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Adam Winkler is a specialist in American constitutional law. His wide-ranging scholarship has touched upon a diverse array of topics, such as the right to bear arms, corporate political speech rights, affirmative action, judicial independence, constitutional interpretation, corporate social responsibility, international economic sanctions and campaign finance law. His work has been cited and quoted in landmark Supreme Court cases and his commentary featured on *CNN*, *The New York Times*, *The Los Angeles Times*, *The Wall Street Journal*, *The New Republic* and numerous other outlets. He is a contributor to *The Daily Beast* and *The Huffington Post*.

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## HELLER'S CATCH-22

Adam Winkler\*

**J**oseph Heller's satirical novel *Catch-22* is a classic of American literature.<sup>1</sup> The novel, which follows the travails of a group of military airmen in World War II, is an insightful and humorous account of the quagmires and incongruities of contemporary bureaucratic life. In the novel, a "Catch-22" is a nonexistent military rule that, by its self-contradictory logic, all service personnel must obey. The notion of a Catch-22 has since become famous as representing a no-win situation built on illogic and circular reasoning. I.

Just as Heller's novel is widely regarded as one of the greatest novels of the twentieth century, the Supreme Court's recent decision in a case bearing the *Catch-22* author's surname, *District of Columbia v. Heller*,<sup>2</sup> which held the Second Amendment protects an individual right to keep and bear arms unrelated to militia service, has been hailed as one of the most significant constitutional law decisions of the twenty-first century. In more substantive ways, however, Heller and *Heller* belong together. Although the Supreme Court properly interpreted the Second Amendment to guarantee an individual right to possess guns, the majority's reasoning suffers from many of the contradictions and paradoxes that animate Joseph Heller's novel.

**A** particularly striking inconsistency in the *Heller* decision is rooted in its purported method of constitutional interpretation. Justice Antonin Scalia's majority opinion was instantly hailed as "a triumph of originalism"<sup>3</sup> because of its heavy reliance on historical materials to answer a slew of Second Amendment questions: whether the amendment's reference to "the right of the people" meant an individual right or a collective, state right; whether "keep and bear Arms" had a purely military connotation; and how to construe the phrases "well-regulated Militia" and "necessary to the security of a free State."<sup>4</sup> Throughout his twenty-two years on the Court, Justice Scalia has argued that the only proper way to interpret the Constitution is by discerning the original understanding of its provisions.<sup>5</sup> Originalism, he argues, is required to maintain the public legitimacy of the Court.<sup>6</sup> II.

*Heller* was characterized as a triumph of originalism in part because even the dissenters adopt this approach, arguing that the Second Amendment was restricted to the militia. The majority and the dissenters "came to opposite conclusions but

proceeded on the premise that original understanding of the amendment's framers was the proper basis for the decision," wrote Linda Greenhouse, the Supreme Court reporter for *The New York Times*.<sup>7</sup> In light of the similar methodologies and starkly different conclusions, one might conclude that originalism should be taken with a grain of salt—or at least a dose of humility. Yet at a lecture at Harvard Law School several months after the *Heller* decision, Scalia opined on the virtues of originalism. "[W]hat method would be easier or more reliable than the originalist approach taken by the Court?"<sup>8</sup> Perhaps he had forgotten about Justice Stevens's dissent. Or perhaps he was channeling the bureaucrats in Joseph Heller's novel, who would have readily agreed that a methodology leading to such disparate conclusions is nevertheless "easy" and "reliable."

For a triumph of originalism, however, Justice Scalia's majority opinion ignores original meaning where it really counts. With any individual right, the most important questions center on what laws are prohibited by the Constitution and what laws are allowed. Individual rights are limitations on government action, so what exact limits on government action does the right to keep and bear arms impose? This is where the Second Amendment rubber hits the road. If the Second Amendment is to be a meaningful constraint on government, then it must do more than just identify a fundamental right in abstract terms. It must also separate out what the government can do from what the government cannot.

It is on these very questions that originalism plays almost no role in Justice Scalia's opinion. Consider, for example, how Justice Scalia's opinion addresses one of the laws at issue in the *Heller* case: a ban on handguns by Washington, D.C. An originalist would look to historical sources to determine whether those who ratified the Constitution thought a ban on handguns or perhaps some other specific type of weapon was contrary to the right to keep and bear arms. Scalia, however, doesn't do this. Handguns are protected, he argues, because they are "the most preferred firearm in the nation" to keep for self-defense.<sup>9</sup> After listing several reasons why twenty-first century Americans prefer handguns, Scalia's opinion concludes: "Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."<sup>10</sup> In place of the rock-hard original meaning of the Second Amendment, Scalia looks to the fickle dynamics of contemporary consumer choices. Handguns are protected because people today choose handguns for protection.

In contrast to handguns, the Court suggests that machine guns might be banned because they are "dangerous and unusual weapons" that are not in "common use."<sup>11</sup> But why are machine guns so rare? Because federal law has effectively discouraged most civilians from purchasing them for the past seventy-five years.<sup>12</sup> Today, new machine guns can't even be sold to civilians. Federal gun control in the twentieth century made machine guns unusual and uncommon. So here, rather than defer to the original understanding, Scalia looks to contemporary government regulation. This sounds a lot like a right evolving with the times—that is, a living Constitution.

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

*Heller* also strays from originalism in what is, for practical purposes, the most important part of the opinion. In a paragraph near the end of the opinion, the Court lists a number of “longstanding prohibitions” on guns that, despite the individual right to bear arms, remain good law: bans on possession by ex-felons and the mentally ill; bans on guns in sensitive places like schools and government buildings; and restrictions on the commercial sales of firearms.<sup>13</sup> The vast majority of gun control laws on the books today fit within these categories. So while forcefully declaring an individual right to keep and bear arms, the Court suggests that nearly all gun control laws we currently have are constitutionally permissible.

The dilemma for the originalist is that none of these broad exceptions are grounded in the original meaning of the Second Amendment. At least *Heller* makes no effort to ground these broad exceptions in original meaning. This list of Second Amendment exceptions is simply offered with no discussion whatsoever about how these exceptions comply with the Founders’ understanding of the right to keep and bear arms. *Heller* does not cite a single historical source to support these broad exceptions.

At one point in *Catch-22*, a character who has been mistreated by the military under the justification of Catch-22 is asked if the military personnel had shown her the text of the rule.<sup>14</sup> She replies that she was told that the rule stipulates that the military need not show it to her.<sup>15</sup> The military, of course, had good reason for its reluctance because the rule didn’t actually exist. Justice Scalia also had good reason to hide the originalist ball on the laundry list of exceptions. There probably is no evidence to support these particular exceptions as part of the original understanding.

Although gun rights hardliners often say that gun control is a modern invention, gun controls existed in the Founders’ day. So there are historical precedents to which Justice Scalia could have looked to determine what types of gun restrictions the Founding generation thought were consistent with the right to keep and bear arms.<sup>16</sup> For example, the armed citizenry was required to report with their guns to militia “musters,” where the weapons would be inspected and the citizens trained.<sup>17</sup> Authorities often required that militia guns be registered;<sup>18</sup> in some instances, colonists conducted door-to-door surveys of gun ownership.<sup>19</sup> There were laws requiring gunpowder to be stored safely, even though the rules (like maintaining the powder on the top floor of a building) made it more difficult for people to load their guns quickly to defend themselves against attack.<sup>20</sup> The Founders also lived with more severe limitations, including complete bans on gun ownership by free blacks, slaves, Native Americans, and those of mixed race.<sup>21</sup> Whites who refused to swear loyalty oaths—first to the Crown and then, when times changed, to the

Revolution—were also subject to being disarmed.<sup>22</sup> Loyalty oaths meant that somewhere near 40 percent of the population was eligible to be disarmed on the eve of the Revolution.<sup>23</sup> Couple that with the restrictions imposed on racial minorities and it turns out that only a fraction of the people enjoyed the right to own a gun. The Founders understood that guns were dangerous and warranted regulation—including, when necessary, disarmament. Little wonder the Second Amendment points to the necessity of a “well regulated Militia.”<sup>24</sup>

One thing the Founders did not do was impose any gun control laws obviously equivalent to those on Scalia’s list of exceptions.<sup>25</sup> They had no restrictions on the commercial sales of firearms as such. Licensing of gun dealers, mandatory background checks, and waiting periods on gun purchases first arose in the twentieth century. Nor did the Founders have bans on guns in schools, government buildings, or any other “sensitive place.” The Founding generation had no laws limiting gun possession by the mentally ill, nor laws denying the right to people convicted of crimes.<sup>26</sup> Bans on ex-felons possessing firearms were first adopted in the 1920s and 1930s, almost a century and a half after the Founding.<sup>27</sup>

The Court didn’t give any substantive explanation for why the types of laws mentioned in the laundry list were constitutional aside from a description of them as “longstanding.”<sup>28</sup> It is entirely unclear why the mere fact that these laws have been on the books for a long time saves them from legal defeat. Would Washington, D.C.’s ban on handguns have been constitutional if it were adopted in the 1920s? That a law violating the Constitution is longstanding hardly seems a good reason to uphold it.

*Heller’s* emphasis on age is especially paradoxical because the Second Amendment had long been read not to have any relevance to gun control. For the previous seventy years, the lower federal courts read the amendment to protect only a militia-related right.<sup>29</sup> During that period, many gun control laws were adopted and, thanks to the militia-based reading of the Second Amendment, upheld. Now the Second Amendment has been reinterpreted to protect an individual right, but the new reading doesn’t call those laws into question simply because they weren’t overturned earlier. Apparently, the fact that those laws survived the militia-based reading of the Second Amendment has strengthened them against challenge under the individual-rights reading.

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

standings about the right to keep and bear arms and its limits, not to Founding-era understandings.

Why does an originalist opinion accept these modern day limits on guns? One good bet is public legitimacy: if the Court had said that guns could only be regulated in ways similar to Founding-era gun control, public respect for the Court would have been sorely tested. And it would not only have been the gun control advocates who would have screamed and hollered. So too would gun rights proponents. Imagine their reaction if the Court had suggested that states could require every gun owner to report to public gatherings to have his or her arms inspected by a government official and included on a census of available militia weapons. Or that states could selectively disarm groups of people on the basis of their political views. Just call the Court's quiet reliance on living constitutionalism while claiming to be originalist, as Joseph Heller did in reference to a chaplain who learns that sinning can be excused because it feels good, a "protective rationalization."<sup>30</sup> As the chaplain discovers, it "was almost no trick at all, he saw, to turn vice into virtue and slander into truth, impotence into abstinence, arrogance into humility, plunder into philanthropy, thievery into honor, blasphemy into wisdom, brutality into patriotism, and sadism into justice."

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

One of the more famous lines from *Catch-22* is spoken by an old woman, who notes that the fabled rule gives the military "a right to do anything we can't stop them from doing."<sup>31</sup> In other words, the rule limiting what the military can do doesn't actually limit the military from doing anything. Due to the list of Second Amendment exceptions, *Heller* looks a lot like *Catch-22*: the Second Amendment limit on government doesn't stop the government from doing very much. At least this is the emerging picture of *Heller* and the newly minted Second Amendment right in the lower courts.

As many people predicted, *Heller* led to an avalanche of challenges to gun control laws. Every person charged with a gun crime saw *Heller* as a Get-Out-of-Jail-Free card. Since the case was decided, the lower federal courts have decided approximately two hundred cases in which gun control laws were challenged as violations of the Second Amendment. The variety of laws has been quite remarkable. There have been suits against laws banning possession by felons,<sup>32</sup> drug addicts,<sup>33</sup> illegal aliens,<sup>34</sup> and individuals convicted of domestic violence misdemeanors.<sup>35</sup> Courts have confronted laws prohibiting particular types of weapons, including sawed-off shotguns<sup>36</sup> and machine guns,<sup>37</sup> in addition to weapons attachments like silencers.<sup>38</sup>

III.



Defendants have challenged laws barring guns in school zones<sup>39</sup> and post offices.<sup>40</sup> Individuals charged with failing to obtain a license to carry a concealed weapon<sup>41</sup> have raised Second Amendment challenges, as have individuals who possessed an unregistered firearm.<sup>42</sup> Courts have ruled on penalty enhancements for commission of a crime while possessing a gun,<sup>43</sup> bans on possession of ammunition,<sup>44</sup> and the federal law giving the Attorney General broad discretion over gun importation.<sup>45</sup> Remarkably, nearly every one of these gun control laws has been upheld.

In most cases, the courts merely point to the list of Second Amendment exceptions in *Heller*. To the extent the challenged laws were explicitly mentioned in the *Heller* case, this outcome is not surprising. In our hierarchical judiciary, lower courts are supposed to follow the Supreme Court's decisions. One might expect, however, that the lower courts would have engaged in some substantive analysis about whether the exceptions are consistent with the underlying right to keep and bear arms. After all, the list is offered up in the *Heller* opinion without any reasoning or explanation. Moreover, none of the exceptions were formally at issue in *Heller*; they were not the subject of briefing by both sides or trial by interested adversaries. The list of exceptions was, in a first-year law student's favorite word, dicta. In the upside down universe of *Heller*, however, the dicta are what really matter.

Lower courts are also hewing closely to the list of exceptions even in cases challenging laws that were never mentioned by the *Heller* majority. For example, in several cases lower courts have upheld the federal law that bars individuals convicted of domestic violence misdemeanors from possessing firearms.<sup>46</sup> Without much substantive analysis, these lower courts have tended to simply analogize this law to the ban on felons. Of course, there is a big difference between felonies and misdemeanors—not least that gun bans applicable to domestic violence misdemeanor convicts, unlike felon bans, are not “longstanding prohibitions.” Whatever sound public policy reasons support the domestic abuser ban, the laws are a recent phenomenon: the federal law challenged in these cases was adopted in 1996,<sup>47</sup> some twenty years after the District of Columbia adopted its insufficiently longstanding ban on handguns.

Another confusing set of contradictions in the *Heller* case stems from the self-defense rationale adopted by the Court. According to the majority, personal self-defense was one of the central purposes of the Second Amendment.<sup>48</sup> The D.C. law went too far because it effectively made it illegal for a person to use a gun to defend himself in his own home.<sup>49</sup> Nevertheless, it is hard to square the right to have a gun for self-defense with the exceptions recognized by the Court. Why don't felons have the same right of self-defense as everyone else? We are really talking about ex-felons—convicts who have served their sentences and returned to the community. One might suppose that people with felony convictions are relatively likely to live in dangerous neighborhoods with disproportionately high numbers

of armed criminals. Felons therefore might need the ability to defend themselves with guns more than the average person. Why should schools be deemed a “sensitive place” where arms can be prohibited? Students and teachers in schools may need to defend themselves, too. While we might all wish that no gun ever came into a school, the awful mass murders at Columbine High School and Virginia Tech University show that students and teachers are subject to violent attack. If the basis of the right to keep and bear arms is self-defense, then it is unclear why students and teachers should be left defenseless.

Self-defense can also be undermined by restrictions on commercial sales of firearms. One common commercial sale restriction is a short waiting period: a prospective purchaser goes to a gun store, picks out a firearm, and then has to wait several days (or ten in California<sup>50</sup>) before the gun can be delivered. These laws might well be good public policy because they discourage impulse buying by a depressed person looking to commit suicide or an angry employee looking to kill the boss who just fired him. But they also interfere with self-defense. A woman who learns that she is being stalked may need a gun right away, and, if there is a delay, she could become a victim of attack. A homeowner in a town where riots have broken out may need a gun today to defend his family; next week is too late. For some people, self-defense is an immediate need with which commercial sale restrictions can interfere.

None of this is to say that the limitations on the right to keep and bear arms recognized in *Heller* are bad ones or should be invalidated as unconstitutional. They just need more justification given the *Heller* Court’s reasoning.

The simple and straightforward reason these exceptions are recognized by the Court, as Joseph Heller might have predicted, is the one that Justice Scalia explicitly rejects. The *Heller* Court goes out of its way to insist that courts should not engage in “interest-balancing” to decide Second Amendment cases.<sup>51</sup> Due to its commitment to originalism, the majority claims it would be illegitimate for courts to engage in this type of balancing: “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”<sup>52</sup> But *Catch-22* teaches us that words are not always what they seem to be. While the Court rejects interest balancing in name, something very much like it underlies the many limitations on the right recognized by the Court. Felons are disarmed because they have proven themselves too dangerous to have weapons. It is not that they don’t have the right to keep and bear arms; they do, just like they have First Amendment rights of speech and religious freedom. Just like every other right, however, the Second Amendment right can be limited when the government has sufficiently important reasons to limit its exercise.

The same logic justifies the bans on guns in sensitive places and restrictions

on commercial sales. Even though these laws interfere with the ability of people to defend themselves against attack, they are nevertheless legitimate because government has sound reasons to impose them. We do not want dangerous people to obtain firearms, so we regulate commercial gun sales. We do not want guns in schools because, given the immaturity of many students, we fear that guns there will result in violence and death. These limitations survive because government is thought to have sufficiently weighty interests to justify them. History, as such, has little to do with it.

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

Some historians insist that the Second Amendment was not designed to guarantee an individual right to have guns for self-defense. If that's right—and I have my doubts—the Court should be commended, not criticized, for departing from original meaning. Whatever the Second Amendment meant two centuries ago, the right to keep and bear arms has evolved in the public consciousness and in the law. For well over a hundred years, Americans have understood the right to keep and bear arms in personal terms, as a guarantee of their ability to protect themselves from violent attack.<sup>53</sup> Despite heated disagreement over the proper way to interpret the Constitution, our Constitution does in fact evolve. One simply cannot link the vast majority of constitutional doctrines to original understanding. Like all of our worthwhile rights, the right to keep and bear arms has changed over time. Today, forty-three of the fifty state constitutions provide for the individual right to keep and bear arms unrelated to militia service<sup>54</sup>—by far one of the best expressions of the constitutional commitments of We the People. The living Constitution strongly supports the *Heller* majority's recognition of an individual right to keep and bear arms.

Perhaps, nonetheless, the Court should have stayed out of the Second Amendment thicket and allowed the political process to work through the gun controversies without judicial involvement. Such an approach, however, would not have been particularly promising from a public policy perspective. Although constitutional scholars have bemoaned for forty years how the Supreme Court's decision in *Roe v. Wade* supposedly prevented Americans from coming to a moderate consensus on abortion rights,<sup>55</sup> the experience with the Second Amendment suggests that judicial abstention does not inevitably lead to political consensus. For seventy years, the Court remained on the sidelines of the gun debate and the result was anything but a gradual move toward a moderate middle. Instead, the Court's absence has allowed the forces of political unreason to command the field. Thanks

to their power over the gun rights debate, we are left the usual bad public policy that comes from inflamed rhetoric and unwillingness to compromise.

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

By recognizing an individual right and also a variety of permissible limits, the Court also denied victory to both extremes in the gun debate. *Heller* stands as a symbol of a truly reasonable right to keep and bear arms. There is a right, but it can and should be subject to regulation.

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

With disarmament off the table, gun rights absolutists may no longer be able to rally the troops to oppose each and every gun law as a step toward inevitable confiscation. Shortly after *Heller* was decided, the Brady Campaign's Dennis Henigan argued, "By erecting a constitutional barrier to a broad gun ban, the *Heller* ruling may have flattened the gun lobby's 'slippery slope,' making it harder for the NRA to use fear tactics to motivate gun owners to give their time, money and votes in opposing sensible gun laws and the candidates who support those laws."<sup>56</sup> This sanguine view is held not only by hopeful gun control advocates. Pro-gun libertarian Jacob Sullum has written that judicial recognition of the individual right to bear arms would put "wholesale disarmament . . . out of the question"—"a development

that could help calm the often vociferous conflict over gun policy.<sup>57</sup> Prior to *Heller*, Glenn Harlan Reynolds, a conservative law professor and gun rights proponent, predicted, “If the Supreme Court were to interpret the Second Amendment” to protect an individual right, “gun owners would have less reason to fear creeping confiscation, and sensible gun control laws—those aimed at disarming criminals, not ordinary citizens—would pass much more easily.”<sup>58</sup>

Nearly fifty years ago, political scientist Robert G. McCloskey argued that for all the fire surrounding judicial activism, the Supreme Court tends to stay within the broad mainstream of American public opinion.<sup>59</sup> On occasion the Court pushes society a bit more in one direction than the views of the day might support, as in *Brown v. Board of Education*.<sup>60</sup> And on occasion the Court is a bit behind the times, as when it erected barriers to Franklin D. Roosevelt’s New Deal. Yet, political institutions and social forces check the courts and keep constitutional doctrine close to the political center.

The political center on guns is pretty much where *Heller* landed. The Court held that the Second Amendment protects an individual right to keep and bear arms and rejected the militia-only view. Polls consistently show that three in four Americans believe the Constitution guarantees an individual right to keep and bear arms.<sup>61</sup> The Court struck down a relatively draconian Washington, D.C. law that barred all handguns, required that all other firearms be maintained locked or disassembled, and effectively made illegal the use of a firearm in self-defense. According to a 2001 study by the National Opinion Research Center, only 11 percent of Americans support a ban on handguns<sup>62</sup>—a less extreme law than the D.C. gun ban. *Heller*’s list of exceptions has raised the ire of hard-line gun advocates, but those exceptions are also well aligned with popular sentiment. The 2001 National Opinion Research Center study surveyed polling data and concluded, “Large majorities back most general measures for controlling guns, policies to increase gun safety, laws to restrict criminals from acquiring firearms, and measures to enforce gun laws and punish offenders.”<sup>63</sup> One need not believe that the Court should slavishly follow polling results—it shouldn’t—to acknowledge that such a mainstream approach makes the decision much more likely to command public respect. Sticking to the middle makes the Court’s interpretation likely to endure.

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

same. In short, the meaning of the Second Amendment has changed a lot, but its impact on gun control has not.

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



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1. JOSEPH HELLER, *CATCH-22* (11th prtg. 1961).
2. 128 S. Ct. 2783 (2008).
3. Cf. Linda Greenhouse, 3 *Defining Opinions*, N.Y. TIMES, July 13, 2008, Week in Review, at 4; J. Harvie Wilkinson, *Of Guns, Abortion, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009); Eric Posner, *Will Heller Implode?*, SLATE, June 29, 2008, <http://www.slate.com/blogs/blogs/convictions/archive/2008/06/29/will-heller-implode.aspx>. These sources refer to the possibility that *Heller* is a triumph of originalism, in those terms, without hailing the decision. For hailing on these grounds (without using that phrase), see Debra Cassens Weiss, *Second Amendment Ruling is Justice Scalia's Originalism "Legacy,"* A.B.A. J., June 27, 2008, available at [http://abajournal.com/news/second\\_amendment\\_ruling\\_is\\_justice\\_scalias\\_originalism\\_legacy](http://abajournal.com/news/second_amendment_ruling_is_justice_scalias_originalism_legacy).
4. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789–812 (2008).
5. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (arguing for originalism).
6. See *id.* at 854–55, 863–64.
7. Greenhouse, *supra* note 3.
8. Elaine McArdle, *In Inaugural Vaughan Lecture, Scalia Defends the "Methodology of Originalism,"* SPOTLIGHT HARV. L. SCH., Oct. 3, 2008, <http://www.law.harvard.edu/news/spotlight/constitutional-law/scalia-vaughan-lecture.html>.
9. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817–18 (2008) (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007)).
10. *Id.* at 2818.
11. See *id.* at 2815–17.
12. Under the National Firearms Act of 1934, machine guns can only be lawfully owned by civilians with specific authorization from government. See National Firearms Act of 1934, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801–5872 (2000)).
13. *Heller*, 128 S. Ct. at 2816–17.
14. HELLER, *supra* note 1, at 398.
15. *Id.*
16. Some of these forms of gun control were described in Justice Stephen Breyer's dissent. See *Heller*, 128 S. Ct. at 2848–50 (Breyer, J., dissenting). For a more comprehensive treatment, see SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 26–30 (2006).
17. See, e.g., § 9, 1776 Mass. Acts at 18; 1778 N.Y. Laws at 66; 1784 S.C. Acts at 68.
18. See, e.g., § 9, 1776 Mass. Acts at 18 (requiring “an exact List of [each man in the] Company, and of each Man's Equipments”).
19. See Robert H. Churchill, *Gun Ownership in Early America: A Survey of Manuscript Militia*



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

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

21. CORNELL, *supra* note 16, at 28–29.

22. Churchill, *Gun Regulation*, *supra* note 19, at 157–60.

23. CORNELL, *supra* note 16, at 28.

24. U.S. CONST., amend. II.

25. Nor are any of the laws on Scalia’s list of exceptions defensible as unbroken traditions that reflect the original understanding. Some originalists, including Justice Scalia, argue that courts should defer to “constant and unbroken national traditions” that reflect the original meaning. *See* *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting). But none of these exceptions originated in the Founding era or even in the immediate post-Revolutionary period. They are instead products of the popular understanding of the right to keep and bear arms as it evolved in the twentieth century.

26. Scholars have argued that felons were not part of “the people” mentioned in the Second Amendment. *See* Don B. Kates Jr., *Gun Rights for Felons?*, N.Y. POST, July 22, 2008, available at [http://www.nypost.com/seven/07222008/postopinion/opedcolumnists/gun\\_rights\\_for\\_felons\\_\\_120908.htm](http://www.nypost.com/seven/07222008/postopinion/opedcolumnists/gun_rights_for_felons__120908.htm). *Heller*, however, suggested that “the people” referred to in the Second Amendment should be treated the same as “the people” referred to in the First and Fourth Amendments. *See* *District of Columbia v. Heller*, 128 S. Ct. 2783, 2790–91 (2008). Felons retain their rights under the First and Fourth Amendments, so *Heller* would seem to mean they must retain their rights under the Second Amendment too. That’s not to say that felons shouldn’t be disarmed. They should be. Like all rights, the Second Amendment right can be limited when government has sufficiently good public policy reasons to do so—although this is a reason *Heller* rejects. *See infra* text accompanying notes 51–52.

27. While states passed their own restrictions on felons possessing firearms during this era, the federal government effectively banned felons from purchasing firearms through the Federal Firearms Act of 1938. *See* Federal Firearms Act (Copeland Firearms Act), ch. 850, 52 Stat. 1252 (1938) (codified as amended at 18 U.S.C. § 921-31 (2005)) (repealed 1968).

28. *Heller*, 128 S. Ct. at 2816–17.

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

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

31. *Id.* at 398.

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

33. *See, e.g.*, United States v. Yancey, No. 08-CR-103-BBC, 2008 WL 4534201 (W.D. Wis. Oct. 3, 2008).
34. *See, e.g.*, United States v. Boffil-Rivera, No. 08-20437-CR-GRAHAM/TORRES, 2008 U.S. Dist. LEXIS 84633 (S.D. Fla. Aug. 12, 2008).
35. *See, e.g.*, United States v. Booker, 570 F. Supp. 2d 161 (D. Me. 2008).
36. *See, e.g.*, United States v. Artez, 290 Fed. App'x 203, 208 (10th Cir. 2008).
37. *See, e.g.*, United States v. Fincher, 538 F.3d 868, 873–74 (8th Cir. 2008); Hamblen v. United States, No. 3:08-1034, 2008 WL 5136586, at \*3–4 (M.D. Tenn. Dec. 5, 2008).
38. *See, e.g.*, United States v. Garnett, No. 05-CR-20002-3, 2008 WL 2796098, at \*4 (E.D. Mich. July 18, 2008) (finding that *District of Columbia v. Heller* does not “cast doubt on the constitutionality of federal regulations over . . . machineguns and silencers”).
39. *See, e.g.*, United States v. Walters, No. 2008-31, 2008 WL 2740398 (D. V.I. July 15, 2008).
40. *See, e.g.*, United States v. Dorosan, No. 08-042, 2008 WL 2622996 (E.D. La. June 30, 2008).
41. *See, e.g.*, United States v. Hall, No. 2:08-00006, 2008 WL 3097558 (S.D. W. Va. Aug. 4, 2008).
42. *See, e.g.*, United States v. Perkins, No. 4:08CR 3064, 2008 WL 4372821 (D. Neb. Sept. 23, 2008).
43. *See, e.g.*, United States v. Heredia-Mendoza, No. CR08-5125BHS, 2008 WL 4951051 (W.D. Wash. Nov. 18, 2008).
44. *See, e.g.*, District of Columbia v. Lewis, No. 2007 CDC 15745, 2008 WL 4961591 (D. D.C. Nov. 17, 2008).
45. *See, e.g.*, Mullenix v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, No. 5:07-CV-154-D, 2008 WL 2620175, at \*5 (E.D. N.C. July 2, 2008).
46. *See, e.g.*, United States v. Booker, 570 F. Supp. 2d 161 (D. Me. 2008).
47. 18 U.S.C. § 922(g)(9) (2005).
48. District of Columbia v. Heller, 128 S. Ct. 2783, 2797–2804 (2008).
49. *Id.* at 2817–18.
50. *See* CAL. PENAL CODE § 12071(b)(3)(A).
51. District of Columbia v. Heller, 128 S. Ct. 2783, 2821 (2008).
52. *Id.*
53. For a historical assessment of the transformation of popular understandings of the Second Amendment from a militia-based right to one based on personal self-defense, see generally CORNELL, *supra* note 16.
54. *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686 (2007).
55. *See* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 48 (1987); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199–1208 (1992); Jeffrey Rosen, *Dissenting, in WHAT ROE V. WADE SHOULD HAVE SAID* 170 (2005). For a persuasive contrary view, see David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 840–41 (1999).

56. Dennis A. Henigan, *The Heller Paradox: A Response to Robert Levy*, CATO UNBOUND, July 16, 2008, <http://www.cato-unbound.org/2008/07/16/dennis-henigan/the-heller-paradox-a-response-to-robert-levy/>.
57. Jacob Sullum, *Second Sight*, REASONONLINE, Oct. 23, 2001, <http://www.reason.com/news/show/35880.html>.
58. Glenn Harlan Reynolds, Letter to the Editor, REASON, June 1996, at 10, *available at* <http://www.reason.com/news/show/29954.html>.
59. *See* ROBERT G. McCLOSKEY, THE AMERICAN SUPREME COURT 14 (4th ed. 2005).
60. 347 U.S. 483 (1954).
61. *See* Jon S. Vernick et al., *Public Opinion Polling on Gun Policy*, 12 HEALTH AFF. 198, 204–05 (1993) (reviewing public opinion polls).
62. *See* TOM W. SMITH, 2001 NATIONAL GUN POLICY SURVEY OF THE NATIONAL OPINION RESEARCH CENTER 34 (2001), *available at* <http://www.mindchanging.com/politics/guncontrolsurvey.pdf>. Some studies find somewhat greater support for a handgun ban, although the position consistently has less than majority support. *See* Vernick et al., *supra* note 61, at 206.
63. *See* SMITH, *supra* note 62, at 2; *accord* Vernick et al., *supra* note 61, at 201–05.