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Protecting Gun Rights and Improving Gun Control after District of Columbia v. Heller

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PROTECTING GUN RIGHTS AND IMPROVING GUN CONTROL AFTER *DISTRICT OF COLUMBIA V. HELLER*

by
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The Supreme Court's decision in District of Columbia v. Heller*, rejecting the narrow interpretation of the Second Amendment that most courts previously embraced, might seem to be a significant setback for gun control supporters and a major victory for gun rights advocates. Challenging that conventional wisdom, the author contends that* Heller *ultimately will help rather than hinder the push toward strong, sensible gun control laws. Justice Scalia's opinion for the majority in* Heller *ultimately backs away from the most drastic implications of its reasoning and instead steers toward a more moderate approach under which virtually all existing gun laws should be upheld. Developments since* Heller*, including the continuing controversy over gun laws in the District of Columbia and the lower courts' reactions to a wave of post-*Heller *challenges to the constitutionality of various federal and state gun laws, suggest that the ultimate effects of the Supreme Court's decision in* Heller *will be far less dramatic than many initially expected. In the long run, the* Heller *decision's most important effect may be to reduce the intensity and bitterness of the nation's political and cultural debate over guns. By confirming that reasonable gun regulations will not lead to extreme measures like prohibition of all guns,* Heller *may turn out to be an important victory for both gun control and gun rights.*

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I. INTRODUCTION

Before becoming a law professor, I was a senior staff attorney at the Brady Center to Prevent Gun Violence, the nation's largest and most influential "gun control" organization.[1] As part of that job, I frequently participated in debates about the Second Amendment right "to keep and bear [a]rms."[2] I argued that the right pertains only to having and using guns in connection with some form of organized, public, military activity. The speakers on the other side of these debates—including gun rights activists and representatives of groups like the National Rifle Association (NRA), Gun Owners of America, and the Second Amendment Foundation—insisted that the right was broader, reaching possession and use of guns for private, non-military purposes such as hunting or protection from crime. It was an enormously complex and intriguing question of constitutional interpretation, giving us plenty to volley back and forth before a wide array of audiences, from high school students to congressional staff members, interested in hearing about the issue.

I came up with a dramatic way to emphasize the enormous weight of precedent that supported my point of view. I would pull out a folder, several inches thick, stuffed with copies of dozens of opinions from federal appellate courts across the country, and announce, "This is where I keep copies of all the decisions that support my reading of the Second Amendment." After ruffling through the contents a bit to underscore their bulk, I would pull out a markedly thinner folder and say, "This is where I keep all the cases that go the other way." After giving the audience a few moments to take in the striking contrast between the sizes of the two folders, I would let the second one fall open to reveal that it had nothing inside it. "As you can see," I would explain with relish, "all of the precedent is on my side." That demonstration always earned a few laughs from the audience, while effectively illustrating the overwhelming judicial consensus about the Second Amendment's narrowly limited reach.

How quickly things can change. In less than a decade, what was a unanimous and seemingly solid wall of precedent about the Second Amendment's limited reach has been swept aside. The U.S. Supreme Court's decision in *District of Columbia v. Heller* decisively rejected the narrow interpretation of the Second Amendment that had previously prevailed in courts across the country.[3]

At first blush, *Heller* seems to be a major setback for gun control advocates and a tremendous victory for gun rights proponents. The real significance of the decision, however, remains to be determined, not only in future court battles but also in political and legislative arenas. Contrary

[1] *See* Brady Center to Prevent Gun Violence, About Us, http://www.bradycenter.org/about/.

[2] U.S. CONST. amend. II.

[3] District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

to conventional wisdom, I believe *Heller* ultimately will turn out to be much more of an aid than a detriment to the push toward strong, sensible gun laws. In the long run, the Supreme Court's decision may help to drive the nation away from unproductive bickering over guns and toward reasonable compromises and real progress on the issue.

Part II of this Article examines the Supreme Court's decision in *Heller*, focusing in particular on several passages of the majority opinion suggesting that the Second Amendment will provide only a moderate and limited right to keep and bear arms. Part III looks at what has occurred in the first ten months since the *Heller* decision. These events, in the District of Columbia as it amends its laws in reaction to the Supreme Court's ruling, and in the lower courts as judges face the leading edge of a wave of Second Amendment challenges to gun laws and regulations, suggest that only the most extraordinarily drastic legal restrictions on guns should be struck down under *Heller* and the vast majority of current gun laws will withstand constitutional attacks. Finally, Part IV suggests that the *Heller* decision may actually prove to be a blessing for those who want a strong but reasonable system of legal controls on guns. By ruling out extreme policy options, such as banning all handguns, the Supreme Court's decision could help dissolve the current partisan, ideological, and cultural divide over guns and bring more people together to seek a sensible middle ground on the issue.

II. THE SUPREME COURT'S DECISION IN *HELLER*

The debate over the meaning of the Second Amendment, and whether it should be construed as protecting access to guns for private, non-military purposes, has been raging for years and surely will continue for many more. Detailed critiques and defenses of the *Heller* majority's and dissents' analyses will be offered. In my view, however, the opinions produced by justices on each side of the fight in *Heller* merely confirm that this is a question on which there is no real "right" or "wrong" answer. Instead, the meaning of the Second Amendment "is in the eye of the beholder, with both sides equally and sincerely able to find what they want to see."[4] Indeed, the issue provides persuasive support to Judge Richard Posner's candid recognition that, no matter how observers or the Supreme Court justices themselves may pretend otherwise, these sorts of constitutional issues do not have objective answers:

> Almost a quarter century as a federal appellate judge has convinced me that it is rarely possible to say with a straight face of a Supreme Court constitutional decision that it was decided correctly or incorrectly. When one uses terms like "correct" and "incorrect" in this context, all one can actually mean is that one likes (approves

[4] Allen Rostron, Op-Ed., *Middle Ground: The Supreme Court's Opportunity in* DC v. Heller, JURIST, Apr. 2, 2008, http://jurist.law.pitt.edu/forumy/2008/04/middle-ground-supreme-courts.php.

> of, agrees with, or is comfortable with) the decision in question or dislikes (disapproves of, disagrees with, or is uncomfortable with) it. One may be able to give reasons for liking or disliking the decision—the thousands of pages of Supreme Court Forewords attest this to any doubter—and people who agree with the reasons will be inclined to say that the decision is correct or incorrect. But that is just a form of words. One can, for that matter, notwithstanding the maxim *de gustibus non est disputandum*, give reasons for preferring a Margarita to a Cosmopolitan. The problem, in both cases, is that there are certain to be equally articulate, "reasonable" people who disagree and can offer plausible reasons for their disagreement, and there will be no common metric that will enable a disinterested observer (if there is such a person) to decide who is right.[5]

For the most part, Justice Scalia's opinion for the majority of the Supreme Court in *Heller* is a solid presentation of textual arguments and historical evidence for interpreting the Second Amendment broadly to protect non-military use of guns. It offers a plausible portrait of how some citizens of the founding generation might have understood the Second Amendment's terms. The most striking passages of the opinion, however, are those in which Scalia suddenly strays from his efforts to divine the provision's original meaning. Tossing aside his chosen methodology when it does not suit his purposes, Scalia makes a series of crucial assertions for which he conspicuously neglects to offer any real support or evidence about original understandings of the constitutional text.

The most prominent example, already receiving abundant attention from lower courts,[6] comes toward the end of Scalia's opinion when he acknowledges that the right to keep and bear arms is limited and consistent with extensive government regulation of guns; he then goes out of his way to offer examples of the sorts of laws that should survive constitutional attack.[7] Scalia first suggests that prohibitions on carrying concealed weapons do not violate the Second Amendment.[8] For this, he provides at least some sort of support, although it consists merely of citations to a few cases and legal treatises establishing that some (but not all) courts in the nineteenth century upheld the constitutionality of concealed weapon bans.[9] That hardly seems like compelling evidence of the Second Amendment's original meaning, but it is apparently enough.

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[5] Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 40–41 (2005). The Latin phrase mentioned by Posner means "There's no disputing about taste" or "There's no accounting for taste." THE NEW DICTIONARY OF CULTURAL LITERACY 49 (E.D. Hirsch, Jr. et al. eds., 3d ed. 2002).

[6] *See infra* Part III.B.

[7] *Heller*, 128 S. Ct. at 2816–17.

[8] *Id.* at 2816.

[9] *Id.*

The majority then offers a list of other "presumptively lawful regulatory measures,"[10] but without even trying to explain how it has arrived at the conclusion that these particular sorts of gun control laws are constitutional:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, 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.[11]

The opinion notes that this list is not complete, and so there may be other gun control measures that are "presumptively" valid as well.[12]

The majority's endorsement of these sorts of sensible restrictions on guns helps make *Heller* seem like a much less radical decision. Personally, I agree that each of the measures on the majority's list should be a constitutionally permissible means of regulating firearms. They are reasonable policy measures that do not excessively burden anyone's legitimate interests in being able to own and use guns. Scalia and the other four members of the majority in *Heller* cannot say that though, because it runs counter to their insistence that the Court should not be engaging in any sort of public policy or "interest-balancing" analysis.[13] The fact that the majority endorses these measures in a cursory bit of dicta, without engaging in any real analysis, undermines the pretense that their originalist methodology truly drives their decision-making rather than merely serving as a convenient way to cloak their conclusions with an air of objectivity and detachment from contemporary political and ideological preferences.

The same can be seen in the portion of the opinion that explains why the Second Amendment gives District of Columbia residents a right to possess handguns and not just rifles and shotguns:

> There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police.[14]

Justice Scalia is an avid hunter; he knows a lot about guns, enjoys using them, and is certainly entitled to whatever personal views he may have about the relative merits of handguns versus long guns for home

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[10] *Id.* at 2817 n.26.
[11] *Id.* at 2816–17.
[12] *Id.* at 2817 n.26.
[13] *Id.* at 2821.
[14] *Id.* at 2818.

defense purposes.[15] But his reliance on that sort of nakedly personal assessment of a public policy issue, to resolve a crucial legal issue in a landmark decision on the Constitution's meaning, is startling. It looks very much like the sort of "judge-empowering" "interest-balancing" that he denounces the dissenters in *Heller* for endorsing.[16]

Meanwhile, the majority opinion artfully dodges one of the stickiest dilemmas that has plagued those arguing for a broad reading of the Second Amendment: If everyone has a right to keep and bear arms for personal, private purposes, does that mean they have a right to even the most potent military weaponry?[17] Perhaps some of the most ardent advocates for gun rights might think so, but Scalia and his colleagues on the Supreme Court surely did not want to be viewed as going to that extreme. Imagine how most of the American public and press would have reacted to *Heller* if it announced that everyone now has a right to amass their own arsenals of machine guns, bazookas, rocket-propelled grenade launchers, and shoulder-fired missiles.

Scalia manages to stay on more moderate ground by concluding that the Second Amendment protects only weapons currently in "common use" among American civilians.[18] He would conclude, for example, that the government can ban machine guns, not because they pose a particularly serious threat to public safety, but because the government has been heavily regulating and restricting them for so long that they are not in common use among civilians.[19] He concocts his "common use"

[15] Scalia is an "enthusiastic hunter" who has called for efforts to change "[t]he attitude of people associating guns with nothing but crime." Clay Carey, *Scalia Champions Hunting and Conservation*, TENNESSEAN, Feb. 26, 2006, at 1B (describing Scalia's address to the annual convention of the National Wild Turkey Federation). In 2007, Scalia received the "Sport Shooting Ambassador Award," an annual honor bestowed by the World Forum on the Future of Sport Shooting Activities, an international association of gun makers and gun rights organizations such as the NRA. Josh Sugarmann, *"Sport Shooting Ambassador Award" Winner Antonin Scalia's 2nd Amendment Ruling Does His Gun Pals Proud*, June 26, 2008, http://www.huffingtonpost.com/josh-sugarmann/sport-shooting-ambassador_b_109367.html.

[16] *Heller*, 128 S. Ct. at 2821.

[17] For discussion of and proposed solutions to this dilemma, see, for example, Richard A. Allen, *What Arms? A Textualist's View of the Second Amendment*, 18 GEO. MASON U. CIV. RTS. L.J. 191 (2008); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms,"* 49 LAW & CONTEMP. PROBS. 151, 157–60 (1986); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 635–37 (1986); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 258–64 (1983); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. REV. 1359, 1531–34 (1998); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 41–46 (1996).

[18] *Heller*, 128 S. Ct. at 2815, 2817 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

[19] Transcript of Oral Argument at 22, *Heller*, 128 S. Ct. 2783 (No. 07-290). In fact, civilians in the United States currently possess about 400,000 legal, registered machine guns and an unknown number of illegal, unregistered ones. *See* OFFICE OF

limitation by quoting *United States v. Miller*,[20] a 1939 case that produced the Court's most extensive discussion of the Second Amendment prior to *Heller*. In *Miller*, the Court emphasized that the Second Amendment must be interpreted and applied with an eye to its "obvious purpose" of ensuring the "continuation" and "effectiveness" of militias.[21] Explaining what the term "militia" meant to the founding generation, the *Miller* opinion stated that the militia "comprised all males physically capable of acting in concert for the common defense," and that "ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[22] Scalia latches on to the phrase "common use," turning it into a basis for limiting the Second Amendment's reach so that it does not extend to the sorts of weapons that would actually be most useful for ensuring the effectiveness of militia forces.

While it is easy to understand the practical and political reasons why Scalia and his fellow justices would hesitate to extend constitutional protection to private possession of the most destructive military armaments, Scalia's selective reliance on one snippet from *Miller* is a brazenly manipulative way of reaching that result. On the overarching issue of whether the Second Amendment protects non-military use of guns, Scalia fervently derides *Miller* as a precedent, claiming that it contains absolutely no discussion of the history of the Second Amendment, and that it resulted from a one-sided proceeding in which only the government filed a brief or presented any argument.[23] According to Scalia, the fact that the defendants in *Miller* were fugitives and their counsel was therefore barred from presenting their side of the issues to the Court is "reason enough, one would think, not to make that case the beginning and the end of this Court's consideration of the Second Amendment."[24] When it comes to the question of what weapons the Second Amendment protects, however, Scalia is happy to cherry-pick language from an opinion that he otherwise disparages as dubious precedent.

In doing so, Scalia also distorts what *Miller* said. *Miller* did not hold that the Second Amendment protects only weapons in common use; it held that the Second Amendment protects only weapons having a reasonable connection to militia service. Specifically, the *Miller* opinion stated that the crucial consideration was whether a firearm was "part of

THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, REPORT NO. I-2007-006, THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES' NAT'L FIREARMS REGISTRATION AND TRANSFER RECORD 2 (2007), *available at* http://www.usdoj.gov/oig/reports/ATF/e0706/final.pdf (reporting that ATF records included registrations for 391,532 machine guns as of November 2006).

[20] 307 U.S. at 179.

[21] *Id.* at 178.

[22] *Id.* at 179.

[23] *Heller*, 128 S. Ct. at 2814.

[24] *Id.*

the ordinary military equipment" or could "contribute to the common defense."[25] That was the test. That is why the government prevailed in the case: there was no evidence that the gun in question, a sawed-off shotgun, was suited for military use.[26]

After reaching that conclusion, the Court in *Miller* then went on to discuss the meaning of "militia," noting that militia members in early America ordinarily brought their own guns when called up for militia service, and therefore militia forces were typically equipped with the sorts of guns in common use in that era.[27] But contrary to Scalia's twisted reading of the decision, *Miller* simply did not say that the Second Amendment protects only firearms in common use among civilians.

Put another way, *Miller* held that the legal test under the Second Amendment is X (military usefulness), and then mentioned that many guns that are X will also be Y (in common use). Scalia pretends that *Miller* said the test is Y. By doing that, Scalia can adopt the broad reading that he wants to give to the Second Amendment in some respects, while avoiding the scary and politically unpalatable prospect that it gives private individuals a right to arm themselves with the sorts of potent weaponry that would actually be most useful for modern combat by militia forces. Scalia and his colleagues thus sacrifice logical consistency and faithful reading of precedent in order to construct an interpretation of the Second Amendment more in harmony with contemporary public opinion. Scalia wants to give us a right to keep and bear arms that is far-reaching in some ways but not others, and his strained interpretation of *Miller* allows him to find what he wants to find in the Constitution.

Aside from his selective reliance on *Miller*, Scalia asserts that his limitation of the Second Amendment's protection to guns in "common use" today is "fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[28] I agree that we should exclude extraordinarily dangerous weapons from the protection of the Second Amendment, because that is an eminently sensible thing to do, but that is true regardless of whether policy makers in the early 1800s reached the same conclusion. Scalia nevertheless insists on hiding his policy preferences under the guise of discerning "traditions." One of the crucial but unarticulated principles of his method of constitutional

[25] *Miller*, 307 U.S. at 178. Immediately after making this point, the *Miller* opinion confirmed and re-emphasized it by citing a Tennessee court decision which unequivocally declared that the right to keep and bear arms applies only to guns useful for military purposes. *See id.* (citing *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840) ("As the object for which the right to keep and bear arms is secured is of general and public nature, to be exercised by the people in a body, for their common defence, so the arms the right to keep which is secured are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment.")).

[26] *Miller*, 307 U.S. at 178.

[27] *Id.* at 179.

[28] *Heller*, 128 S. Ct. at 2817.

interpretation seems to be that if judges make policy arguments supported by citations to sources from the nineteenth century, they are properly giving weight to tradition, but if they make policy arguments supported by citations to sources from the twentieth or twenty-first centuries, they are engaged in illegitimate legislating from the bench. Scalia's "faint-hearted" version of originalism[29] begins to seem not only methodologically unsound, but like an antiquarian fetish that obscures more than it contributes to decision-making.

Despite his penchant for historical evidence of early American understandings, Scalia conspicuously avoids mentioning one significant but notorious antebellum precedent. In *Dred Scott v. Sandford*, the Supreme Court held that people of African descent could not be American citizens protected by the Constitution.[30] In doing so, Chief Justice Roger Taney's opinion explained that a contrary conclusion would be absurd because it would mean that "persons of the negro race" would have rights that included the freedom "to keep and carry arms wherever they went."[31] That was a clear expression of an understanding by a majority of the Supreme Court, albeit in dicta, that the Second Amendment protects a right that extends beyond use of guns for organized military activities. *Dred Scott* therefore has long been a key piece of evidence for those arguing for a broad interpretation of the Second Amendment.[32] Scalia never cites it, even though it would provide strong support for his interpretation of the Second Amendment, apparently preferring to avoid mention of a case that has become infamous for its repugnant views about race. Once again, Scalia puts considerations about the "optics" of his decision ahead of the substance of his analysis, ignoring key precedent that has a bad reputation for reasons unrelated to the issue at hand.

Of all the things that Scalia's majority opinion in *Heller* does to make its reading of the Constitution appear less threatening to moderate, mainstream audiences, the most important maneuver is to downplay the notion that the Second Amendment was meant to ensure that the American people would be well armed to fight against their own government if necessary. Gun rights advocates have heavily emphasized that point for years, arguing that the primary purpose of the Amendment was to enable Americans to deter and to resist tyranny.[33] The idea has

[29] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–63 (1989) (describing how a "faint-hearted" originalist would not be willing to accept all consequences of an entirely originalist interpretation of the Constitution).

[30] Dred Scott v. Sandford, 60 U.S. 393 (1856).

[31] *Id.* at 417.

[32] *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 651 (1989) (noting that "Taney's seeming recognition of a right to arms is much relied on by opponents of gun control").

[33] *See, e.g.*, David B. Kopel & Christopher C. Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 MD. L. REV. 438, 466 (1997) (contending that "[v]irtually all legal scholarship on the Second Amendment from

even been captured in a slogan emblazoned on bumper stickers: "The Second Amendment is not about duck hunting."[34] Although the meaning of that saying may be opaque to many, it is well understood by gun rights proponents:

> The Second Amendment isn't about duck hunting, nor about shooting lone criminals, although both activities were considered morally laudable. The Second Amendment at its core is about fear of a criminal federal government in general, and fear of a federal standing army in particular. Uniformed, professional, heavily armed employees of the central government in Washington—these were the people that the authors of the Constitution wisely feared would be more loyal to centralized authority than to the communities of America.[35]

The validity of this line of argument has been one of the most incendiary issues in the debate over the Second Amendment's meaning. Some commentators criticize it as a dangerous "insurrectionist" theory, saying that it is absurd to think the founders of this nation meant to enshrine a constitutional right to amass weapons for use in violent revolutionary actions, and that such an interpretation of the Second Amendment would lend justification to anti-government acts like Timothy McVeigh's murderous bombing of the federal building in Oklahoma City in 1995.[36] On the opposite side, some argue that the continuing need for a heavily armed citizenry as a check against despotic government action is proven by modern events like federal law enforcement's confrontation with the Branch Davidian religious group at Waco, Texas, in 1994.[37] Whatever one thinks of the resistance-to-tyranny rationale, it has been a central part of the debate and a fundamental component of the so-called "Standard Model" of the Second Amendment developed by scholars and other commentators urging courts to

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the last two decades" agrees that "one of the major reasons the Amendment was included in the Bill of Rights was to ensure the perpetuation of a force of armed citizens that could resist domestic tyranny when—but only when—it was absolutely necessary").

[34] S. Vaughn Binzer, *Against Handgun Ban*, ADVERTISING AGE, Mar. 30, 1992, at 28.

[35] David B. Kopel, *On the Firing Line: Clinton's Crime Bill*, *in* THE HERITAGE FOUNDATION LECTURES NO. 476 (1993), *available at* http://www.heritage.org/Research/Crime/HL476.cfm.

[36] *See, e.g.*, Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 386–87 (1998); Dennis Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107, 109–12 (1991); Harold S. Herd, *A Re-Examination of the Firearms Regulation Debate and Its Consequences*, 36 WASHBURN L.J. 196, 198, 237–240 (1997); Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 359–63 (2000).

[37] *See* Kopel, *supra* note 35 ("Already we live in a world where federal agencies feel free to assault on specious charges a peaceful community which happens to have eccentric religious beliefs and a lot of firearms."); *cf.* David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879 (1996) (examining the Second Amendment views of the militia movement).

reconsider and reject precedent limiting the right to keep and bear arms to military endeavors.[38] According to the gun rights advocates who have most exhaustively studied the issue, the people's ability to resist their own government is the very core of the right guaranteed by the Second Amendment.[39]

The striking thing about Justice Scalia's handling of this point in *Heller* is that he says so little about it. The idea makes only scant appearances in the majority's opinion. For example, when he explains why a militia was thought to be necessary to the security of a free state, Scalia mentions that, among other things, "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny."[40] Considering its central importance in the Second Amendment debate, however, the idea gets very little attention in the quite lengthy majority opinion.

Shying away from the resistance-to-tyranny rationale, the *Heller* majority instead portrays the Second Amendment, at every opportunity, as an anti-crime measure. Scalia posits that it "guarantee[s] the individual right to possess and carry weapons in case of confrontation,"[41] it "enable[s] individuals to defend themselves,"[42] and it "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[43] Scalia even asserts, without citing any authority and despite the very glaring evidence to the contrary in the Second Amendment's text, that most early Americans "undoubtedly" thought the right to keep and bear arms was "even more important for self-defense and hunting" than for preventing elimination of the militia.[44] Individual self-defense is, Scalia insists, "the *central component* of the right."[45]

Scalia's opinion is a very skillful and impressive piece of work, but it is ultimately the work of an advocate. It is a highly selective, result-oriented presentation of the issues, produced by someone laboring hard not only to reach a particular result, but also to deliver that result wrapped in the most appealing possible packaging for mainstream public tastes. It is not the product of judges earnestly striving to act merely as umpires calling balls and strikes, as soon-to-be Chief Justice John Roberts

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[38] *See, e.g.*, Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENT. 221, 237–245 (1999); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 466–71 (1995).

[39] Kopel, *supra* note 35.

[40] Heller, 128 S. Ct. 2783, 2801 (2008).

[41] *Id.* at 2797.

[42] *Id.* at 2799.

[43] *Id.* at 2821.

[44] *Id.* at 2801.

[45] *Id.*; *see also id.* at 2817 ("[T]he inherent right of self-defense has been central to the Second Amendment right."); *id.* at 2818 (describing self defense as the right's "core" purpose).

once famously described his conception of the judicial role.[46] While Scalia's majority opinion repeatedly condemns the District of Columbia and the dissenting members of the Supreme Court for selectively disregarding historical reality,[47] overstating the conclusions that can be drawn from historical sources,[48] and reaching conclusions ultimately driven by contemporary, personal policy preferences,[49] the majority itself is guilty of every one of those same faults.

For gun control supporters, the good news is that Scalia's most questionable analytical maneuvers have the effect of making the *Heller* decision less of a threat to gun laws currently in effect and less of an obstacle to those that might be adopted in the future. While Scalia's dicta endorsing several significant types of gun regulations as "presumptively valid" may be a brazen departure from what otherwise purports to be his approach to judging in general and constitutional interpretation in particular,[50] it is a crucial cue to lower court judges that is likely to minimize greatly the *Heller* decision's impact. Likewise, Scalia's arguments for limiting the Second Amendment's protection to guns currently in "common use" may strain precedent, history, and logic,[51] but it is ultimately a welcome conclusion to anyone who favors tight restrictions on civilian access to the most potent types of weapons. Whether he was merely trying to give the Court's decision a veneer of moderation, or also struggling to hold the support of all four justices who joined him, his opinion winds up steering closer to the middle ground of the gun debate and away from the most extreme consequences it might have triggered.

III. POST-*HELLER* DEVELOPMENTS

The ultimate impact of the *Heller* decision will not become fully clear for some time. Events during the first ten months after the Supreme Court's announcement of its ruling, however, suggest that the decision's consequences will be much smaller than many gun control supporters may have feared and many gun rights proponents may have expected.

A. Revising the District of Columbia's Laws

The *Heller* decision's most direct effect obviously would be in the District of Columbia. The Supreme Court's ruling clearly meant that the District needed to make some revisions to its gun laws, but the extent of the required changes has been the subject of great controversy.

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[46] *Roberts: 'I Have No Agenda,'* WASH. POST, Sept. 13, 2005, at A7.
[47] *See, e.g.*, *Heller*, 128 S. Ct. at 2801–02.
[48] *See, e.g.*, *id.* at 2819–21.
[49] *See, e.g.*, *id.* at 2821.
[50] *See supra* notes 7–13 and accompanying text.
[51] *See supra* notes 18–29 and accompanying text.

The D.C. Council and Mayor Adrian Fenty felt that *Heller* demanded only minimal changes, and they were not inclined to loosen legal restrictions on guns any more than necessary.[52] In a measure passed just a few weeks after the issuance of the *Heller* decision, the Council amended the District's firearm laws to permit registration of a handgun by any person "for use in self-defense within that person's home."[53] Stopping at the bare minimum required by *Heller*, the new law barred anyone from having more than a single handgun,[54] and it made clear that the handgun generally must remain in the owner's home and cannot be carried elsewhere.[55] The D.C. Council retained the other key provision struck down by the Supreme Court—the requirement that any firearm in a person's home be kept unloaded and either disassembled or secured by a trigger lock, gun safe, or similar device—but added an exception permitting a registered gun to be loaded and unlocked "while it is being used to protect against a reasonably perceived threat of immediate harm to a person within the registrant's home."[56]

Meanwhile, in enacting these measures, the District's government essentially concluded that revolvers could be registered under the newly amended law, but not semi-automatic pistols.[57] This distinction stemmed

[52] *See* District of Columbia Mayor's Office, *District Government Reacts to* Heller *Ruling* (2008), http://www.dc.gov/mayor/news/release.asp?id=1325&mon=200806.

[53] Firearms Control Emergency Amendments Act of 2008, sec. 2(a)(1), § 202(a)(4), 55 D.C. Reg. 8237 (Aug. 1, 2008). The new enactment actually used the term "pistol" rather than handgun, but pre-existing D.C. law defined the term "pistol" to mean "any firearm originally designed to be fired by use of a single hand." D.C. Code § 7-2501.01(12) (2009). For a more detailed explanation of the District of Columbia's gun laws and their history prior to the Supreme Court's decision in *Heller*, *see* Allen Rostron, *Incrementalism, Comprehensive Rationality, and the Future of Gun Control*, 67 MD. L. REV. 511, 533–45 (2008).

[54] Firearms Control Emergency Amendments Act of 2008, sec. 2(b), § 203(e), 55 D.C. Reg. at 8238.

[55] *Id.* sec. 2(a)(3), § 202(c), 55 D.C. Reg. at 8237.

[56] *Id.* sec. 2(c), § 702(3), 55 D.C. Reg. at 8238.

[57] Revolvers and semi-automatic pistols are the two basic types of handguns. A revolver has a rotating cylinder with a number of chambers (usually five or six), each of which holds one round of ammunition. As the cylinder rotates, one chamber at a time is aligned with the barrel so that the round in that chamber can be fired. A semi-automatic pistol instead typically has a magazine (a container that holds ammunition) that fits inside the pistol's grip. There are other types of handguns, such as derringers, but they are relatively uncommon today. *See generally* Chuck Hawks, Handgun Types, http://www.chuckhawks.com/handgun_types.htm.

The term "semi-automatic" refers to the means by which spent cartridge cases are ejected from the firearm and new cartridges are loaded into the firing chamber. In other words, when a gun fires, a bullet flies out of the barrel and heads toward the target, but the empty cartridge case that contained the bullet is left behind in the gun's firing chamber and must be ejected to make room for the next round of ammunition. For many guns (such as bolt action, lever action, slide action, or pump action guns), this is accomplished by some sort of manual force supplied by the shooter. *See* Allen Rostron, *High-Powered Controversy: Gun Control, Terrorism, and the Fight over .50 Caliber Rifles*, 73 U. CIN. L. REV. 1415, 1419–20 (2005). Other firearms are "self-

from the existence of D.C. statutes which had long prohibited possession of "machine gun[s]."[58] While that term ordinarily refers only to guns capable of automatic fire,[59] District laws defined "machine gun" more broadly to include any gun that fires semi-automatically and "which shoots, is designed to shoot, or can be readily converted or restored to shoot . . . more than 12 shots without manual reloading."[60]

This posed no problem for revolvers, most of which have an ammunition capacity of less than twelve rounds, and almost none of which are semi-automatic.[61] Pistols, however, are a different story. In revising its laws in response to *Heller*, the District of Columbia took the position that every semi-automatic pistol constituted a "machine gun" within the meaning of the D.C. gun laws, because it can either hold or be readily converted to hold more than twelve rounds of ammunition. The conversion entails simply replacing the original ammunition magazine with a longer one capable of holding more rounds. For example, an enormous magazine, containing many dozens of rounds of ammunition, could be put into even a very small pistol; the magazine would just extend a long way down out of the bottom of the gun's hand grip.[62]

The D.C. government thus concluded that semi-automatic pistols were "machine guns" prohibited by the D.C. gun laws. Moreover,

loading," meaning that the explosive force created by firing a round ejects the spent cartridge from the gun, permitting the next round of ammunition to move into the firing chamber, and thus require no action by the shooter to eject the spent round and place a new round in the chamber. *Id.* at 20. A self-loading firearm is "automatic" if it fires more than one round per trigger pull, and "semi-automatic" if it fires just one round per trigger pull. *Id.*

[58] *See* D.C. Code §§ 7-2502.02(a)(2), 22-4514(a) (2009).

[59] *See, e.g.*, Sporting Arms and Ammunition Manufacturers' Institute, Glossary, http://www.saami.org/glossary/display.cfm?letter=M. For a brief explanation of "automatic" fire, *see supra* note 57.

[60] D.C. Code § 7-2501.01(10) (2008); *see also id.* § 22-4501(c) (defining "machine gun" as "any firearm which shoots automatically or semiautomatically more than twelve shots without reloading"). These provisions were amended in September 2008. *See supra* note 72 and accompanying text.

[61] Only a few models of semi-automatic revolvers, such as the Webley-Fosbery and Mateba Unica, have ever been commercially produced. Neither had an ammunition capacity of more than twelve rounds. *See, e.g.*, World Guns, Webley-Fosbery Automatic Revolver (Great Britain), http://world.guns.ru/handguns/hg184-e.htm; World Guns, Mateba Model 6 Unica Auto-Revolver (Italy), http://world.guns.ru/handguns/hg186-e.htm.

[62] A pistol would not constitute a "machine gun" under District law if it had a fixed (*i.e.*, non-detachable) magazine that held only twelve or fewer rounds of ammunition, or if it had some other unusual design feature that would prevent a large-capacity magazine from being inserted into it. But such pistols are so uncommon that the District's position essentially amounted to saying every pistol was a banned "machine gun." *Cf.* 55 D.C. Reg. 10081 (Oct. 3, 2008) (D.C. Res. 17-771, § 2(d), *available at* http://newsroom.dc.gov/file.aspx/release/15044/03%20-%20Resolutiions.pdf (stating that the definition of "machine gun" in D.C. statutes "effectively prohibits the registration of most semi-automatic pistols because the typical semi-automatic can be fitted with a large ammunition magazine").

according to the District, a ban on such pistols should survive a Second Amendment challenge, even after *Heller*, because allowing people to register and possess revolvers is sufficient to satisfy whatever interest in self-defense people have under the Second Amendment.[63]

Dick Heller found himself tripped up by the District of Columbia's response to the landmark decision that bears his name. When Heller tried to exercise his Second Amendment rights by registering a handgun under the newly-amended D.C. gun laws, he was turned away because the handgun he had brought with him to the registration office was a semi-automatic pistol. When he then tried to register a revolver, his application was again rejected because he did not have the gun with him.[64]

Not surprisingly, the District of Columbia's positions drew strong criticism from organizations like the NRA[65] and their allies in the U.S. Congress.[66] The lawyers who brought the *Heller* case filed a new lawsuit against the District of Columbia.[67] In their view, the D.C. Council had brazenly thumbed its nose at the Supreme Court and refused to comply with the *Heller* decision. They condemned the District's refusal to permit registration of semi-automatic pistols, the most common type of handgun used in America today, as well as the fact that the newly amended D.C. law permitted firearms in the home to be loaded and unlocked only when actually being used "to protect against a reasonably perceived threat of immediate harm."[68] Under that law, the critics sarcastically suggested, "a robber has to make an appointment with you so you can get your gun ready for him."[69]

Before the legal merits of the D.C. Council's initial legislative response to *Heller* could be evaluated by any court, developments on the political front dramatically changed the situation. Rather than leaving the matter for judges to resolve, federal legislators stepped into the fray, threatening to enact measures that would substantially weaken the

[63] Del Quentin Wilber & Paul Duggan, *D.C. Is Sued Again over Handgun Rules*, WASH. POST, July 29, 2008, at B1 (describing District's acting attorney general, Peter Nickles, as saying Supreme Court's decision in *Heller* allows a government to ban a type of firearms, such as semi-automatic pistols, that the government considers unreasonably dangerous).

[64] David C. Lipscomb & Matthew Cella, *District Begins Licensing Pistols; Appeal Victor Turned Away*, WASH. TIMES, July 18, 2008, at A1.

[65] David C. Lipscomb & Gary Emerling, *D.C. on Verge of New Gun Law, at Risk of Challenges; NRA Lobbyist Calls Legislation 'a Joke,'* WASH. TIMES, July 15, 2008, at A1.

[66] Editorial, *Trigger-Happy on the Hill; Writing D.C. Gun Laws Isn't Congress's Job*, WASH. POST, July 25, 2008, at A20.

[67] Wilber & Duggan, *supra* note 63.

[68] Firearms Control Emergency Amendments Act of 2008, sec. 2(c), § 702(3), 55 D.C. Reg. 8237, 8238 (Aug. 1, 2008); *see supra* note 56 and accompanying text.

[69] Wilber & Duggan, *supra* note 63 (quoting Stephen P. Halbrook, an attorney for Dick Heller).

District's gun laws and strip the District's local government of authority to enact new restrictions.[70]

Hoping to defuse the congressional threat and to preserve its local control over gun issues, the District government quickly backpedaled and enacted more legislation.[71] Responding to the sharpest criticisms of its initial response to *Heller*, the D.C. Council relaxed the restrictions on semi-automatic firearms and the requirements for storage of guns. Specifically, the new law revised the definition of "machine gun" to maintain a ban on automatic weapons but to permit registration of semi-automatic pistols and rifles with magazines holding ten or fewer rounds.[72] The revised law also allowed a person to register and own multiple handguns, although it provided that only one handgun could be registered by a person during any thirty day period,[73] effectively imposing a "one handgun a month" rule like those in effect in several states.[74] As for storage of guns, the revised law permitted a person to keep a registered gun loaded and ready to use for defense in the person's home if carried "on his person or within such close proximity that he can

[70] In September 2008, the U.S. House of Representatives passed a bill that would drastically cut back legal restrictions on guns in the District of Columbia. 154 CONG. REC. H8285 (daily ed. Sept. 17, 2008) (voting 266 to 152 in favor of the Second Amendment Enforcement Act, H.R. 6842, 110th Cong. (2008)). The U.S. Senate, however, did not act on the bill. *See* Mary Beth Sheridan, *Limit on Gun Law Passes; Senate Vote Unlikely*, WASH. POST, Sept. 18, 2008, at B2 (describing moves to block the bill in the Senate).

Early in the next term of Congress, the U.S. Senate approved a measure very similar to what the House of Representatives had passed in September 2008. *See* 155 CONG. REC. S2538 (daily ed. Feb. 26, 2009) (voting 62 to 36 in favor of Amendment No. 575 to the District of Columbia Voting Rights Act of 2009, S. 160, 111th Cong. (2009)). The Senate measure was passed as an amendment to a bill that would give the District of Columbia a voting member in the U.S. House of Representatives, forcing D.C. officials and Democratic leaders in Congress to make a difficult choice between continuing to push for D.C. voting rights or fighting to preserve the District's gun laws. *See* Michael E. Ruane & Mary Beth Sheridan, *D.C. Weighs Price of Securing Vote in Congress; Gun Law Compromise May Be Unavoidable to Pass Bill*, WASH. POST, Mar. 21, 2009, at A1. At the moment, as this Article is being finalized for publication, it remains uncertain how this showdown in Congress will be resolved. *See* Nikita Stewart, *Gun Amendment Assailed at Capitol Hill Rally*, WASH. POST, Apr. 22, 2009, at B4.

[71] Responding to the pressure from Congress, the District passed the Second Firearms Control Emergency Amendment Act of 2008, 55 D.C. Reg. 9904 (Sept. 26, 2008). This was a temporary "emergency" measure, effective for only ninety days. *Id.* § 7. It was renewed by the Second Firearms Control Congressional Review Emergency Amendment Act of 2008, 56 D.C. Reg. 9 (Jan. 12, 2009), and then superseded by a regular (*i.e.*, non-emergency) enactment, the Firearms Registration Amendment Act of 2008, 56 D.C. Reg. 1365 (Feb. 13, 2009).

[72] Second Firearms Control Congressional Review Emergency Amendment Act of 2008, sec. 2(a)–(b), (d), §§ 101(10), 202(a)(4), 601(b), 56 D.C. Reg. at 9–10.

[73] *Id.* sec. 2(c), § 203(e), 56 D.C. at 10.

[74] *E.g.*, MD. CODE ANN., PUB. SAFETY § 5-128 (2003); VA. CODE ANN. § 18.2-308.2:2(P) (2008); *see* Rostron, *supra* note 53, at 544.

readily retrieve and use it as if he carried it on his person."[75] The revised law made it a crime to store a gun in a way that permits a minor to gain unauthorized access to it.[76]

While the D.C. Council relaxed restrictions on guns in those respects, it tightened them in many other ways. Among other things, the Council extended the waiting period for handgun purchases from two days to ten days,[77] updated and strengthened the District's ban on assault weapons,[78] added a new ban on certain extremely high-powered rifles,[79] adopted California's strict safety and testing standards for handguns,[80] and copied California's demand that gun makers soon begin equipping pistols with "microstamping" technology to help police solve crimes when they recover cartridge cases left behind at the scenes of shootings.[81] The D.C. Council also imposed new requirements on District residents registering guns, such as requiring each applicant to complete a five-hour training course,[82] requiring registration certificates to be renewed every three years,[83] and requiring registered gun owners to undergo a background check every six years.[84]

Political pressure from Congress thus forced the D.C. government to go beyond its initial, very limited response to the *Heller* ruling. As a result, the constitutionality of the D.C. Council's initial response to *Heller* will

[75] Second Firearms Control Congressional Review Emergency Amendment Act of 2008, sec. 2(e), § 702(b), 56 D.C. Reg. at 11.

[76] *Id.*

[77] Inoperable Pistol Emergency Amendment Act of 2008, sec. 2(g), § 8, 56 D.C. Reg. 927, 929–30 (Jan. 30, 2009).

[78] Firearms Registration Amendment Act of 2008, sec. 3(a)(1), § 101 ¶ 3A, 56 D.C. Reg. 1366 (Feb. 13, 2009).

[79] The District banned .50 BMG rifles as well as other rifles "capable of firing a projectile that attains a muzzle energy of 12,000 foot-pounds or greater in any combination of bullet, propellant, case, or primer." *Id.* sec. 3(a)(2), § 101 ¶ 8A, 56 D.C. Reg. at 1369–70. For the inspiration for that measure, see Rostron, *supra* note 57, at 1461–65.

[80] As of January 1, 2009, only handguns on the "California Roster of Handguns Certified for Sale" can be sold or registered in the District. Second Firearms Control Congressional Review Emergency Amendment Act of 2008, sec. 3(m), § 504(a), 56 D.C. Reg. at 1377.

[81] "Microstamping" means that a pistol, when fired, will imprint a number or other identifying code on cartridge cases. The cartridge cases are ejected from the gun as it fires and may be left scattered on the ground at crime scenes. If police recover a cartridge case with a microstamped code on it, they can use the code to determine what gun was used to commit the crime. *See* David Muradyan, *Firearm Microstamping: A "Bullet with a Name on It,"* 39 MCGEORGE L. REV. 616, 625 (2008). The District's "microstamping" requirement takes effect on January 1, 2011, while California's similar requirement takes effect one year earlier. *See* Second Firearms Control Congressional Review Emergency Amendment Act of 2008, sec. 3(l), § 408(b), 56 D.C. Reg. at 1375.; CAL. PENAL CODE § 12126(b)(7) (West 2009).

[82] Second Firearms Control Congressional Review Emergency Amendment Act of 2008, sec. 3(d)(1)(E), § 203(a) ¶ 13, 56 D.C. Reg. at 1372.

[83] *Id.* sec. 3(g), § 207a, 56 D.C. Reg. at 1373.

[84] *Id.*

never be tested in court. If courts had decided the matter, the D.C. government may well have prevailed, for every aspect of its initial response to the *Heller* decision was based on very plausible readings of the Supreme Court's majority opinion. Although Justice Scalia concluded that handguns have constitutionally-significant advantages over long guns for purposes of defending against criminals,[85] his opinion did not say anything about the relative merits of revolvers versus semi-automatic pistols. Justice Scalia's opinion did say that the Second Amendment extends only to firearms that are in "common use" today,[86] and pistols obviously satisfy that criterion so they do not fall completely outside the scope of the right to keep and bear arms. But that merely begins the inquiry, and does not necessarily mean a ban on pistols violates the Second Amendment. The District of Columbia certainly could make a credible argument that a new law banning pistols but permitting revolvers would impair its residents' ability to defend themselves against criminals far less than the old law, found unconstitutional in *Heller*, which banned all handguns.

The issue would be a very tough one to resolve on the basis of "historical" evidence, despite Scalia's insistence that looking back at how guns were regulated in the olden days is the best way to decide these sorts of questions today.[87] Revolvers were virtually unknown in America until legendary gun maker Samuel Colt began producing them in 1836.[88] Semi-automatic pistols would not appear until more than fifty years later.[89] Obviously no one had any thoughts about the relative virtues of revolvers and pistols in the founding era, nor would anyone for a century after the Second Amendment's adoption.

Of course, the lack of any original understanding or early America historical tradition concerning the issue of revolvers versus pistols would not necessarily stop Justice Scalia. After all, his assertions in *Heller* about the importance of handguns versus long guns did not really depend on historical evidence. Instead, Scalia simply relied on his own beliefs about handguns being preferable for people with little upper body strength, easier to hold while dialing a telephone, and so on.[90]

If judges undertake the same sort of free-ranging public policy inquiry about revolvers and semi-automatic pistols, what are they likely to find?[91] Revolvers are generally considered to be a bit more durable and

[85] District of Columbia v. Heller, 128 S. Ct. 2783, 2818 (2008); *see supra* notes 14–16 and accompanying text.

[86] *Heller,* 128 S. Ct. at 2815, 2817.

[87] *See supra* note 29 and accompanying text.

[88] Colt's Manufacturing Company, Inc., Colt History, http://www.coltsmfg.com/cmci/history.asp.

[89] *See* WALTER H.B. SMITH, THE BOOK OF PISTOLS & REVOLVERS: AN ENCYCLOPEDIC REFERENCE WORK 25–26 (5th ed. 1962).

[90] *Heller*, 128 S. Ct. at 2818; *see supra* notes 14–16 and accompanying text.

[91] The general observations about revolvers and pistols in this paragraph are not based on any one particular source, and instead reflect basic conventional wisdom

reliable than pistols, require less training and experience to handle safely, and are slightly easier to load and unload (for example, requiring less manual dexterity and strength). The most powerful handguns, such as the .44 Magnum and .50 Magnum, are revolvers. Revolvers also are, as a very general matter, less expensive. On the other hand, pistols typically have a greater ammunition capacity and can be loaded more quickly than revolvers, although speedloader devices for revolvers cut the loading time gap considerably by allowing all chambers of a revolver to be loaded simultaneously instead of one at a time. Many pistols have manual safeties (a switch that can be put in a position that deactivates the gun), but revolvers typically do not. Pistols also can be flatter in shape (because they do not have the relatively wide cylinder required for a revolver), so they can be easier to carry concealed.

Given all that, would it violate the Second Amendment for the District of Columbia, or some other jurisdiction, to prohibit pistols while allowing possession of revolvers for home defense? Courts could easily go either way on this sort of fact-intensive, subjective decision-making about the relative merits of various guns. Indeed, it certainly seems like the sort of issue on which courts do not have any particular expertise, but it is exactly the sort of judicial micromanagement of gun policymaking to which *Heller* opened the door. In my view, the District of Columbia at least had very plausible arguments that a statutory preference for revolvers over pistols would yield some slight public or personal safety benefits without materially infringing on anyone's constitutional interest in keeping and bearing arms for defensive purposes. For example, the fact that pistols are generally easier to conceal weighs against them in this analysis because the District of Columbia still does not permit people to carry concealed guns in public,[92] and the Supreme Court has strongly hinted that such a law is constitutional.[93]

The District also had a reasonable argument for the gun storage provision of its initial legislative response to *Heller*. As explained above,

about the relative merits of each type of handgun. For a few typical examples of discussion of these sorts of considerations, see L.R. WALLACK, AMERICAN PISTOL & REVOLVER DESIGN AND PERFORMANCE 23–24 (1978); RUPERTO ELPUSAN, JR., WOMEN'S GUIDE TO BUYING YOUR FIRST HANDGUN ch. 5 (2006), *available at* http://www.besafeguntraining.com/womens-first-handgun-buy/ch5-revolver-vs-semiautomatic-pistol.htm; Mark Freburg, FirearmsForum.com on Outdoors Network, *Revolvers and Semi-Automatic Pistols: A Primer for Beginners*, http://www.outdoors.net/site/features/feature.aspx+Forum+Firearms+ArticleCode+2619+V+N+SearchTerm++curpage+2619; InternetArmory.com, *Selection of a Handgun for Self Defense*, http://www.internetarmory.com/handgun_defense.htm; PistolProwess.com, *Choosing a Pistol: What Gun Should I Buy?*, http://www.pistolprowess.com/Choosing_a_Pistol.htm.

[92] D.C. CODE § 22-4504(a) (2009); *see* Rostron, *supra* 53, at 536 (summarizing history of ban on concealed weapons in District of Columbia).

[93] *Heller*, 128 S. Ct. at 2816 (noting that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues"); *see supra* notes 8–9 and accompanying text.

the D.C. Council initially opted to maintain the requirement that guns be kept unloaded and disassembled or locked, but created an exception for circumstances where the gun was being used in response to a "perceived threat of immediate harm."[94] That provision, imposing a safe-storage requirement but with a limited self-defense exception, seems to be exactly what the majority opinion in *Heller* suggested would be sufficient to satisfy the Constitution.[95] In the *Heller* litigation, the District argued that its statute on storage of guns already implicitly contained an exception for self-defense.[96] The Supreme Court rejected that attempted concession, saying that it was not supported by the D.C. statute's explicit language.[97] The Supreme Court thus condemned the D.C. law for "its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense,"[98] while emphasizing that its ruling should not be read as "suggest[ing] the invalidity of laws regulating the storage of firearms to prevent accidents."[99] In other words, the Supreme Court made clear that governments can require guns to be stored safely, but must permit people to unlock and use their guns when faced with an immediate need for defensive use. In its initial response to *Heller*, the District of Columbia amended its statute to do exactly what the Supreme Court required, even phrasing the exception with the same "immediate" threat language suggested by the Court.

Again, the District of Columbia's eventual capitulation to congressional pressure means that the validity of the D.C. Council's initial post-*Heller* enactments will never be tested in court. If courts had the opportunity to decide the matter, I believe the District's initial response to *Heller* may well have survived constitutional attack. That is not to say that the D.C. Council's initial response to *Heller* constituted an ideal approach to firearm regulation. If I were a legislator, I would not draw a distinction between revolvers and pistols as the D.C. Council initially tried to do.[100] I also would not favor the sort of rigid law on gun storage that the D.C. Council initially enacted in response to *Heller*, and instead I would support the more flexible sort of "child access prevention" law that the D.C. Council eventually adopted.[101] That law, like the similar statutes in force in a number of other states,[102] properly focuses on the ultimate concern, whether the gun owner acts responsibly

[94] Firearms Control Emergency Amendments Act of 2008, sec. 2(c), § 702(3), 55 D.C. Reg. 8237, 8238 (Aug. 1, 2008); *see supra* note 56 and accompanying text.

[95] *See Heller*, 128 S. Ct. at 2817 n.26, 2821–22.

[96] *See* Brief for Petitioners at 56, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290).

[97] *Heller*, 128 S. Ct. at 2818.

[98] *Id.* at 2822.

[99] *Id.* at 2820.

[100] *See supra* note 58–59 and accompanying text.

[101] *See supra* note 75–76 and accompanying text.

[102] *See, e.g.*, MD. CODE ANN., CRIM. LAW § 4-104(c) (2008); N.J. STAT. ANN. § 2C:58-15(a) (West 2008); TEX. PENAL CODE ANN. § 46.13 (Vernon 2008).

under the circumstances to prevent children from gaining unauthorized access to the weapon, without prescribing a specific rule about exactly how that goal must be achieved in every situation.[103]

I therefore do not particularly like the D.C. Council's initial response to *Heller*. But I am not a legislator for the District of Columbia, and neither is Antonin Scalia or any other member of his Court. The D.C. Council, with oversight from the U.S. Congress,[104] has the job of making these sorts of policy decisions for the District of Columbia, and its choices should be respected by courts unless they violate the Constitution. The District of Columbia's initial legislative response to *Heller* consisted of only very modest changes to its gun laws. That is not because the District ignored the Supreme Court's ruling; it is because the Supreme Court did not require more. If that surprised Dick Heller and his allies, that is because their victory in the constitutional litigation was not as sweeping as they initially may have imagined it to be. The District's gun laws ultimately have been changed more substantially than the D.C. Council initially hoped, but that outcome is the result of political pressure from Congress rather than anything the Supreme Court actually said in *Heller*.

B. Lower Courts' Initial Reactions to Heller

Heller also prompted a flurry of rulings in lower courts around the country on constitutional challenges brought against various gun laws. These early decisions give only a very preliminary, tentative sense of how the caselaw will develop and the effect that *Heller* ultimately will have. To the extent they give any signals about the future, however, they suggest that *Heller*'s impact will be limited.

Virtually all of the early rulings that discuss *Heller* have come in criminal cases, with defendants raising Second Amendment arguments in an effort to overturn indictments or convictions for violating firearm laws. Courts have upheld almost all of the challenged statutes, usually with little difficulty or discussion. Many of the cases have involved the sorts of gun laws that the Supreme Court in *Heller* deemed to be presumptively valid. For example, following *Heller*'s clear cue,[105] lower courts have unanimously upheld federal laws prohibiting convicted felons from possessing firearms.[106] Consistent with the Supreme Court's

[103] *See generally* Andrew J. McClurg, *Child Access Prevention Laws: A Common Sense Approach to Gun Control*, 18 ST. LOUIS U. PUB. L. REV. 47 (1999).

[104] Congress has granted home rule authority to the District of Columbia, but retains the power to review the D.C. Council's enactments and to pass resolutions overruling them. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, §§ 401–04, 602(c), 87 Stat. 774, 785–88, 814 (1973).

[105] *Heller*, 128 S. Ct. at 2816–17.

[106] *E.g.*, United States v. Brye, No. 08-12578, 2009 WL 637553, at *1 (11th Cir. Mar. 13, 2009); United States v. Anderson, 559 F.3d 348, 348 (5th Cir. 2009); United States v. Brunson, 292 F. App'x 259, 261 (4th Cir. 2008); United States v. Gilbert, 286

suggestion that firearms can be prohibited in "sensitive places such as schools and government buildings,"[107] lower courts have rejected challenges to criminal charges for possessing a firearm within 1,000 feet of a school,[108] on U.S. Postal Service property,[109] or at an airport.[110] In keeping with the Supreme Court's conclusion that the Second Amendment protects only weapons in "common use" today, lower courts have rejected challenges to laws imposing special restrictions on possession of automatic weapons,[111] sawed-off shotguns,[112] and silencers.[113] Citing the Supreme Court's statement in *Heller* about most nineteenth-century courts upholding bans on carrying concealed weapons,[114] courts have concluded that a state may prohibit carrying a concealed gun in public without a permit.[115]

Those rulings, strongly foreshadowed by *Heller*, are not surprising. They raise the sorts of issues that should be easy for courts and that are likely to be decided unanimously in favor of upholding gun laws against Second Amendment attacks. The harder cases will be those in which

F. App'x 383, 386 (9th Cir. 2008); United States v. Irish, 285 F. App'x 326, 327 (8th Cir. 2008); *see also* United States v. McRobie, No. 08-4632, 2009 WL 82715, at *1 (4th Cir. Jan. 14, 2009) (upholding federal law prohibiting possession of gun by person committed to mental institution); United States v. Solis-Gonzalez, No. 3:08-CR-145-MR-DCK-1, 2008 WL 4539663, at *2–3 (W.D.N.C. Sept. 26, 2008) (upholding federal law prohibiting possession of gun by illegal alien); State v. Hunter, 195 P.3d 556, 562–64 (Wash. Ct. App. 2008) (upholding ban on possession of gun by person convicted of felony while a juvenile).

[107] *Heller*, 128 S. Ct. at 2817.

[108] United States v. Walters, No. 2008-31, 2008 WL 2740398 at *1 (D.V.I. July 15, 2008).

[109] United States v. Dorosan, No. 08-042, 2009 WL 273300, at *1 (E.D. La. Jan. 28, 2009).

[110] United States v. Davis, No. 05-50726, 2008 WL 4962926, at *1 (9th Cir. Nov. 21, 2008); People v. Ferguson, No. 2008QN036911, 2008 WL 4694552, at *4 (N.Y. Crim. Ct. Queens County Oct. 24, 2008); *cf.* Georgiacarry.org, Inc. v. City of Atlanta, No. 08-15571, 2009 WL 614778, at *1 (11th Cir. Mar. 12, 2009) (rejecting claim that ban on guns in Atlanta airport violated Georgia).

[111] *E.g.*, United States v. Ross, No. 08-1120, 2009 WL 1111544, at *2 (3d Cir. Apr. 27, 2009); United States v. Fincher, 538 F.3d 868, 870 (8th Cir. 2008); United States v. Gilbert, 286 F. App'x 383, 386 (9th Cir. 2008); Salter v. Roy, No.5:08-CV-145, 2008 WL 4588629, at *2 (E.D. Tex. Oct. 6, 2008); United States v. Garnett, No. 05-CR-20002-3, 2008 WL 2796098, at *4 (E.D. Mich. July 18, 2008).

[112] United States v. Artez, 290 F. App'x 203, 208 (10th Cir. 2008); *Fincher*, 538 F.3d at 870; *Gilbert*, 286 F. App'x at 386.

[113] United States v. Perkins, No. 4:08CR3064, 2008 WL 4372821, at *4 (D. Neb. Sept. 23, 2008); *Garnett*, 2008 WL 2796098, at *4.

[114] District of Columbia v. Heller, 128 S. Ct. 2783, 2816 (2008).

[115] *E.g.*, Young v. Hawaii, No. 08-00540 DAE-KSC, 2009 WL 874517, at *5 (D. Haw. Apr. 1, 2009); Swait v. University of Nebraska at Omaha, No. 8:08CV404, 2008 WL 5083245, at *3 (D. Neb. Nov. 25, 2008); United States v. Hall, No. 2:08-00006, 2008 WL 3097558, at *1 (S.D. W. Va. Aug. 4, 2008); People v. Flores, 86 Cal. Rptr. 3d 804, 807–08 (Cal. Ct. App. 2008); People v. Yarbrough, 86 Cal. Rptr. 3d 674, 682–83 (Cal. Ct. App. 2008).

courts face challenges to gun laws that go beyond the types of regulations specifically blessed by *Heller*.

For example, gun rights advocates have complained bitterly about New York City's licensing system, which requires all gun owners to obtain a permit through a process that critics say is too long, complex, arbitrary, and costly.[116] Courts nevertheless have rejected challenges to the New York City laws, even where the defendant possessed the firearm in his home and was not engaged in any criminal activity other than not having a license for the firearm.[117] Although the New York City laws may be very restrictive, they do not amount to "a complete ban on the possession of handguns in the home" and therefore they do not violate Second Amendment rights under *Heller*.[118]

Another hotly contested question will be the validity of the federal law that prohibits possession of a gun by a person who has been convicted of a misdemeanor crime of domestic violence.[119] That provision, enacted in 1996 and commonly referred to as the "Lautenberg amendment,"[120] has been loudly criticized by many gun rights advocates, particularly for disqualifying people with domestic violence misdemeanor convictions from doing law enforcement or military work that requires carrying a gun.[121] On this issue, the *Heller* opinion could be read as giving hints in either direction. *Heller* specifically referred to the presumptive validity of "longstanding prohibitions on the possession of firearms by felons and the mentally ill,"[122] without mentioning any of the other categories of people barred by federal law from possessing guns—including domestic violence misdemeanants, drug addicts, people who have renounced their U.S. citizenship, or those dishonorably discharged

[116] Joseph Goldstein, G*un Rights of New Yorkers May Rest on Case of Hot Dog Vendor*, N.Y. SUN, Aug. 1, 2008, at 1.

[117] *E.g.*, People v. Abdullah, 870 N.Y.S.2d 886, 887 (N.Y. Crim. Ct. Kings County Dec. 30, 2008).

[118] *Id.* at 887. Most courts seem similarly inclined to read *Heller* as applying only to a person's possession of guns within his or her home. *See, e.g.*, Minotti v. Whitehead, 584 F. Supp. 2d 750, 760 (D. Md. 2008); Sims v. United States, 963 A.2d 147, 150 (D.C. 2008); Brook v. State, 999 So. 2d 1093, 1094–95 (Fla. Dist. Ct. App. 2009). *But cf.* Lund v. Salt Lake City Corp., Civil No. 2:07-CV-0226BSJ, 2008 WL 5119875, at *7 n.9 (D. Utah Dec. 4, 2008) (suggesting that "mere possession of a firearm in public . . . may well represent the exercise of a fundamental constitutional right guaranteed by the Second Amendment").

[119] 18 U.S.C. § 922(g)(9) (2006).

[120] The provision was enacted in 1996 as part of the Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3309–371 (1996).

[121] *See* Jodi L. Nelson, Note, *The Lautenberg Amendment: An Essential Tool for Combating Domestic Violence*, 75 N.D. L. REV. 365, 366–68 (1999). Federal law also bans possession of guns by a person subject to a domestic violence restraining order, 18 U.S.C. § 922(g)(8) (2006), although that provision does not affect law enforcement or military personnel possessing guns as part of their job duties, *see* 18 U.S.C. § 925(a)(1) (2006) (providing exception to certain federal firearm laws for governments).

[122] District of Columbia v. Heller, 128 S. Ct. 2783, 2816–17 (2008).

from the U.S. military.[123] The explicit mention of felons, but not misdemeanants, could be taken as a signal that the ban on guns for the latter group poses greater constitutional difficulties. On the other hand, the *Heller* opinion noted that it was not trying to provide an exhaustive list of all presumptively valid gun laws, and the reference to "felons and the mentally ill" may have been simply a shorthand way of referring to all the restrictions on access to guns for categories of people posing special dangers.[124]

So far, the courts that have faced this issue have ruled in favor of the government, upholding the Lautenberg amendment's ban on guns for people convicted of domestic violence misdemeanors.[125] The federal district court in Maine provided a particularly cogent analysis, in *United States v. Booker*, noting first that the Supreme Court in *Heller* strongly suggested that banning guns for felons is permissible, and then reasoning that the ban for domestic violence misdemeanants is actually even more tightly tailored to the strong government interest in preventing gun violence.[126] While the ban on guns for felons applies to all sorts of offenses, violent and non-violent, the Lautenberg amendment applies only to misdemeanors that actually involve use or attempted use of violence.[127] Other courts have undertaken a similar analysis in upholding the federal law that prohibits possession of a gun by a person who is the subject of a domestic violence restraining order.[128] These early decisions are a positive sign, albeit only a preliminary and tentative one, about how *Heller* will play out in the lower courts.

One of the key uncertainties after *Heller* is what test or standard of scrutiny will be applied in Second Amendment cases. The Supreme Court in *Heller* declined to say, other than to make clear that it would not be mere rational basis scrutiny.[129] So far, only a few reported decisions by lower courts have ventured answers. Most have concluded that intermediate scrutiny should apply to laws restricting the right to keep

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[123] *See* 18 U.S.C. § 922(g) (2006).

[124] *Heller*, 128 S. Ct. at 2817 n.26.

[125] United States v. Li, No. 08-CR-212, 2008 WL 4610318, at *6 (E.D. Wis. Oct. 15, 2008); United States v. Chester, No.2:08-00105, 2008 WL 4534210, at *2 (S.D. W. Va. Oct. 7, 2008); United States v. Booker, 570 F. Supp. 2d 161, 162–65 (D. Me. 2008); United States v. White, No. 07-00361-WS, 2008 WL 3211298, at *1 (S.D. Ala. Aug. 6, 2008); *see also* People v. Flores, 86 Cal. Rptr. 3d 804, 807 (Cal. Ct. App. 2008) (upholding California law prohibiting possession of guns by person convicted of misdemeanor assault).

[126] *Booker*, 570 F. Supp. 2d at 163–64.

[127] *Id.* at 164–65.

[128] 18 U.S.C. § 922(g)(8) (2006); United States v. Montalvo, No. 08-CR-004S, 2009 WL 667229, at *3 (W.D.N.Y. Mar. 12, 2009); United States v. Luedtke, 589 F. Supp. 2d 1018, 1021–23 (E.D. Wis. 2008); United States v. Lippman, No. 4:02-cr-082, 2008 WL 4661514, at *3 (D.N.D. Oct. 20, 2008); United States v. Erwin, No. 1:07-CR-556 (LEK), 2008 WL 4534058, at *3 (N.D.N.Y. Oct. 6, 2008); United States v. Knight, 574 F. Supp. 2d 224, 225–27 (D. Me. 2008).

[129] *See Heller*, 128 S. Ct. at 2817–18, 2818 n.27.

and bear arms, requiring the legislation to be substantially related to an important government objective.[130] In these cases, the courts have gone on to find that the challenged laws easily survived the intermediate scrutiny analysis. For example, in rejecting a challenge to the federal law requiring a person to be 21 years old to buy a handgun from a licensed firearms dealer, a judge simply noted that statistics show "the vast majority of guns confiscated from 18–20 year old criminal defendants are handguns."[131] That was enough, the judge thought, to show a substantial government interest served by the challenged statute. Thus, the court not only steered toward an intermediate scrutiny test rather than adopting strict scrutiny, but also applied the intermediate scrutiny formula in a relatively undemanding way that suggests virtually all existing legal restrictions on guns should be upheld because they reasonably aim to achieve an interest in preventing crimes, deaths, and injuries.

Applying that sort of test, focused on the reasonableness of gun regulations, would be consistent with the approach taken by the many courts that, even before *Heller*, discussed and applied a constitutional right to keep and bear arms for purposes unrelated to organized military activity. Prof. Adam Winkler has described how courts in many states have long held that their citizens have a right under their state constitutions to keep and bear arms for non-military purposes.[132] In this robust line of precedent, comprising hundreds of cases involving challenges to a wide array of gun laws,[133] there is an overwhelming consensus that government restrictions on guns are valid if they are "reasonable regulations."[134] According to Winkler's review of the decisions, this is an extremely deferential standard "under which nearly all gun control laws would survive judicial scrutiny."[135] No state applied strict scrutiny or any sort of similarly heightened review.[136] Although this "reasonable regulations" test is very deferential, it is not entirely toothless, it is not the same as mere rational basis scrutiny, and courts have used it to strike down laws "found

[130] *E.g.*, United States v. Miller, No. 08-CR-10097, 2009 WL 499111, at *6 (W.D. Tenn. Feb. 26, 2009); United States v. Radencich, 3:08-CR-00048(01)RM, 2009 WL 127648, at *4 (N.D. Ind. Jan. 20, 2009); United States v. Marzzarella, No. 07-24 Erie, 2009 WL 90395, at *7–*9 (W.D. Penn. Jan. 14, 2009); United States v. Schultz, No. 1:08-CR-75-TS, 2009 WL 35225, at *5 (N.D. Ind. Jan. 5, 2009); United States v. Bledsoe, No. SA-08-CR-13(2)-XR, 2008 WL 3538717, at *4 (W.D. Tex. Aug. 8, 2008). *But see* United States v. Engstrum, No. 2:08-CR-430 TS, 2009 WL 975286, at *3 (D. Utah Apr. 10, 2009) (applying strict scrutiny but upholding indictment under federal law banning possession of firearm by person with a past conviction for a misdemeanor crime of domestic violence).

[131] *Bledsoe*, 2008 WL 3538717, at *4.

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

[133] Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL'Y REV. 597, 598 (2006).

[134] Winkler, *supra* note 132, at 686, 706; Winkler, *supra* note 133, at 598.

[135] Winkler, *supra* note 132, at 686.

[136] *Id.* at 686–87.

to be arbitrary or to amount to a complete denial of the right to bear arms."[137] The U.S. Supreme Court could have provided valuable direction in *Heller* by endorsing and using the "reasonable regulations" approach to invalidate the challenged provisions of District of Columbia law.[138] Although Justice Scalia's opinion in *Heller* did not do that, and instead left the standard of review uncertain, I believe the lower court decisions will head in the direction of a suitably deferential test like the "reasonable regulations" standard so widely embraced under state constitutions for many years.[139] Since the *Heller* decision, several state courts have already suggested that the "reasonable regulation" test should continue to apply, implying that it is consistent with what the U.S. Supreme Court said and did in *Heller*.[140]

The same conclusion finds support in the cases decided by federal courts in the Fifth Circuit over the seven years prior to the *Heller* decision. Those courts had a head start on grappling with the issues raised by interpreting the Second Amendment to extend to non-military possession and use of guns, because the U.S. Court of Appeals for the Fifth Circuit in 2001 adopted that view of the Second Amendment in *United States v. Emerson*, the case that created the first crack in the previously uniform judicial consensus on a narrow interpretation of the Amendment's reach.[141]

Although the *Emerson* decision was certainly a dramatic development in Second Amendment jurisprudence and a key precursor of *Heller*, the practical impact of *Emerson* on gun laws within the Fifth Circuit was decidedly minimal. In *Emerson* itself, Fifth Circuit judges decided that the Second Amendment provides a right to keep and bear arms for non-military purposes, but then emphasized that this right is subject to reasonable regulations,[142] and held that the federal ban on possession of guns by people subject to domestic violence restraining orders is valid.[143] Not a single gun law was ever struck down as unconstitutional under *Emerson*. Instead, Fifth Circuit courts rejected every Second Amendment

[137] Winkler, *supra* note 133, at 598.

[138] Winkler and Erwin Chemerinsky filed an *amici* brief in the *Heller* case. Brief of Law Professors Erwin Chemerinsky and Adam Winkler as Amici Curiae in Support of Petitioner, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290).

[139] *See* Nat'l Rifle Ass'n v. City of Philadelphia, No. 1472, 2008 WL 3819269, at n.6 (Pa. Ct. Com. Pl. July 1, 2008).

[140] *See id.*; State v. Rosch, No. 59703-5-I, 2008 WL 4120052, at *4–*5 (Wash. Ct. App. Sept. 8, 2008).

[141] United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

[142] *Id.* at 261 ("Although, as we have held, the Second Amendment *does* protect individual rights, that does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.").

[143] *Id.* at 261–64.

argument presented to them,[144] while holding that the right to keep and bear arms is not a fundamental right and it does not make restrictions on firearms subject to strict scrutiny.[145] The Fifth Circuit's experience under *Emerson* is a strong indication of what courts across the nation are likely to do under *Heller*; it suggests that the Second Amendment will be a very broad right, but not a particularly strong one.

Indeed, in the first ten months after the Supreme Court's decision in *Heller*, courts have resolved only a few minor issues in the direction of greater gun rights rather than gun control. The most prominent examples involve the pretrial release conditions imposed on defendants charged with child pornography offenses. In the "Adam Walsh" provisions added to federal law in 2006, Congress provided a mandatory list of conditions for courts to impose on a defendant released on bail to await trial on child pornography offenses, including that the defendant "refrain from possessing a firearm."[146] Citing *Heller*, two federal courts have concluded that this restriction on access to firearms cannot be imposed automatically, and instead an individualized determination must be made as to whether the circumstances warrant restriction of the defendant's right to have firearms.[147] These rulings, giving defendants in child pornography cases a chance to argue why they should be allowed to have guns while out on bail, represent the biggest "victory" to date for gun rights under *Heller*.

In a few other cases, *Heller* has influenced lower courts' analysis of various legal issues, but without resulting in any law being found to

[144] *See, e.g.*, United States v. Patterson, 431 F.3d 832, 835–36 (5th Cir. 2005) (rejecting Second Amendment challenge to federal ban on guns for unlawful drug users or addicts); United States v. Everist, 368 F.3d 517, 519 (5th Cir. 2004) (rejecting Second Amendment challenge to federal ban on guns for convicted felons); United States v. Woods, 37 F. App'x 712, 712(5th Cir. 2002) (rejecting Second Amendment challenge to federal ban on guns for people convicted of domestic violence misdemeanors); Hunter v. City of Electra, No. 7:03-CV-153-R, 2006 WL 1814150, at *2 (N.D. Tex. June 29, 2006) (rejecting Second Amendment challenge to confiscation of firearm during arrest); Dickerson v. City of Denton, 298 F. Supp. 2d 537, 540–41 (E.D. Tex. 2004) (rejecting Second Amendment challenge to seizure of firearm during search of business premises).

[145] *See, e.g.*, United States v. Darrington, 351 F.3d 632, 635 (5th Cir. 2003) ("Again, *Emerson* is a carefully and laboriously crafted opinion, and if it intended to recognize that the individual right to keep and bear arms is a 'fundamental right,' in the sense that restrictions on this right are subject to 'strict scrutiny' by the courts and require a 'compelling state interest,' it would have used these constitutional terms of art."). Only two of fourteen Fifth Circuit judges took the position that strict scrutiny should apply to Second Amendment claims under *Emerson*. *See* United States v. Herrera, 313 F.3d 882, 888 (5th Cir. 2002) (DeMoss, J., dissenting).

[146] 18 U.S.C. § 3142(c)(1)(B)(viii) (2006).

[147] United States v. Kennedy, 593 F. Supp. 2d 1221, 1230 n.4 (W.D. Wash. 2008), *motion to revoke order denied*, 593 F. Supp. 2d 1233 (W.D. Wash. 2009); United States v. Arzberger, 592 F. Supp. 2d 590, 601–03 (S.D.N.Y. 2008).

violate the Second Amendment.[148] For example, in a case in federal court in Pennsylvania, William Kitsch faced charges of illegally possessing eleven firearms, thousands of rounds of ammunition, and body armor despite being a convicted felon.[149] Kitsch claimed that he truly and reasonably believed he did not have a felony criminal record, because law enforcement agents had told him that they would expunge a conviction from his record, and he thereafter passed a criminal background check when he started purchasing guns.[150] Rather than challenging the validity of the law banning felons from having guns, Kitsch instead raised a question of statutory interpretation. To obtain a conviction, prosecutors had to prove that Kitsch "knowingly" violated federal gun laws.[151] In the prosecution's view, this merely required proof that Kitsch knew he had a gun, but Kitsch insisted that it also required proof that he knew he had a felony criminal record.[152] A federal district court judge agreed with Kitsch's interpretation of the statute. The judge stated that he would have decided the issue the same way before *Heller*, but noted that *Heller* did add some additional weight in favor of Kitsch's interpretation.[153] In other words, punishing a felon for possessing a gun, even if he reasonably believed in good faith that he was not a felon, would "at the very least, raise constitutional doubts," and so accepting Kitsch's interpretation of the statute's scienter requirement had the "added benefit of avoiding potential doubts post-*Heller* about the statute's constitutionality."[154] Again, this could be scored as a win for gun rights under *Heller*, but it is a ruling of fairly minor consequence, determining only the scope of the *mens rea* requirement of a criminal statute rather than the statute's constitutionality.

The U.S. Supreme Court recently had a similar opportunity for *Heller* to influence its interpretation of a federal firearm statute. In *United States v. Hayes*,[155] the Court considered whether the federal statute prohibiting

[148] *See, e.g.*, Jennings v. Mukasey, No. 6:08-cv-833-Orl-31GJK, 2008 WL 4371348, at *2 (M.D. Fla. Sept. 22, 2008) (finding that plaintiff was entitled to have court determine whether he was legally permitted to have firearms after expungement of conviction for domestic violence misdemeanor); City of Cleveland v. Fulton, 898 N.E.2d 983, 989 (Ohio Ct. App. 2008) (requiring police to return confiscated handgun to person who was acquitted of charges of using weapons while intoxicated and endangering children); Simmons v. Gillespie, No. 08-CV-1068, 2008 WL 3925157, at *2 (C.D. Ill. Aug. 1, 2008) (declining to dismiss claim that police chief violated police officer's rights by issuing memorandum prohibiting officer from possessing or carrying firearms, on or off duty, without the chief's prior authorization), *report and recommendation adopted*, No. 08-CV-1068, 2008 WL 3876145 (C.D. Ill. Aug. 20, 2008).

[149] *See* United States v. Kitsch, No. 03-594-01, 2008 WL 2971548, at *1, *2 & n.4 (E.D. Pa. Aug. 1, 2008).

[150] *Id.* at *1.

[151] *Id.* at *2 (citing 18 U.S.C. § 942(a)(2) (2006)).

[152] *Id.* at *2.

[153] *Id.* at *7.

[154] *Id.*

[155] United States v. Hayes, 129 S. Ct. 1079 (2009).

possession of a gun by a person convicted of a "misdemeanor crime of domestic violence"[156] applies only where proof of a domestic relationship between offender and victim was actually a required element of the misdemeanor offense, or instead reaches more broadly to situations where a person was convicted of battery against a spouse but was prosecuted under a "general battery" statute rather than one specifically addressing domestic violence. The Court adopted the broader interpretation favored by federal prosecutors and gun control advocates.[157] Never mentioning *Heller* or the Second Amendment, the Court instead emphasized the need to achieve Congress's purpose of keeping guns out of the hands of domestic abusers. "Firearms and domestic strife," the Court observed, "are a potentially deadly combination nationwide."[158] Although the constitutionality of the statute was not an issue directly before the Court in that case, the Court easily could have taken Second Amendment interests into account in interpreting the statute if it were inclined to do so. The Court obviously was not, and its opinion certainly does not read like the work of judges poised to start invalidating gun control laws, like the one banning possession of guns by those with misdemeanor domestic violence convictions.

The future of Second Amendment jurisprudence remains very much an open question. *Heller* generated a slew of significant questions that have not yet been clearly answered, from the standard of scrutiny that will be applied in Second Amendment cases to whether the right to keep and bear arms will be held applicable to state and local governments through the Fourteenth Amendment. But to the extent that developments since *Heller* provide clues, they point consistently toward the conclusion that *Heller*'s impact will be limited and only the most extraordinarily restrictive gun laws should be struck down.

IV. *HELLER*'S IMPACT ON THE NATIONAL DEBATE OVER GUNS

The most important consequences of the *Heller* decision will not come via courts. Indeed, *Heller* ultimately may turn out to have virtually no direct effect on gun laws outside the District of Columbia and the very small number of other jurisdictions that have handgun bans[159] or gun

[156] 18 U.S.C. § 922(g)(9) (2006).

[157] 129 S. Ct. at 1087.

[158] *Id.*

[159] Chicago and a few other municipalities in northern Illinois had handgun bans in effect at the time of the *Heller* decision. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2864–65 (2008) (Breyer, J., dissenting). San Francisco also had an ordinance that purported to ban handguns, but it had already been declared invalid on other grounds. *See id.* at 2865; Fiscal v. City & County of San Francisco, 70 Cal. Rptr. 3d 324, 326–28 (Cal. Ct. App. 2008). Some of the Illinois cities with handgun bans responded to *Heller* by amending their laws to permit possession of handguns for protection in the home. *See, e.g.*, National Rifle Ass'n of Am., Inc. v. City of Evanston, No. 08 C

storage laws akin to those struck down in *Heller*.[160] The real impact of *Heller* will depend on how it affects the nation's political and cultural debate over guns, and whether it ultimately makes it easier or more difficult to achieve progress on the issue of how we can protect and promote socially beneficial uses of guns while reducing harmful ones.

The U.S. Supreme Court makes a lot of controversial decisions. On virtually every issue, it draws strong criticism from some segment of society. But despite all the talk about the Court being too conservative or too liberal, and about the judges having unchecked discretion to do whatever they want, the Court actually has a very strong tendency to gravitate toward conclusions that match the predominant sentiment of the American public.[161] For example, on hot-button topics such as

3693, 2008 WL 5070358, at *2 (N.D. Ill. Nov. 24, 2008) (upholding city's amended statute banning handguns unless gun owner has state license and "said handgun is kept at the residence of said person for self-protection"); Deborah Horan, *Under Fire, Suburbs Vote Down Gun Bans; Evanston Is the Latest to Repeal Its Handgun Ban*, CHI. TRIB., Aug. 13, 2008, at C1. On the other hand, Chicago and a few other Illinois cities vowed to defend their handgun bans in court. The fate of those laws ultimately will depend on whether courts decide that the right to keep and bear arms applies to state and local governments through the Fourteenth Amendment, a question left unanswered by *Heller*. *See Heller*, 128 S. Ct. at 2813 n.23. So far, courts have split on the question, with a Ninth Circuit decision concluding that the right to keep and bear arms is incorporated into the Fourteenth Amendment, Nordyke v. King, No. 07-15763, 2009 WL 1036086, at *13 (9th Cir. Apr. 20, 2009), while some other courts have determined that they are bound by pre-*Heller* precedents on this point and concluded that whether to overrule those precedents is a question for the U.S. Supreme Court to decide. *See, e.g.*, Maloney v. Cuomo, 554 F.3d 56, 58–59 (2d Cir. 2009); National Rifle Ass'n of Am., Inc. v. Village of Oak Park, Nos. 08 C 3696, 08 C 3697, 2008 WL 5111163, at *2 (N.D. Ill. Dec. 4, 2008).

[160] For example, Massachusetts has a law requiring each firearm to be "secured in a locked container or equipped with a tamper-resistant mechanical lock" unless the firearm is being "carried by" or is "under the control of" the gun owner or another lawfully authorized user. MASS. GEN. LAWS ch. 140, § 131L(a) (2009). Massachusetts trial court judges have split on whether this law is invalid under *Heller*, with some concluding that the Massachusetts statute is valid because it allows a gun to be unlocked when the gun owner is at home and carrying or otherwise in control of the firearm, and others concluding that the Massachusetts law is nevertheless too restrictive and indistinguishable from the District of Columbia's gun storage law struck down in *Heller*. *See* David E. Frank, *It's (Not) a Lock: Massachusetts Judges Split over Supreme Court Gun Ruling*, MASS. LAW. WKLY., Mar. 16, 2009.

[161] *See* Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2606–07 (2003) (discussing how "the wealth of existing evidence suggests that most of the time judicial decisions fall within the range of acceptability that one might expect of the agents of popular government" and that "if there is a divergence, time—and not too long a time—usually serves to ensure that the court bows to public opinion, or confirms that public opinion was moving in the same direction as the Court's decisions"); Jack M. Balkin, *Alive and Kicking: Why No One Truly Believes in a Dead Constitution*, SLATE, Aug. 29, 2005, http://www.slate.com/id/2125226/ (describing how political scientists have found "that the Supreme Court never strays too far too long from the center of the national political coalition" and so "[p]eople in the political center usually get pretty much what they want"). For examples of the voluminous literature on the relationship between Supreme Court decisions and

affirmative action and abortion, the Court in recent years has rejected extreme or absolute stands in either direction and instead staked out positions that are very much in the middle ground and roughly correspond to the median of American attitudes toward these issues.[162]

With respect to the Second Amendment, I believe that the Supreme Court's decision in *Heller* does the same thing. The vast majority of Americans feel that they should have a right to own and use guns if they choose to do so.[163] Indeed, most Americans believed they had such a right long before *Heller* ever came along, regardless of how courts in the

public opinion, see DAVID G. BARNUM, THE SUPREME COURT AND AMERICAN DEMOCRACY (Don Reisman et al. eds., 1993); THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT (1989); Nathaniel Persily, *Introduction* to PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily et al. eds., 2008); ROBERT WEISSBERG, PUBLIC OPINION AND POPULAR GOVERNMENT (1976); Cecilie Gaziano, *Relationship Between Public Opinion and Supreme Court Decisions: Was Mr. Dooley Right?*, 5 COMM. RES. 131 (1978); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1019 (2004); William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169 (1996); James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 B.Y.U. L. REV. 1037.

[162] *See, e.g.*, Loan Le & Jack Citrin, *Affirmative Action*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 161, at 162, 181 (finding that most Americans oppose racial preferences or quotas, but "[s]ofter" forms of affirmative action receive much higher levels of public support, and Supreme Court decisions on affirmative action "generally have hewed to this line"); Samantha Luks & Michael Salamone, *Abortion*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 160, at 101 (finding that "[a]lthough commentators may consider abortion to be the paradigmatic constitutional controversy, the survey data point to a public and constitutional jurisprudence largely in sync with one another"); Neal Devins, *The Countermajoritarian Paradox*, 93 MICH. L. REV. 1433, 1456 n.93 (1995) (stating that Supreme Court's "middle-ground approach" to abortion, "without question, matched public opinion"); Neal Devins, *Explaining* Grutter v. Bollinger, 152 U. PA. L. REV. 347 (2003) (describing how Supreme Court heeded social and political forces in its rulings on affirmative action).

[163] The majority of Americans, regardless of their political affiliation or whether they own guns, believe that the Second Amendment gives them a right to have guns for purposes unrelated to militia service. *See* Harris Interactive, *Second Amendment Supreme Court Ruling Matches with Public Opinion from the Harris Poll*, June 26, 2008, http://www.harrisinteractive.com/harris_poll/index.asp?PID=922 [hereinafter Harris Poll] (finding that seventy percent of respondents, including eighty-four percent of Republicans and sixty-five percent of Democrats, believe the Second Amendment protects an individual's right to bear arms and not just a state's right to form a militia); Jeffrey M. Jones, *Americans in Agreement with Supreme Court on Gun Rights; Nearly Three in Four Say Second Amendment Guarantees Right of Americans to Own Guns*, June 26, 2008 http://www.gallup.com/poll/108394/Americans-Agreement-Supreme-Court-Gun-Rights.aspx [hereinafter Gallup Poll] (finding that seventy-three percent of respondents, including ninety-one percent of those who own guns and sixty-three percent of those who do not, believe the Second Amendment protects the rights of Americans to own guns even if they are not members of state militias).

past interpreted the Second Amendment.[164] At the same time, an overwhelming majority of Americans favor careful government regulation of guns.[165] In particular, they support a system of gun registration and gun owner licensing to maximize the extent to which guns will be in the hands of responsible, well-trained users and to minimize the extent to which they slip into the hands of children, convicted criminals, and others who are not legally permitted to have them.[166] In short, the vast majority of Americans favor both gun rights *and* gun control.

The Supreme Court's decision in *Heller* roughly reflects that predominant public sentiment. The Court concluded that the Second Amendment gives people a right to have guns, but it is a right subject to extensive regulation.[167] If properly applied by courts in the future, *Heller* will prevent governments in America from banning guns while at the same time permitting all reasonable types of regulations, including laws providing for background checks for everyone who acquires a gun, laws taking advantage of technological advancements to keep track of guns

[164] JAMES D. WRIGHT, PETER H. ROSSI & KATHLEEN DALY, UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA 241 (Aldine Publishing Co. 1983) ("Large majorities believe that they have a right to own guns and that the Constitution guarantees that right. Most people also feel that a licensing requirement for handgun ownership would not violate that right."). For additional discussion of survey data suggesting most Americans believe they have a Second Amendment right to have guns, see Kates, *supra* note 17, at 206 & n.11; Thomas B. McAffee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?*, 75 N.C. L. REV. 781, 792 & n.29 (1997); Jon S. Vernick et al., *Public Opinion Polling on Gun Policy*, 12 HEALTH AFFAIRS, 198, 204–05 (1993).

[165] The same recent surveys that show Americans believe they have a right to own guns also show that most Americans want to maintain current laws or increase legal controls on guns, and relatively few want restrictions on guns to be relaxed. *See* Harris Poll, *supra* note 163 (finding that forty-nine percent of respondents favor stricter control of guns, twenty-one percent want to maintain current laws, and twenty percent favor less strict control); Gallup Poll, *supra* note 163 (finding that forty-nine percent of respondents favor stricter gun laws, thirty-eight percent want to maintain current laws, and eleven percent favor less strict gun laws). An enormous amount of evidence from past surveys supports the same conclusion: Most Americans believe the Constitution protects the right to have a gun, but they do not think that right is violated by strict gun control laws. *See* Kates, *supra* note 17, at 206 n.11; *see also* ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL 118 (Christopher J. Kelaher ed., 1995) (reviewing poll data and observing that the "most important fact about public opinion on gun control has been its remarkable consistency in support of greater governmental control of guns"); Hazel Erskine, THE POLLS: GUN CONTROL, 36 PUB. OPINION Q. 455, 455 (1972) ("The vast majority of Americans have favored some kind of action for the control of civilian firearms at least as long as modern polling has been in existence.").

[166] Rostron, *supra* note 53, at 565 & n.359.

[167] *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2816–17 (2008).

and to identify those who misuse them,[168] and laws requiring that gun owners act responsibly in storing their weapons.[169]

The *Heller* decision thus should not stand in the way of sensible, effective gun control measures. The big question is whether it might actually promote progress toward such measures by diminishing the hostility surrounding the gun issue and alleviating the "slippery slope" fears that have long stood in the way of achieving constructive reforms of gun regulation.[170] In the past, many gun owners have opposed even the most modest gun control measures out of a concern that they will lead inevitably to more drastic restrictions and eventually confiscation of all guns.[171] This is a concern shared by roughly half the nation, not just some small fringe of the most militant opponents of gun control.[172] Organizations like the NRA continually play on these fears to rally support.[173] Gun control advocates frequently pour fuel on the fire by sounding "anti-gun" rather than just "anti-gun-violence" or "pro-gun-safety."[174] Legislators often have exacerbated the problem by incrementally implementing increasingly strict controls on guns rather than pursuing comprehensive approaches.[175]

The *Heller* decision should reduce these sorts of slippery slope concerns. After all, the Supreme Court made clear that possession and use of guns, at least for purposes of self-defense in the home, cannot be completely prohibited.[176] As Justice Scalia put it, that policy choice is now

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[168] *See* Muradyan, *supra* note 81, at 620 (describing new California law requiring each semi-automatic pistol sold in the state, beginning in 2010, to have mechanism leaving identifying microstamp mark on cartridge cases); *Not a Magic Bullet, But…*, CHRISTIAN SCIENCE MONITOR, Nov. 27, 2002, at 10 (describing NRA's opposition to more effective use of technology to prevent and investigate gun crimes).

[169] *See supra* note 103 and accompanying text.

[170] Rostron, *supra* note 53, at 562–63. For analysis of how we might measure the real risks of slippery slopes, using the gun control issue as a key example, see Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

[171] Rostron, *supra* note 53, at 562–63.

[172] Gary Kleck, *Absolutist Politics in a Moderate Package: Prohibitionist Intentions of the Gun Control Movement*, *in* ARMED: NEW PERSPECTIVES ON GUN CONTROL 129, 129–39 (Gary Kleck & Don B. Kates eds., 2001) (describing survey results indicating that half of Americans fear a national gun registration program could lead to gun confiscation).

[173] *See, e.g.*, Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 FORDHAM L. REV. 681, 682–83, 694, 710 (2004); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 86, 89–90 & n.126 (1995); Kenneth Lasson, *Blunderbuss Scholarship: Perverting the Original Intent and Plain Meaning of the Second Amendment*, 32 U. BALT. L. REV. 127, 161 (2003); Drew Westen, *Guns on the Brain*, AMERICAN PROSPECT, June 2007, at 51.

[174] Don B. Kates, Jr., *Public Opinion: The Effects of Extremist Discourse on the Gun Debate*, *in* THE GREAT AMERICAN GUN DEBATE: ESSAYS ON FIREARMS & VIOLENCE 93, 96–98 (Don B. Kates, Jr. & Gary Kleck eds., 1997); Kleck, *supra* note 172, at 131–39.

[175] Rostron, *supra* note 53, at 563.

[176] District of Columbia v. Heller, 128 S. Ct. 2783, 2822 (2008).

"off the table."[177] Gun owners should realize the slope is not as slippery as they once feared.

The change will take time, and it will need to overcome the resistance of organizations like the NRA that will always have an interest in insisting that gun rights are in grave peril. Within a week after the announcement of the *Heller* decision, the NRA turned from celebrating to issuing warnings to its faithful followers that the Supreme Court's ruling would aggravate "anti-gun anxiety" of the media, politicians, and gun control activists, and that all could be lost unless NRA supporters redoubled their efforts to ensure election of friendly candidates in the upcoming November 2008 elections.[178] The NRA soon began attacks on Barack Obama, calling him the most anti-gun presidential candidate in history.[179] Of course, it made the same claim about John Kerry four years ago,[180] after having said the 2000 election was the most important since the U.S. Civil War,[181] and that Bill Clinton was the most anti-gun president in American history.[182] Obama's victory in the election sparked a surge in gun sales[183] and new efforts by the NRA to frighten gun owners.[184]

The Supreme Court's decision in *Heller* obviously could not bring an immediate end to that sort of overwrought hyperbole and fear-mongering. Despite that, significant progress eventually can be made if

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[177] *Id.*

[178] *See* NRAILA.org, *Heller Decision Ramps Up Media's Anti-Gun Hysteria*, NATIONAL RIFLE ASSOCIATION—INSTITUTE FOR LEGISLATIVE ACTION, July 3, 2008, http://www.nraila.org/Legislation/Federal/Read.aspx?id=4067.

[179] Ben Smith, *NRA: Obama Most Anti-Gun Candidate Ever, Will Ban Guns*, POLITICO, Aug. 6, 2008, http://www.politico.com/blogs/bensmith/0808/NRA_Obama_most_antigun_candidate_ever_will_ban_guns.html. A non-partisan fact checking organization concluded that the NRA's advertising "distorts Obama's position on gun control beyond recognition." FactCheck.org, *NRA Targets Obama*, ANNENBERG POLITICAL FACT CHECK, Sept. 22, 2008, http://www.factcheck.org/elections-2008/nra_targets_obama.html.

[180] Jack Kelly, *NRA Campaigns Against Kerry*, PITTSBURGH POST-GAZETTE, Oct. 14, 2004, at A8 (quoting NRA Executive Vice President Wayne LaPierre as saying "John Kerry is the most anti-gun, anti-hunting presidential nominee in American history").

[181] Eunice Moscoso, *Campaign 2000: NRA Blitz Turns Spotlight Back on Gun Control; Charlton Heston Brings Pro-Gun Message to Georgia as Group's Aggressive Campaign Puts Al Gore on Defensive*, ATL. J. & CONST., Nov. 4, 2000, at A12 (quoting NRA President Charlton Heston as saying the 2000 presidential election is "the most important election since the Civil War"); *see also* Susan Milligan, *NRA's Top Brass Aims for Gore; Members Decry Gun-Control Proposals at Annual Meeting*, BOSTON GLOBE, May 21, 2000, at A25 (quoting NRA's chief lobbyist James J. Baker as saying "This election will determine whether or not the right to keep and bear arms will survive into the next century. It's that simple. We are at a crossroads.").

[182] Sandy Banisky, *NRA Convention Takes Aim at Clinton; Its Theme Is "ABC," "Anybody But Clinton,"* BALT. SUN, Apr. 22, 1996, at 1A.

[183] Kirk Johnson, *Buying Guns, for Fear of Losing the Right to Bear Them*, N.Y. TIMES, Nov. 7, 2008, at A20.

[184] *See, e.g.*, Amy Hunter, *NRA CEO Predicts Obama Will Break Campaign Promises on Protecting Second Amendment*, BRISTOL HERALD COURIER (Va.), Nov. 8, 2008.

the Court's recognition of a constitutional right protecting ownership of guns becomes a settled, familiar part of our legal, political, and cultural landscapes. The most paranoid among us will never be satisfied, but the vast majority of Americans in the middle ground, whether they lean to the left or right side of it, can come together with a shared understanding that the Second Amendment right to guns will never go away, and at the same time that the right should never stand in the way of adopting whatever measures will be most effective at promoting beneficial uses of guns and minimizing their misuse.

V. CONCLUSION

For years before *Heller*, the Second Amendment posed a dilemma for gun control advocates. I witnessed many debates and disagreements within gun control circles about how much of a role, if any, constitutional arguments should play in making the case for stronger gun laws.

On one side, some felt that the Second Amendment, and the very narrow interpretation then being given to it by courts, should not be part of the "talking points" or message for gun control. Some wanted to go even further, ignore the courts, and embrace the idea that people have a right to have guns, while emphasizing that this right comes with responsibilities and limitations. In their view, trying to tell people that the Second Amendment protected only military use of guns was counterproductive. No matter how clearly or consistently courts had interpreted the Second Amendment that way, most Americans believed otherwise. Moreover, denying that there is a constitutional right to have guns played into the hands of the NRA and its allies by giving credence to their continual assertions that gun control is really about taking away all guns, not just making sure they are used safely. Even politicians strongly supportive of gun control efforts, like President Bill Clinton or Senator Charles Schumer, sometimes expressed a belief that the Second Amendment gave Americans a right to have guns.[185]

Meanwhile, other gun control advocates recoiled at the thought of conceding or downplaying constitutional arguments. In their view, the Second Amendment clearly did not protect private use of guns, an enormous pile of court precedent unanimously confirmed that interpretation, and it would be crazy for the gun control movement not to take maximum advantage of that fact. If most Americans

[185] *See, e.g.*, Fred LeBrun, *Schumer Pushing for Hunting Easements*, TIMES UNION (Albany, N.Y.), Aug. 5, 2004, at C5 (quoting Sen. Schumer as saying "I'm a firm believer in the right to bear arms" and "Why shouldn't I be? The Second Amendment is as important as the First, the Third and all the others."); Todd S. Purdum, *Shifting Debate to the Political Climate, Clinton Condemns 'Promoters of Paranoia,'* N.Y. TIMES, Apr. 25, 1995, at A19 (quoting President Clinton as saying "If we are to have freedom to speak, freedom to assemble, and, yes, the freedom to bear arms, we must have responsibility as well.").

misunderstood the meaning and significance of the Second Amendment, the solution was to educate them, not to give up the point.

This was a difficult strategic issue, and I am not sure which side had the better view. Either way, the Supreme Court's decision in *Heller* has ended the debate. Like it or not, the Second Amendment has been authoritatively construed as giving people the right to have guns, at least for purposes of self-defense in their homes. Fortunately, that need not dismay anyone who believes in strong gun control measures such as a comprehensive system of background checks, gun registration, and gun owner licensing. Banning handguns or all guns is off the table, but with the exception of a small number of the most liberal cities in the country, those policy options were never really on the table in the first place. If courts applying *Heller* properly recognize the very limited nature of what the Supreme Court did, the *Heller* case ultimately may wind up being an enormous help in the effort to achieve reasonable gun control measures. Rather than being a win for the "pro-gun" side or a setback for "anti-gun" forces, it may turn out simply to have been a victory for all Americans, having finally driven home to everyone that respecting gun rights and achieving sound gun control are not mutually exclusive endeavors.