that many historians support Stevens' narrower, militia-connected reading of the Second Amendment (256).

<sup>3</sup> Most studies address more than one of these subjects. See, for example, Churchill (2007: 161), Cornell (2008: 632-5; 2009: 1106-10); Henigan (2009: 1176-82); Konig (2007); Malcolm (2009); Shalhope (1982). For a direct comparison of the sources used by Scalia and Stevens see Wilkinson (2009: 267-272).

<sup>4</sup> Or, as Mark Tushnet (2008a: 610) has termed it, "history-in-law."

<sup>5</sup> The role of history in law has been extensively debated. For an introduction, see Flaherty (1995); Kramer (2003); Reid (1993); Tushnet (1996). For criticisms of law office history in Second Amendment scholarship, see Bogus (2000); Cornell (2009:1098); Henigan (2009); Gura (2009: 1129); Kates (2009: 1226-7); Levinson (2008); Rakove (2008), Tushnet (1996: 610; 2008a).

<sup>6</sup> Lawyers and legal scholars have also criticised their opponents for misusing history, but since they are generally also the targets of such criticism it is entirely possible to see these criticisms as part of the political or ideological agenda for which they are arguing. See for example, Alan Gura's (2009: 1129) praise for the *Heller* majority's refusal to be distracted by arguments "driven by modern ideological dogmas and backed by historical revisionism or selective citation," implying this was exactly what the dissenters had done (Gura was the lead attorney for Dick Heller). Or, Dennis Henigan's (2009: 1171) critique of Scalia's majority opinion as "an unprincipled abuse of judicial power in pursuit of an ideological objective" (Henigan is former Vice President of the Brady Center to Prevent Gun Violence).

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<sup>7</sup> See, for example, Winkler (2009: 1561-3) and Schaerer (2014: 811-13). *District of Columbia v. Heller* 554 US 570, 720 (2008) (Justice Breyer, dissenting).

<sup>8</sup> For example, military musters where weapons could be inspected, registration of firearms, and regulations for the safe storage of gunpowder. See Cornell (2006: 26-30); Churchill (2007: 161-165); Rakove et al. (2015).

<sup>9</sup> On Brennan's views about the working of the Court, including his "rule of five," see Johnsen (2013).

<sup>10</sup> In 2013, Mark Tushnet confidently claimed that the list of exceptions was included to secure the vote of Justice Anthony Kennedy (182). Although plausible, Tushnet provides no definitive evidence for this.

<sup>11</sup> The literature on the Court and public opinion is voluminous. As a starting point see Casillas, Enns, and Wohlfarth (2011); Epstein and Martin (2010); McGuire and Stimson (2004); Rehnquist (1986).

<sup>12</sup> The first challenged the majority's view that self-defence requires operable weapons. The second challenged those who argued the self-defence rationale permits unrestricted carrying of weapons in public. *District of Columbia v. Heller* 554 US 570, 683-6 (2008) (Justice Breyer, dissenting).

<sup>13</sup> "And, in any event, as I have shown, the gunpowder-storage laws would have *burdened* armed self-defense, even if they did not completely *prohibit* it." *District of Columbia v. Heller* 554 US 570, 687 (2008) (Justice Breyer, dissenting – emphasis in original).

<sup>14</sup> Traditionally the Court considers laws subject to constitutional challenge under one of three levels of scrutiny: strict scrutiny, intermediate scrutiny, or rational basis. While each begins with a different level of scepticism about the constitutionality of the challenged law, each category, in effect, weighs the balance between government needs and individual rights. Breyer's approach in *Heller* simply continued this approach.

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<sup>15</sup> *District of Columbia v. Heller* 554 US 570, 704 (2008) (Justice Breyer, dissenting - first emphasis added, second in original).

<sup>16</sup> Although the police powers doctrine is traditionally applied to states, in principle it can apply to any body with responsibility for governing: the council of the District of Columbia can thus been considered as imbued with many of the same rights and responsibilities as other governments.

<sup>17</sup> *Heller* continues to inspire political action, however, and gun rights advocates have had significant success, particularly in relation to rights outside the home. See recent legislative trends at Law Center to Prevent Gun Violence, <http://smartgunlaws.org/category/gun-laws-policies/new-gun-legislation/> (accessed 3 June 2015) and the National Rifle Association's Institute for Legislative Action website, <https://www.nraila.org>.

<sup>18</sup> In the summer of 2015 Justices Thomas and Scalia dissented twice from the Court's rejection of gun law cases. See *Jackson v. San Francisco* 576 US \_\_ (2015), docket no. 14-704 (Justice Thomas dissenting from denial of *certiorari*) and *Friedman v. City of Highland Park, Illinois* 577 US \_\_ (2015), docket no. 15-133 (Justice Thomas dissenting from denial of *certiorari*). Two cases heard by the Court after *McDonald* addressed gun rights: *Abramski v. US* 573 US \_\_ (2014), raised the question of whether one person may be prevented from buying a gun on behalf of someone else, so-called "straw buyers," but did not involve a Second Amendment challenge; *Caetano v. Massachusetts* 577 US \_\_ (2016) addressed the Second Amendment but in the context of stun guns rather than firearms.