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## HELLER, HLR, AND HOLISTIC LEGAL REASONING

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Well, the show sure ended with a bang. On the last day of the Term, the Court — for the first time ever, by a single vote, over vigorous dissents, and against the weight of circuit precedent — wielded the Second Amendment to strike down a federal gun control measure and to declare a robust individual right to use firearms for self-defense.

Experts began parsing *District of Columbia v. Heller*<sup>1</sup> within hours of the Court's pronouncement. Over the ensuing weeks, sophisticated commentary blossomed in a rich profusion of blogs, wikis, posts, threads, and chats. Now, nearly five months after the decision, does anything remain to be said? In the Internet Age, does anyone still read law reviews? They seem so twentieth-century.

Yet the Justices apparently still do look at law reviews. Almost half the cases decided with signed opinions last Term cited at least one law review article.<sup>2</sup> In *Heller* itself, the various opinions invoked over a dozen articles, including a 1940 classic from the *Harvard Law Review*.<sup>3</sup> Indeed, last Term was a banner year not just for gun wielders like Dick Heller, but also for the editors of the *Harvard Law Review*. All told, the Justices cited fifteen different *HLR* articles — more than double the article count of any other legal periodical.<sup>4</sup>

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<sup>1</sup> 128 S. Ct. 2783 (2008).

<sup>2</sup> Throughout this Comment, I shall use the word “article” to refer generically to all significant law review items, including notes, comments, essays, and book reviews.

<sup>3</sup> 128 S. Ct. at 2832 (Stevens, J., dissenting) (quoting Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 182 (1940)). Wiener's is the only article cited by the various opinions in *Heller* that had previously been invoked by a Court majority. See *Perpich v. Dep't of Def.*, 496 U.S. 334, 341 (1990); *Maryland ex rel. Levin v. United States*, 381 U.S. 41, 46 (1965). Wiener is also the only journal author cited in *Heller* who wrote before the outpouring of modern Second Amendment scholarship, an outpouring that began in earnest with a provocative article authored by Don Kates in 1983. See Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983). Following in the footsteps of a prophetic 1997 concurrence by Justice Thomas, the *Heller* majority cited this notable Kates article with approval. See *Printz v. United States*, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring); *Heller*, 128 S. Ct. at 2803.

<sup>4</sup> The next highest article count was from the *Yale Law Journal* and the *Michigan Law Review*, each with seven.

One particular *HLR* article was cited in two different cases last term. See *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 759 n.6 (2008) (Stevens, J., dissenting) (citing O.W.

Perhaps the Court pays particular attention to *HLR* because *HLR* has traditionally returned the compliment, famously beginning every Volume with an entire issue devoted exclusively to the Court's most recent work product and typically featuring in the remaining seven issues a rich smorgasbord of scholarship suitable for judicial consumption.

Remarkably, four former *HLR* staff members — John Roberts, Antonin Scalia, Ruth Bader Ginsburg, and Stephen Breyer — now sit on the very Court they once helped analyze as student editors. No other law review can point to four alums who have *ever* served on the Court, much less four former editors sitting *together* as Justices. And the next round of Justices may well be picked by Barack Obama, who first rose to national attention as *HLR* President.<sup>5</sup>

Nor is *HLR*'s influence confined to those who once served on this review. Justice Stevens, for example, though not a *Harvard Law Review* alum, is evidently a loyal reader. Not only did he cite to *HLR* in *Heller* itself, but during the Term as a whole he invoked almost as many *HLR* articles (seven) as were cited by all his colleagues combined.

In this Comment, I refract *Heller* through the prism of *HLR* by paying particular attention to the aforementioned *HLR* alums and *HLR*'s loyal reader, Justice Stevens.<sup>6</sup> I conclude that no member of the *HLR* group offered a sufficiently holistic account of certain important methodological and substantive issues implicated by the *Heller* debate. Methodologically, no member of the *HLR* group persuasively explained how the Court should proceed when established case law collides with the clear meaning of the Constitution itself. Substantively, members of the *HLR* group scanted various amendments beyond the Second even though three of these amendments — the Ninth, the Fourteenth, and the Nineteenth — are in fact key to a full understanding of what “the right of the people to keep and bear arms” properly means in America today. The *HLR* group's failure to highlight the Fourteenth Amendment is particularly notable because this failure has a fascinating history starring the *Harvard Law Review* itself and leading mid-twentieth-century figures closely associated with this periodical.

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Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897)); *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2627 (2008) (same).

<sup>5</sup> See Fox Butterfield, *First Black Elected To Head Harvard's Law Review*, N.Y. TIMES, Feb. 6, 1990, at A20.

<sup>6</sup> I admit that this is an artificial — indeed cutesy — way of organizing my analysis. As will become clear soon enough, while I have framed my remarks around six persons with special links to this Review, I have not hesitated to weave into my analysis discussion of other jurists where appropriate.

## I. THE DUELISTS: SCALIA AND STEVENS

In 1959–1960, Antonin Scalia served as Notes Editor for Volume 73 of the *Harvard Law Review*.<sup>7</sup> In 2008, he delivered what history may well deem his most memorable opinion, writing for a five-Justice majority in the biggest Second Amendment case ever decided. John Paul Stevens, the Court’s Senior Associate Justice, wrote the lead dissent for himself and three others.<sup>8</sup>

### A. *Constitutional Method in Heller: The Document and the Doctrine*

Justice Scalia’s landmark ruling merits our attention for its method as well as its result. Behold: a constitutional opinion that actually dwells on the Constitution itself!

Most constitutional opinions do not do this. Constitutional cases nowadays typically involve the application of settled constitutional precepts that all parties accept as binding. In such cases, there is usually no occasion for the opinion writer to discourse at length on the Constitution’s text, history, and structure. Even when open constitutional questions work their way up through the lower courts to the Supreme Court, the resulting opinions rarely lavish attention on the Constitution’s words and original meaning. Rather, these opinions often focus more on judicial doctrine — the multi-pronged tests, the tiers of scrutiny, the standards of review, and other implementing formulas and frameworks found in prior judicial rulings.<sup>9</sup>

At times the Constitution’s language can come to resemble a pea covered by a stack of judicial mattresses — a grain of sand no longer visible, though presumably resting deep inside the pearl of judicial elaboration. The majority opinion in *Roe v. Wade*,<sup>10</sup> for example, never even quoted the constitutional clause that the Court used to reach its sweeping result. In countless cases involving application of the Bill of Rights against the states, the operative Fourteenth Amendment text has received little or no mention.<sup>11</sup>

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<sup>7</sup> The other Notes Editor for Volume 73 was Frank Michelman. John D. French was *HLR* President that year.

<sup>8</sup> The Chief Justice and Justices Kennedy, Thomas, and Alito joined Justice Scalia’s majority opinion; Justices Souter, Ginsburg, and Breyer joined Justice Stevens’s dissent. Justice Breyer also delivered a separate dissent, joined by Justices Stevens, Souter, and Ginsburg. For analysis of this Breyer dissent, see *infra* section II.B, pp. 182–87.

<sup>9</sup> Where direct and extensive analysis of the Constitution’s text, history, and structure does occur in the *United States Reports*, it is often found in dissents or concurrences.

<sup>10</sup> 410 U.S. 113 (1973).

<sup>11</sup> Even when the Justices have explicitly invoked the Fourteenth Amendment’s text, they have almost never paused to explain how a clause that speaks of “due *process*” is properly read to require states to honor various nonprocedural rights such as the free exercise of religion or the

By contrast, in Justice Scalia's *Heller* opinion, the textual pea swelled to the size of a boulder that no prior judicial mattress could cover up. The Second Amendment's grain of sand became an entire world inviting a fresh and detailed exploration.

After briefly summarizing the facts of the case — in which a private citizen, Dick Heller, asserted a constitutional right to keep a loaded handgun at his D.C. home notwithstanding the District's sweeping gun control ordinance — Justice Scalia “turn[ed] first to the meaning of the Second Amendment.”<sup>12</sup> He began by quoting in full the Amendment's text.<sup>13</sup>

After the quote came the quest. Justice Scalia announced that he sought to understand the Amendment's text as it was understood or would have been understood by “ordinary citizens in the founding generation.”<sup>14</sup> He then took the reader on an extended journey through Constitution-land.<sup>15</sup> The journey began with page after page of close textual analysis and a review of eighteenth-century legal and linguistic sources.<sup>16</sup> After that, Justice Scalia devoted another long chunk of his opinion to analogous language in “state constitutions that preceded and immediately followed adoption of the Second Amendment”; to the Amendment's drafting history; and to its subsequent interpretation in the nineteenth century.<sup>17</sup> All these sources, Justice Scalia concluded, cohere to establish a clear “individual right to use arms for self-defense.”<sup>18</sup>

Only at this late juncture did Justice Scalia turn to the Supreme Court's Second Amendment precedents. His doctrinal discussion occupied just a few pages,<sup>19</sup> and even before it began, he made clear that the burden of proof had already shifted in Dick Heller's favor. Thus, Heller did not need to show that the best reading of the Court's case law strongly or even weakly supported his position. Rather, “[w]e now ask whether any of our precedents *forecloses* the conclusions we have reached about the meaning of the Second Amendment”<sup>20</sup> — conclu-

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entitlement to just compensation (or the right of privacy, for that matter). The best textual approach is to use the Fourteenth Amendment's companion Privileges or Immunities Clause, but the Court has only rarely invoked this grand provision. For more discussion, see *infra* pp. 175–77. See also AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 163–80 (1998).

<sup>12</sup> *Heller*, 128 S. Ct. at 2788.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Cf. *Ring v. Arizona*, 536 U.S. 584, 613 (2002) (Scalia, J., concurring) (referring, with style, to “*Apprendi-land*”).

<sup>16</sup> See *Heller*, 128 S. Ct. at 2788–2802.

<sup>17</sup> *Id.* at 2802; see also *id.* at 2802–12.

<sup>18</sup> *Id.* at 2803.

<sup>19</sup> See *id.* at 2812–16.

<sup>20</sup> *Id.* at 2812 (emphasis added).

sions, to repeat, based on Justice Scalia's direct engagement of constitutional text, history, and structure on a virtually clean analytic slate.<sup>21</sup>

In his spirited dissent, Justice Stevens took potshots at Justice Scalia's methodology, but most of these projectiles missed their mark. In various passages, Justice Stevens can be read to suggest that even if Justice Scalia were correct about the Second Amendment's text and original understanding, Dick Heller still should have lost because of the pull of precedent.

Precedent encompasses several elements. Let us consider each component with care.

1. *Vertical Precedent.* — First, *vertical* precedent reflects the institutional hierarchy set forth in the Constitution itself, which establishes one court designed as "supreme" over all other courts.<sup>22</sup> These subordinate courts include all other Article III tribunals, which the Constitution explicitly describes as "inferior to" the Supreme Court,<sup>23</sup> and also state courts whose rulings are subject to reversal by the Supreme Court in "all Cases" arising under federal law.<sup>24</sup> Thus, Supreme Court precedent properly binds all other courts: as a rule, a lower court judge should follow the Constitution as the Supreme Court understands the Constitution even if she thinks (and has good legal reasons for thinking) that the higher Court's understanding is erroneous.

With this quick refresher in mind, consider one of Justice Stevens's main precedent-based arguments, namely, his repeated reminder that all the federal circuit court cases decided between 1939 and 2000 rejected the approach now championed by Justice Scalia.<sup>25</sup> So what? Lower court rulings do not oblige the Supreme Court to ignore what the Court now believes to be the best reading of the Constitution itself. Inferior court rulings are in general merely persuasive authorities, entitled to interpretive weight depending on factors such as the intrinsic strength of their arguments, the legal reputations of their authors, the number of judges opining on the issue, and the degree of consensus among these judges.<sup>26</sup> On one hand, a lawyerly lower court opinion might be weightier than, say, an article in the *Harvard Law Review*

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<sup>21</sup> Justice Scalia ultimately concluded that the key precedent actually tended to support Dick Heller's claim. *See infra* p. 165.

<sup>22</sup> U.S. CONST. art. III, § 1, cl. 1.

<sup>23</sup> *Id.* art. I, § 8, cl. 9.

<sup>24</sup> *Id.* art. III, § 2, cl. 1.

<sup>25</sup> *Heller*, 128 S. Ct. at 2823 & n.2, 2844 n.38 (Stevens, J., dissenting).

<sup>26</sup> Lower court rulings might also sometimes give rise to reliance interests that the Supreme Court should properly take into account. The reliance issue is discussed in more detail *infra* section I.A.3, pp. 156–61. As we shall see, none of the lower court cases invoked by Justice Stevens created any reliance interests that should properly prevent today's Supreme Court from enforcing the correct meaning of the Constitution.

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because lower court judges have their minds wonderfully concentrated by concrete facts, real-world stakes, adversarial presentations, and collegial deliberation within a multi-member panel. On the other hand, these judges may not be scholarly experts on the Constitution's text and history, whereas some *HLR* authors may plausibly claim to possess this expertise.

Also, in many cases lower courts are not even trying to directly engage the Constitution, but are instead simply parsing the Court's case law — something that the Court thinks it can usually do quite well on its own, thank you. Most of the circuit cases invoked by Justice Stevens contain little independent analysis of the text and original understanding of the Second Amendment. A handful of federal appellate cases do feature more detailed textual, structural, and historical expositions, but these cases were typically decided *after* the 1939–2000 period emphasized by Justice Stevens. Even worse for Stevens, these recent rulings are a mixed bag, with several leading judges and courts endorsing views similar to those of Justice Scalia.<sup>27</sup> As merely persuasive authority, the general views of lower courts largely cancel out, and Justice Stevens did not dwell on the particular arguments contained in these lower court opinions. His was largely a precedent-based claim about the sheer number of lower court judges on his side, and as such his claim fell flat.

2. *Horizontal Precedent.* — Just as lower court cases are entitled to weight as persuasive authority, so too are prior Supreme Court rulings. Here we move from vertical precedent to *horizontal* precedent — to the respect the Court properly owes its own previous judgments.

If today's Court seeks to follow the Constitution's text and structure as these were publicly understood at the time of the Founding, current Justices would do well to study landmark rulings by Chief Justice Marshall and Justice Story with special care. Not only were Justice Story and Chief Justice Marshall much closer in time to the enactment of the Constitution and its early amendments, but these two figures (and others, of course) have been deservedly canonized as particularly gifted constitutional guides. However, the weight that the current Court properly gives to these early judicial landmarks is ultimately of a persuasive sort: today's Court should heed an earlier Court case precisely to the degree that today's Justices believe that the prior Court was likely correct about what the Constitution meant when enacted and amended.

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<sup>27</sup> See, e.g., *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007); *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

But not all prior Court opinions are as impressive as Justice Story's in *Martin v. Hunter's Lessee*<sup>28</sup> or Chief Justice Marshall's in *McCulloch v. Maryland*,<sup>29</sup> and not all departed Justices deserve statues in the Pantheon. Thus, a 1939 Court opinion that Justice Stevens brandished at every possible turn,<sup>30</sup> *United States v. Miller*,<sup>31</sup> per Justice McReynolds, simply lacked the silver bullet that Justice Stevens craved and claimed. *Miller* was no *Martin*, and James McReynolds was no John Marshall.

*Miller* came nearly 150 years after the adoption of the Second Amendment, and there is little reason to believe that the *Miller* Justices had a dramatically clearer view of the Founding texts and events than do today's Justices. As Justice Scalia reminded us, *Miller* was decided without the benefit of full adversarial presentation.<sup>32</sup> Nor did any dissenting or concurring Justice come forth to sharpen the *Miller* Court's five-page discussion of the Second Amendment — which was long on quotation and citation, but short on analysis. The Court's clipped opinion<sup>33</sup> said enough to decide the case at hand but was hardly a comprehensive exposition of the Second Amendment or of the Constitution's general structure.<sup>34</sup> If today's Court believes that *Miller* misunderstood the Constitution's original meaning, the Court should follow the Constitution, not the case.

Justice Stevens tried to boost *Miller*'s precedential firepower in two ways. First, he suggested that today's Court may properly deviate from *Miller* and thereby introduce "a change in the law" only if the Court could identify some new piece of historical evidence or some new line of argument that the *Miller* Court did not consider.<sup>35</sup>

But is a break from precedent best described as a "change in the law" if that break occurs because a current Court majority seeks to

<sup>28</sup> 14 U.S. (1 Wheat.) 304 (1816).

<sup>29</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>30</sup> See *Heller*, 128 S. Ct. at 2822, 2823 & nn.2–3, 2824, 2829 n.10, 2836–37, 2838 n.30, 2839, 2844 n.36, 2845–46 (Stevens, J., dissenting).

<sup>31</sup> 307 U.S. 174 (1939).

<sup>32</sup> See *Heller*, 128 S. Ct. at 2814. The respondent in *Miller* did not make an appearance at oral argument and did not file a brief; the Court heard only from the Solicitor General. See *id.*

<sup>33</sup> By "clipped" I mean both terse and filled with cut-and-pasted squibs.

<sup>34</sup> See *Miller*, 307 U.S. at 178–82. Justice Scalia also argued that what little *Miller* did say on balance tended to support Heller's right to keep a handgun at home. See *Heller*, 128 S. Ct. at 2813–16; see also *infra* p. 165.

<sup>35</sup> *Heller*, 128 S. Ct. at 2836, 2846 (Stevens, J., dissenting). For other (and slightly different) formulations of Justice Stevens's claim that a break with precedent requires some "new" evidence or argument, see *id.* at 2823–24 & n.4, 2831, 2845. It is worth repeating that Justice Scalia denied that he was radically departing from *Miller*. He clearly approved of *Miller*'s outcome on *Miller*'s facts; he claimed that *Miller* contained language supporting Heller's position; and he actually borrowed two doctrinal formulations from *Miller* in his effort to specify which sorts of guns are protected by the Second Amendment. See *id.* at 2813–16 (majority opinion).

abide by the Constitution's original meaning? Strictly speaking, the Constitution itself is the law — the supreme law — and when today's Court enforces the dictates of the Constitution, the Court is in the most fundamental sense not *changing* the law, but *obeying* it.<sup>36</sup> The now-superseded case did not itself create any law.<sup>37</sup> Rather, the old case merely attempted to declare what the law of the Constitution already was. If this declaration was, in the view of today's Court, based on a demonstrably mistaken reading of the Constitution, then repudiation of this mistake is rooted in the Constitution itself.

This classical vision of the judicial function was powerfully articulated by Justice Scalia in an influential 1990 meditation on legal retroactivity in *American Trucking Ass'n v. Smith*,<sup>38</sup> and this vision has laid the conceptual foundation for several of Justice Scalia's most notable majority opinions prior to *Heller*. In particular, his 2004 opinion in *Crawford v. Washington*<sup>39</sup> explicitly overruled a prior Court case in order to bring Sixth Amendment Confrontation Clause case law into alignment with the text and original meaning of that clause.<sup>40</sup>

Just last Term, in one of the Court's most magisterial majority opinions, Justice Stevens himself embraced and embellished Justice Scalia's classical vision. (The opinion also highlighted a trio of *HLR* articles analyzing the practical and jurisprudential issues raised when case law shifts.<sup>41</sup>) It is worth quoting Justice Stevens's rich opinion for

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<sup>36</sup> At the end of his opinion, Justice Stevens appeared to recognize this truth: "The Court concludes its opinion by declaring that it is not the proper place of this Court to change the meaning of rights 'enshrine[d]' in the Constitution." *Id.* at 2846 (Stevens, J., dissenting) (alteration in original) (quoting *id.* at 2822 (majority opinion)). Justice Stevens responded by arguing that the majority had simply misconstrued the original meaning and had failed to carry its burden "as a matter of text or history." "[T]he right the Court announces was not 'enshrined' in the Second Amendment by the Framers; it is the product of today's law-changing decision." *Id.* This is a quite different — and, as we shall see below, much more plausible — critique, alleging not that the Court has ignored precedents such as *Miller*, but rather that it has misinterpreted the Constitution's original meaning.

<sup>37</sup> It may, however, have created reliance interests. See *infra* section I.A.3, pp. 156–61.

<sup>38</sup> See 496 U.S. 167, 200–05 (1990) (Scalia, J., concurring in the judgment).

<sup>39</sup> 541 U.S. 36 (2004).

<sup>40</sup> *Id.* at 60, 68 (overruling *Ohio v. Roberts*, 448 U.S. 56 (1980)). Justice Thomas also deserves special notice here as the first member of the Court to identify the pre-*Crawford* mismatch between the Sixth Amendment's actual words and the Court's Sixth Amendment doctrine and to propose a proper corrective. See *White v. Illinois*, 502 U.S. 346, 358–66 (1992) (Thomas, J., concurring in part and concurring in the judgment).

<sup>41</sup> See *Danforth v. Minnesota*, 128 S. Ct. 1029, 1036 n.6 (2008) (citing Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959)); see also *id.* at 1038 (citing Paul J. Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965)).



the Court in *Danforth v. Minnesota*<sup>42</sup> at length because it seems in tension with his *Heller* dissent, issued only four months later:

Our interpretation of that basic Sixth Amendment right of confrontation has evolved over the years.

In *Crawford* we accepted the petitioner’s argument that the interpretation of the Sixth Amendment right to confrontation that we had previously endorsed . . . needed reconsideration because it “stray[ed] from the original meaning of the Confrontation Clause.” We “turn[ed] to the historical background of the Clause to understand its meaning,” and relied primarily on legal developments that had occurred prior to the adoption of the Sixth Amendment to derive the correct interpretation. We held that the “Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.”

Thus, our opinion in *Crawford* announced a “new rule” — as that term is defined in [our case law] — because the result in [*Crawford*] “was not dictated by precedent existing at the time the defendant’s conviction became final.” It was not, however, a rule “of our own devising” or the product of our own views about sound policy. . . .

. . . .

. . . As we have already explained, the source of a “new rule” is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule. . . .

. . . .

Cf. *American Trucking Assns., Inc. v. Smith* (Scalia, J., concurring in judgment).<sup>43</sup>

Justice Stevens, meet Justice Stevens. The *Danforth* Stevens did not oppose breaking with a precedent that “stray[ed] from the original meaning” of the Sixth Amendment. Indeed, the *Danforth* Stevens quoted with approval the Court’s originalist language from *Crawford* (an opinion authored by Justice Scalia and joined by Justice Stevens) asserting that the Court in general “lack[s] authority” to depart from the text and original understanding of the Sixth Amendment. But the *Heller* Stevens wrapped himself in the robes of precedent and argued that even if precedent has strayed from the original meaning, precedent should be followed. Apparently, the Court has general authority

<sup>42</sup> 128 S. Ct. 1029 (2008) (holding that state courts on collateral review of state convictions are free to give retroactive effect to new rules of federal constitutional criminal procedure where federal courts would not do so under *Teague v. Lane*, 489 U.S. 288 (1989)).

<sup>43</sup> *Id.* at 1035 & n.5 (internal citations omitted).

to depart from the original understanding of some amendments but not others.<sup>44</sup>

This brings us to the big problem with Justice Stevens's methodological assault on Justice Scalia: the Justice Stevens of *Heller* suggested that even if a precedent got the Constitution's original meaning wrong, the precedent (here, *United States v. Miller*) should still be followed so long as the precedent-setting Court was fully aware of the contrary evidence and arguments. In order to overrule a prior Court case, said Justice Stevens, the Court must identify some new item that was not brought to the attention of the precedent-setting Court.

But no constitutional clause says anything of the sort. On the contrary, the Constitution's text explicitly and unqualifiedly proclaims itself "the supreme Law of the Land"<sup>45</sup> — supreme over any contrary statute, or executive order, or *judicial precedent*. So Justice Stevens's suggestion cannot be defended textually.

How about structurally? Justice Stevens failed to mount any structural defense of his insistence on "new evidence," and it is hard to imagine what a persuasive structural argument might look like. The Constitution creates three coordinate branches of government. True, the Supreme Court was designed to be supreme over other courts — but not to lord over other branches, and surely not over the Constitution itself. No one thinks that when Congress enacts an unconstitutional statute, that statute is sacrosanct so long as Congress considered and erroneously rejected all the constitutional objections. Nor does anyone think that the President may generally act in ways that squarely violate the Constitution's text and original understanding, so long as the Office of Legal Counsel considered everything before wrongly giving the President the green light. Why should a Court decision that got the constitutional issue wrong be treated differently?

Justice Stevens failed to answer this question. Indeed, he failed even to ask it.

Justice Stevens apparently believed that his "new evidence" test derives from precedent itself. But he has simply misread the precedents. He quoted bland language from the 1986 case of *Vasquez v. Hillery*,<sup>46</sup> but pointed to no previous opinion by the Court or any of its members reading *Vasquez's* boilerplate in the startling way that he insisted it be

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<sup>44</sup> Justice Scalia has been rather more methodologically consistent. His quest for textual fidelity and original understanding of the Sixth Amendment in *Crawford* anticipated his similar approach to the Second Amendment in *Heller*. See *supra* p. 152. But as we shall see later, he too has failed to articulate and follow a convincing and coherent approach when the Court's cases and the Constitution's original meaning collide. See *infra* pp. 160–61.

<sup>45</sup> U.S. CONST. art. VI.

<sup>46</sup> 474 U.S. 254 (1986).

read.<sup>47</sup> A computer search confirms that no such opinion exists. Thus, Justice Stevens's claims in *Heller* about precedent were themselves unprecedented.<sup>48</sup>

If *Vasquez* meant what Justice Stevens said it meant, then *Vasquez* itself would contradict landmark opinions in which the Court overruled itself simply because an earlier case got the Constitution wrong, even though the precedent-setting Court considered (and erroneously rejected) the arguments and evidence that later persuaded the overruling Court.<sup>49</sup> Beyond the practice of the Court as a whole, many of our nation's greatest Justices have refused to acquiesce in cases they deemed egregiously wrong, and have never felt obliged to add some new argument or fact in each subsequent case. Justices Brennan and Marshall's stance in literally hundreds of post-1976 death penalty cases furnishes perhaps the most obvious example. Justice Stevens himself furnishes another. He has repeatedly rejected the Court's state sover-

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<sup>47</sup> See *Heller*, 128 S. Ct. at 2824 n.4 (“[T]he careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged to bring its opinions into agreement with experience and with facts newly ascertained.” (quoting *Vasquez*, 474 U.S. at 266)) (internal quotation marks omitted). This bland *Vasquez* dictum did not purport to lay down a rigid legal prerequisite for all future overrulings. Indeed, in its very next sentence (a sentence not quoted by Justice Stevens), the *Vasquez* Court declared that “[o]ur history does not impose any rigid formula to constrain the Court in the disposition of cases.” *Vasquez*, 474 U.S. at 266. As the coda for this meditation on *stare decisis*, *Vasquez* closed with a sweepingly open-ended list of reasons for overruling: *stare decisis* might properly yield if the Court deemed a particular precedent “outdated, *ill-founded*, unworkable, or otherwise legitimately vulnerable to serious reconsideration.” *Id.* (emphasis added). Moreover, surely *Vasquez*'s reference to “experience” properly includes the experiences encoded in the Constitution itself — that is, the experiences of the American people that led them to put a given rule into the Constitution in the first place. And nothing in the words “facts newly ascertained” says that these facts must have been unavailable to the precedent-setting Court. “Newly ascertained” does not self-evidently mean “newly available” or “never before considered by the Court.” Rather, it quite naturally can mean a fact that was never before accepted or properly understood by the Court — or a fact that was previously accepted and is now confirmed afresh (“newly”).

<sup>48</sup> The most notable citation to *Vasquez* by a Court majority on the subject of *stare decisis* in constitutional cases simply invoked the case for the following proposition: precedent should be followed “absent demonstration that our earlier cases were themselves a misinterpretation of some constitutional command.” *Johnson v. Texas*, 509 U.S. 350, 366–367 (1993) (citing *Vasquez*, 474 U.S. at 265–66). In another majority opinion — in a case where the Court ultimately opted to overrule a prior precedent — the citation to *Vasquez* on the value of *stare decisis* was followed by this reminder: “[n]evertheless, when governing decisions are unworkable or are badly reasoned, ‘this Court has never felt constrained to follow precedent.’” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (emphasis added) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)).

Prior to *Vasquez*, here is what the Court said in *Allwright*: “[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.” *Allwright*, 321 U.S. at 665.

<sup>49</sup> See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968) (overruling *Hodges v. United States*, 203 U.S. 1 (1906)).

eign immunity rulings and called for their overturning — not because he has any new fact or argument but simply because he believes the earlier Court got the Constitution wrong.<sup>50</sup> To be clear: I applaud Justice Stevens for his methodological stand in these sovereign immunity cases. I just wish he had stayed true to this methodology in *Heller*. Once again: Justice Stevens, please meet Justice Stevens.<sup>51</sup>

And also, please remember Justice Marshall. Thurgood Marshall, the author of *Vasquez*, devoted his life as a litigator to the dismantling of Jim Crow and the overturning of gross judicial errors such as *Plessy v. Ferguson*.<sup>52</sup> One would hope that he did not believe that *Plessy* could be overturned only if some new fact or argument could be adduced against it. And, even if he ever did believe this, we should not. Surely *Plessy* was ripe for overruling the day it was decided even if every single thing that could be said about its wrongness was in fact said in dissent earlier that day, and all these things were thus actually considered and erroneously rejected by the misguided *Plessy* majority.

3. *Reliance*. — However, to overrule a case not the day it was decided but decades later is to introduce additional jurisprudential wrinkles. And here we come to another facet of precedent, namely, its connection to *reliance* interests.

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<sup>50</sup> See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 97–98 (2000) (Stevens, J., dissenting) (“Despite my respect for *stare decisis*, I am unwilling to accept [*Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)] as controlling precedent. First and foremost, the reasoning of that opinion is so profoundly mistaken and so fundamentally inconsistent with the Framers’ conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court. *Stare decisis*, furthermore, has less force in the area of constitutional law.”). Justices Souter, Ginsburg, and Breyer joined this dissent.

<sup>51</sup> A focus on individual Justices prompts interesting questions about whether a Justice’s age might predictably influence his or her attraction or resistance to precedent-entrenching proposals such as the one Justice Stevens floated in *Heller*. Given that such efforts restrict the immediate freedom of future Court majorities, we might expect younger Justices — who are on average more likely to serve longer and thus to be in more future majorities — to be more skeptical of precedent entrenchment than older Justices, who will be tying their successors’ hands more than their own with any new precedent-entrenchment rule. True, an entrenching formula can also be seen as empowering tomorrow’s Court to project its authority further into the future, but the formula requires immediate judicial forbearance without any ironclad guarantee that Justices in the far future will in fact reciprocate and enforce the deal. Any newly adopted entrenchment rule also gives a windfall to past decisions and thus differentially advantages senior Justices who have on average joined more past majority opinions than junior Justices.

In *Heller*, it is perhaps suggestive that the three youngest Justices (Chief Justice Roberts and Justices Thomas and Alito) all opposed the precedent-entrenching formula offered by Justice Stevens; the two oldest Justices (Justices Stevens and Ginsburg) favored the formula; while the remaining four Justices in the middle of the Court’s age distribution (Justices Scalia, Kennedy, Souter, and Breyer) split evenly. If we rank instead by actual seniority, the two most junior Justices (Chief Justice Roberts and Justice Alito) opposed the entrenching formula offered by the most senior Justice (Justice Stevens) with the remaining six Justices in the middle of the seniority distribution (Justices Scalia, Kennedy, Thomas, Souter, Ginsburg, and Breyer) splitting evenly.

<sup>52</sup> 163 U.S. 537 (1896).

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The text, history, and structure of the Constitution cohere to suggest that courts may properly take account of reasonable reliance interests. Both the Constitution's general structure and the specific Article III language vesting federal courts with "judicial Power" over federal question "Cases" in "Law and Equity"<sup>53</sup> envision a system in which Article III tribunals will sit in judgment over events that have already occurred and will decide these cases, not by creating new rules, but by declaring the pre-existing federal law that applied when the relevant litigation-creating events happened. A variety of general background rules of law and equity in place at the Founding and continuing to the present day allow courts to keep reliance considerations in mind when judging past events, declaring rights, and fashioning remedies.

A Supreme Court precedent handed down at time  $T_1$  might well create reliance interests, even though this precedent is later deemed constitutionally erroneous by the Court at time  $T_2$ . At time  $T_2$ , the overruling Court may properly consider the remedial implications of these reliance factors. But a proper consideration, consistent with the Constitution's general structure of coordinate branches, should not treat the Supreme Court's past constitutional errors as categorically different from the past constitutional errors of other branches. Thus, a congressional statute enacted at time  $T_1$  — or a presidential order, or a lower federal court ruling, or a state governmental action for that matter — might well also create legitimate reliance interests, even though this statute (or order, or ruling, or other action) is later deemed constitutionally erroneous by the Court at time  $T_2$ .

Consider for example a kidnapping prosecution at time  $T_1$ , in which the prosecutor, relying on Supreme Court precedent  $X$ , introduces a certain kind of hearsay evidence and wins a conviction that is affirmed on appeal. Years later, the Court decides that precedent  $X$  got the Constitution — in particular, the Confrontation Clause — wrong. But to overturn the verdict at this late date might well be remedially problematic. Reversal might penalize the prosecutor's reliance and make the prosecution irreparably worse off (and the defendant hugely better off) than if precedent  $X$  had simply never existed. Suppose, for instance, that without precedent  $X$  on the books at time  $T_1$ , the prosecutor would simply have introduced a very different piece of evidence via an alternative witness to prove the same point; but years later this piece of evidence is no longer available to her because the alternative witness has moved away.

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<sup>53</sup> U.S. CONST. art. III, § 2.

In such a situation, what should the Court do at time  $T_2$ ? To reaffirm precedent  $X$  even after a Court is persuaded that  $X$  got the Constitution wrong would be to do violence to the ultimate supremacy of the Constitution. So as a first step, the Court should declare the law properly: “ $X$  was erroneous and is hereby overruled.” (And, contra the *Heller* Stevens, the Court should do so even if the Justices in  $X$  fully considered but erroneously rejected all the correct constitutional facts and arguments.) But it does not automatically follow that the kidnapper should go free, pending retrial, for this would be an unfortunate remedial windfall.

In this and similar settings, how certain must the Court be that the other evidence would have done the trick? How decisive should it be that this evidence was not, in fact, introduced at trial even though it could have been? Should the Court have different rules for direct appeals as opposed to habeas cases? For cases arising in state as opposed to federal courts? If state courts are not required to free the kidnapper, should they be allowed to do so under state remedial laws?

These remedial questions involve various equitable considerations as to which the Constitution’s text, history, and structure may give relatively little specific guidance, even if these sources are quite clear on the underlying point that precedent  $X$  was wrong on the meaning of the Confrontation Clause. In recent years, the Court has addressed these and related issues under an assortment of remedial doctrines such as “harmless error” and “retroactivity.” Perhaps no opinion of the Court has treated these jurisprudential issues with more nuance than Justice Stevens’s *Danforth* opinion, explicitly building on Justice Scalia’s earlier contributions.<sup>54</sup>

Yet for all his sophistication in *Danforth*, Justice Stevens’s analysis of jurisprudentially related questions in *Heller* disappoints. Seeking another way, beyond *Vasquez*, to boost *Miller*’s firepower, Justice Stevens repeatedly relied on reliance. He spoke of the “substantial reli-

<sup>54</sup> Here, once again, is *Danforth*:

[W]e note at the outset that the very word “retroactivity” is misleading because it speaks in temporal terms. “Retroactivity” suggests that when we declare that a new constitutional rule of criminal procedure is “nonretroactive,” we are implying that the right at issue was not in existence prior to the date the “new rule” was announced. But this is incorrect. As we have already explained, the source of a “new rule” is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule. What we are actually determining when we assess the “retroactivity” of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.

*Danforth v. Minnesota*, 128 S. Ct. 1029, 1035 (2008).

The opinion continued in a footnote: “It may, therefore, make more sense to speak in terms of the ‘redressability’ of violations of new rules, rather than the ‘retroactivity’ of such rules. *Cf. Am. Trucking Ass’n, Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in judgment).” *Id.* at 1035 n.5.

ance” of “judges and legislators” and “citizens” — indeed, of “hundreds of judges” and “millions of Americans” — on *Miller* and its pro-gun control lower court progeny.<sup>55</sup> But how, precisely, did any of these persons or institutions rely to their detriment on *Miller* in a way that should entrench *Miller* from an immediate and fully operative overruling if *Miller* did indeed get the Constitution wrong?

Had the Supreme Court in 1939 *struck down* a gun control ordinance banning handguns — call it Ordinance *X* — it is easy to see how reliance interests would have arisen in a way that would bear on how the 1939 case should be overruled, if later deemed erroneous. Imagine a law-abiding citizen, Nick Deller, who kept a handgun at home in 2007, notwithstanding the existence on the books of gun control Ordinance *Y*, because Deller reasonably believed that *Y* was in every relevant respect identical to *X* and thus clearly invalid under the logic of our hypothetical 1939 case. Were the Court in 2008 to deem the 1939 case erroneous and squarely overrule it, Deller’s prior handgun possession should never subject him to prosecution or penalty. Deller relied on the 1939 case in a rather obvious way: had the 1939 Court precedent never existed, Deller would not have kept the gun because he would have understood that Ordinance *Y* fully applied. To punish or penalize Deller for his pre-2008 gun possession — to make him worse off than he would have been had the 1939 case never existed — would be inequitable and perhaps also a violation of his due process right to fair notice. In this hypothetical, even though the 1939 case should be overruled because the Court now views it as erroneous, the Court must attend to the reliance interests that it created and should try to minimize the degree to which persons are made worse off than they would have been had the case never existed.

But in real life the 1939 Court case *upheld* a gun control ordinance, and it is hard to see how overruling it if it is now seen as erroneous works any inequity or due process violation. Precisely how did “judges” rely on *Miller* in a way that would make them worse off if *Miller* were immediately overruled? No one is proposing to impeach lower court judges because they followed *Miller*’s erroneous lead.<sup>56</sup>

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<sup>55</sup> *Heller*, 128 S. Ct. at 2823, 2845 & n.38, 2846 (Stevens, J., dissenting). Justice Stevens’s repeated emphasis on reliance by “judges” was no casual slip. Rather, this emphasis intertwined with his efforts to stress the pro-gun control consensus among circuit courts between 1939 and 2000. See *supra* p. 149.

<sup>56</sup> True, a lower court judge might suffer a reputational hit and a psychic letdown: she followed *Miller* faithfully and now the Supreme Court is in effect reversing her, making her worse off than if the case had never existed! But surely this is not the sort of reliance generally protected by remedial principles and constitutional structure. In fact, the Court itself has made clear that there is no judicial dishonor when a lower court follows erroneous Supreme Court precedent and leaves the task of correcting the Court’s own error to the Court itself. See, e.g., Rodriguez de

Precisely how would “legislators” or “citizens” be worse off by overruling *Miller* than they would have been had *Miller* never existed? Justice Stevens offered no satisfying answers or analysis:<sup>57</sup> “reliance” in his hands became a vague catchall for entrenching erroneous precedents.<sup>58</sup>

In Justice Stevens’s opinion, then, we see a remarkable failure to offer a coherent analysis of one of the most obvious, important, and recurring questions of constitutional law: what to do when case law contradicts the Constitution.

The methodological failure is not confined to Justice Stevens, nor even to the Justices who joined his dissent. Consider, for example, Justice Stevens’s dueling partner in *Heller*, Justice Scalia. In particular, consider Justice Scalia’s attitude toward the exclusionary rule. Justice Scalia knows full well that this rule strays quite far — miles, really — from the text and original understanding of the Fourth Amendment. (And nothing in the text or original meaning of any other amendment supports the rule.) Yet Justice Scalia has never called for the complete and immediate abolition of the exclusionary rule. Why not? What legitimate reliance interests stand in the way? The interest of an especially calculating criminal in getting out of jail

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*Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). In one recent episode, the Court *praised* circuit judges even as it *reversed* them because they had properly followed an old Court precedent that the current Court ultimately decided to explicitly repudiate. *See Eberhart v. United States*, 126 S. Ct. 403, 407 (2005) (per curiam).

<sup>57</sup> Perhaps the underlying thought was that, absent *Miller*’s and lower courts’ broad approval of gun control in the mid-twentieth century, gun control supporters would have amended the Second Amendment out of the Constitution. But of course they are free to do so today, and are thus no worse off than they would have been had *Miller* never existed. If the concern is somehow about the increased risk of crime in the District pending the likely ratification of a repealing amendment, this concern would at most argue for a modest time lag before any overruling took full remedial effect. One can imagine other possible reliance interests, but, to repeat, Justice Stevens offered no details or analysis, and most imaginable reliance interests would merely counsel a short delay before a full overruling should take effect.

<sup>58</sup> At one particularly unfortunate turn, Justices Stevens and Scalia talked past each other. Justice Scalia pointed to the American people’s legitimate reliance on the “*true* meaning” of the Second Amendment, which he believed his opinion expounded and restored. *Heller*, 128 S. Ct. at 2815 n.24 (emphasis added). This is a very different sort of reliance interest than the one that we have been considering so far, namely, reliance on a constitutionally *erroneous* Court case (or other government action) that has given rise to conduct relying on the validity of the case (or action).

Justice Stevens responded by saying that it was “hard to see how Americans have ‘relied,’ in the usual sense of the word, on the existence of a constitutional right that, until 2001, had been rejected by every federal court to take up the question.” *Id.* at 2844 n.38 (Stevens, J., dissenting).

But as noted, “reliance” here was being used by Justice Scalia in a different sense. If the Framers and Amenders did indeed constitutionally codify a given right, subsequent generations of Americans are entitled to believe that it will always be protected. Otherwise, what is the point of writing down the Constitution and proclaiming it supreme law? And why bother to keep it short? Precisely so that the people themselves can directly engage it and be part of its unfolding interpretation. The people are entitled to rely on the written Constitution’s core original meaning and to rely on current judges to restore this meaning if past judges have erroneously constricted it.



free if the cops ever err in procuring compelling evidence against him? Merely to state this interest is to see its absurdity: this is not the stuff of proper reliance worthy of equitable protection.<sup>59</sup> So for Justice Scalia what presumably protects the exclusionary rule is not its conformance to constitutional text and history, nor its protection of legitimate reliance interests, but rather the simple fact that it is a well-settled practice. But how can this justify continuation of a rule that strays so far from the Constitution itself? Here, it is Justice Scalia who has no good answer to the obvious question.

Sad to say, none of the current Justices has a wholly satisfying vision of how to proceed when the Constitution itself is sharply at odds with the case law.<sup>60</sup> While Justice Stevens said the oddest things about this issue in *Heller* itself, the general failure to offer a good conceptual account of precedent is probably a bigger lapse in the overall jurisprudence of those on the Court, like Justice Scalia, who reckon themselves originalists and who usually insist that it is the Constitution, and not the case law, that stands as the supreme law of our land.

While we are apportioning blame, let us reserve some for *HLR*. Sensible constitutional analysis involves careful consideration of both the document and the doctrine — of the Constitution itself as well as the case law construing it. Yet *HLR* has historically devoted vastly more institutional attention to the latter than to the former. Every *HLR* Volume begins with a November Supreme Court issue gazing intently at recent case law, but *HLR* has no regular counterbalancing issue devoted to the Constitution itself. Small wonder, then, that many former editors and loyal readers of *HLR* might tend to overweight precedent.<sup>61</sup>

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<sup>59</sup> Even if this interest were to be protected, it would offer no shield to any crime committed after the Court made clear that the exclusionary rule must go. For detailed analysis of the various legal interests at stake, see AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 27, 97–116, 151–52 (1997).

<sup>60</sup> Although I cannot fully defend this admittedly sweeping charge today, I have begun to do so elsewhere. See, e.g., Akhil Reed Amar, *On Text and Precedent*, 31 HARV. J.L. & PUB. POL'Y 961 (2008); Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 78–89 (2000).

<sup>61</sup> Justice Stevens's *Heller* dissent is emblematic, privileging precedent by both overreading it and overentrenching it. First he tried to make a mountain out of the *Miller* molehill, insisting that the case decided far more than it did. See *supra* p. 151. Then he defended his extreme precedent-entrenching formula, which would require that an overruling be accompanied by “new evidence,” by appealing to precedent itself — *Vasquez* — in a methodologically circular enterprise remarkable for the total absence of any plausible accompanying textual, structural, or originalist arguments for this extreme entrenchment. See *supra* pp. 154–55. Is it wholly coincidental that Justice Stevens's dissent was joined by two *HLR* alumni, Justices Ginsburg and Breyer, and yet another *HLR* well-wisher, Justice David Souter? (Since the beginning of the 2000 Term, Justice Souter has hired more *HLR* alumni as law clerks than any other Justice. To preserve consistency, this calculation combines the clerk counts for Chief Justice Rehnquist and his successor, Chief

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4. *Popular Ratification.* — Before we leave the fascinating methodological issues raised by *Heller*, one additional item deserves to be brought into view: the Ninth Amendment.

Thanks to this amendment, it is possible to imagine a scenario in which a Court case that got the Constitution wrong at time  $T_1$  should be affirmed rather than repudiated at time  $T_2$ . The Ninth Amendment reminds us that the textual enumeration of certain constitutional rights should “not be construed to deny or disparage” other rights “retained by the people.” But where should judges — or the rest of us, for that matter — look for nontextual constitutional rights? Under one attractive reading of the Ninth Amendment, unenumerated constitutional rights retained by the people encompass, among other things, those basic rights that the people at large in fact believe that they have and should have under the Constitution. If enough people believe in a given right and view it as fundamental, then that right is for these very reasons a right of the people.<sup>62</sup>

It may not matter *how* the people’s belief arose — even if it arose as a result of a Supreme Court case that was wrong as a matter of text and original intent when decided. Thus, if the Court at time  $T_1$  gets the Constitution’s text and original understanding wrong and proclaims a right that does not in fact properly exist at time  $T_1$ , and if the vast majority of Americans come to rejoice in this right,<sup>63</sup> the Court at time  $T_2$  should *affirm* the originally erroneous precedent. The case, though wrong when decided, has become right thanks to an intervening change of fact — broad and deep popular endorsement — that the Constitution’s own text, via the Ninth Amendment, endows with special significance.

Note the key asymmetry here: a case that construes a textual constitutional right too narrowly is different from one that construes the right too broadly. Even if both cases come to be widely embraced by the citizenry, only the rights-expanding case interacts with the text of the Ninth Amendment so as to immunize it from subsequent reversal.<sup>64</sup>

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Justice Roberts, and also combines the counts for Justice O’Connor and her replacement, Justice Alito.)

<sup>62</sup> A similar analysis can be applied to the broad language of the Fourteenth Amendment’s Privileges or Immunities Clause. The rights protected by this clause explicitly apply against states and implicitly against the federal government as well. See AMAR, *supra* note 11, at 163–80, 195–96 n.\*, 281 n.\*.

<sup>63</sup> This is not something that can be said about the exclusionary rule, whose upside-down logic springing the guilty and demoralizing crime victims has always been strongly resisted by a very large portion of the general citizenry, especially in cases of violent crime such as murder, rape, and robbery.

<sup>64</sup> An exception to this general approach might well be warranted if expanding a nontextual right would somehow contract a textual right.

Such rights-expanding cases that Americans have come to embrace, whether or not these cases originally got the Constitution's text and original understanding correct, deserve a name. Let us call them Ninth Amendment superprecedents. And let us honor these cases and the new rights they proclaim, rather than denying or disparaging these rights of the people, by the people, for the people, and from the people.

As it turns out, the Ninth Amendment also casts light on other aspects of the *Heller* debate. But before we examine that amendment (and its counterpart language in Fourteenth Amendment) in more detail, let us take a closer look at the provision that all the Justices in *Heller* thought was at the center of the dispute: the Second Amendment.

*B. Constitutional Substance in Heller:  
The Case of the Missing Amendments*

“A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.”<sup>65</sup>

Them's fightin' words in *Heller*. Justice Scalia insisted that these words, like their older cousins in English common law and their companions in early state constitutions, clearly encompass an individual's right to have a ready gun at home for self-protection. Justice Stevens said no: he read these words as miles removed from the common law right of self-defense. As we have seen, Justice Stevens wasted considerable energy trying to deploy *Miller* and other precedents, including *Vasquez* and pre-2001 lower court rulings, none of which had enough firepower and accuracy to do much damage to Scalia's claims. But when Justice Stevens moved beyond precedent and took direct aim at Justice Scalia on the grounds of text, history, and structure, the resulting shootout was a closely balanced duel, with each side giving nearly as good as it got. Were the Second Amendment the only constitutional text on point, the closeness of the vote in *Heller* would have been warranted.

1. *Holism Within the Second Amendment: Two Clauses, One Vision.* — Consider first the relationship between the Second Amendment's opening words and its closing command. Law typically tells us *what* to do, but the Second Amendment, in its preamble, also tells us *why*: the right to keep and bear arms exists principally to protect the Constitution's militia structure.

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<sup>65</sup> U.S. CONST. amend. II (punctuation modernized). On the oddities of comma placements in various eighteenth-century sources, see Ian Ayres, *Pregnant with Embarrassments: An Incomplete Theory of the Seventh Amendment*, 26 VAL. U. L. REV. 385, 386–89 (1991).

Justice Stevens saw a tight link between the why and the what, between the Amendment's preamble and its operative command. On his view, because the right was designed to safeguard America's militia structure, its core command protects *militiamen* in their *military* use of arms.<sup>66</sup> Dick Heller should have lost because he was not an active-service militiaman and because there was nothing military about his having his own private firearm in his own private home for self-defense against burglars.

Justice Scalia countered that while there should indeed be some link between preamble and command, the link need not be tight. On his view, an individual's right to keep a private gun for self-protection even in a wholly nonmilitary space such as a home "helped to secure the ideal of a citizen militia"<sup>67</sup> at the Founding by insuring that citizens would have guns that they knew how to use, guns that could never be confiscated on a pretext — and thus guns that could be of service to the militia if tyrants ever tried to usurp power. In this way the hip bone connected to the shoulder bone.

Though Justice Scalia did not stress the point, Founding-era militias did guard against private thugs, such as pirates and renegade Indians, as well as against more organized threats. Before the emergence of professional police in the nineteenth century, the militia served various law enforcement functions, alongside the posse comitatus, the hue and cry, and the self-informing grand jury. In the Founders' world, individual self-protection and community defense were not wholly separate spheres.

Justice Scalia also linked Dick Heller's claim of right to the preamble's militia by stressing that Heller's pistol was the sort of firearm customarily used by military officers in armies and militias.<sup>68</sup> At first, this suggested linkage startles: is the relevant right the right of the gun or of the man?<sup>69</sup> Surely the latter, argued Justice Stevens: the Bill of Rights is about persons; and Dick Heller, the person, was not an active-service militiaman. This focus on persons seemed all the more natural to Justice Stevens in light of the Court's unanimous 1990 opin-

<sup>66</sup> *Heller*, 128 S. Ct. at 2822 (Stevens, J., dissenting).

<sup>67</sup> *Id.* at 2801 (majority opinion).

<sup>68</sup> *Id.* at 2815–17.

<sup>69</sup> Here is a parable recounted by one prominent Founder:

Today a man owns a jackass worth fifty dollars and he is entitled to vote; but before the next election the jackass dies. The man in the mean time has become more experienced, his knowledge of the principles of government, and his acquaintance with mankind, are more extensive, and he is therefore better qualified to make a proper selection of rulers — but the jackass is dead and the man cannot vote. Now gentlemen, pray inform me, in whom is the right of suffrage? In the man or in the jackass?"

BENJAMIN FRANKLIN, *THE CASKET, OR FLOWERS OF LITERATURE, WIT AND SENTIMENT* (1828), quoted in ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 3 (2000).

ion in *Perpich v. Department of Defense*,<sup>70</sup> an opinion that Stevens himself authored and that concerned the rights and duties of active-service militiamen under Article I, Section 8. Predisposed to view militia-related issues through the prism of *Perpich* (a case cited repeatedly by Justice Stevens in *Heller* but never by Justice Scalia), Justice Stevens saw the Section 8 clauses concerning the “militia” as tightly linked — intratextually, logically, and historically — to the Second Amendment’s preambulatory “militia” clause, which in turn tightly intermeshed with the Amendment’s operative command language.<sup>71</sup>

Here it was Justice Scalia’s turn to wield precedent — indeed, Justice Stevens’s own weapon of choice, *United States v. Miller*. According to Justice Scalia, *Miller* did not need to be overruled because its narrow holding did not conflict with the Second Amendment right as correctly understood from a textualist and originalist perspective. The Second Amendment claim lost in *Miller*, Justice Scalia argued, not (as Justice Stevens would have it) because Mr. Miller was not a militiaman and therefore fell outside the Second Amendment, but rather because the gun in *Miller* was not a military-style weapon. Here, Justice Scalia suggested, was a related link between the operative clause and the preamble: the only arms protected are those that are generally suitable for militia use.<sup>72</sup>

This focus on things, rather than persons — shades of *Pennoyer v. Neff*<sup>73</sup> — runs counter to much modern thinking about rights. Nevertheless, in one corner of Eighth Amendment jurisprudence, Justice Scalia has similarly tried to direct our gaze away from persons and toward things. To determine whether a civil forfeiture is so extreme as to violate the Constitution, Justice Scalia has urged that the Court should not look at how much the government has in fact taken away from a *person*, but rather at how closely the forfeited *thing* — the deodand, the contraband, the “offending” physical instrument — was connected to the prohibited transaction.<sup>74</sup>

Even if Justice Scalia’s focus on objects is the best way to conceptualize constitutional commands concerning civil forfeitures, it remains a rather im-personal way to read the Second Amendment, whose text

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<sup>70</sup> 496 U.S. 334 (1990).

<sup>71</sup> See *Heller*, 128 S. Ct. at 2842–44 (Stevens, J., dissenting).

<sup>72</sup> *Id.* at 2815–16 (majority opinion).

<sup>73</sup> 95 U.S. 714 (1878). *Pennoyer*, the famous case explaining hoary rules of in rem jurisdiction, was good law when *Miller* was decided but was ultimately overruled in the 1945 case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

<sup>74</sup> *Austin v. United States*, 509 U.S. 602, 628 (1993) (Scalia, J., concurring in part and concurring in the judgment).

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does not say that “the right of arms to be borne shall not be infringed.” Rather, the Amendment declares a right of “the people.”

Which brings us to the nub: who were “the people” within the meaning of the Second Amendment at the time of the Founding? Consider three possible readings.

Reading One — The “Select Militia” Reading: “A well regulated militia being necessary to the security of a free state, the right of *organized militiamen* (that is, those in active service who regularly muster and train with other militiamen) to keep and bear arms shall not be infringed.”

Reading Two — The “General Militia” Reading: “A well regulated militia being necessary to the security of a free state, the right of *the general militia* (that is, all those in active service plus all those capable of being called upon to serve) to keep and bear arms shall not be infringed.”

Reading Three — The “Fourth Amendment” Reading: “A well regulated militia being necessary to the security of a free state, the right of *all adult citizens* (roughly speaking, the same rights-holders as are protected by the Fourth Amendment) to keep and bear arms shall not be infringed.”

Justice Stevens in effect chose Reading One; Justice Scalia, Reading Three. The best answer lies between these two extremes: Reading Two.

The key to the textual puzzle is this: the otherwise stilted syntax of the Amendment, with its reference to the “militia” in the opening and the “people” in the closing, makes the most sense and becomes the least stilted when we read these two key nouns, “militia” and “people,” as synonyms. Here is the key linkage between the Amendment’s two parts. In eighteenth-century republican ideology, the (general) militia *were* the people. Indeed, an earlier version of the Amendment made this implicit syntactical equation textually explicit by referring to “a well regulated militia, composed of the body of the people.”<sup>75</sup> Although this extra verbiage clarified the Amendment’s substance, it clunked up the style of an already grammatically complicated sentence and eventually got dropped. Even so, the equation of the militia with the people is implicit in the very syntax and flow of the final Amendment as a whole when read against its background of eighteenth-century republican ideology.

We can now see why Justice Stevens’s reading was too narrow. Justice Stevens read “militia” in a way that is commonplace in twenty-first-century America. Today, the word typically refers to the paid semiprofessional volunteers who make up the modern National Guard

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<sup>75</sup> 1 SEN. J. 63 (Aug. 25, 1789).

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— semiprofessionals who were at the heart of the *Perpich* case. But in the eighteenth century, such a small, self-selected, semiprofessional, and not entirely representative cadre would have been typically described as a “*select militia*” and viewed by republicans as merely a junior varsity version of the professional standing army that they disdained. For these Founding-era republicans, a select militia would not offer a free state the security that could only be provided by a truly general militia comprising a wide cross-section of the polity. Roughly speaking, the Founders’ general militia encompassed the same men who voted and who served on juries — that is, the people.

Justice Stevens thus misread the word “militia.” In 1789, when this word was used without the qualifying adjective “select,” it ordinarily referred to the *general militia* — all men capable of serving, not just those in active service.<sup>76</sup> Justice Stevens’s reading of “militia” ends up contradicting the preamble’s core ideological claim; a select militia like today’s National Guard would not have been viewed by the republican framers of the Second Amendment as truly the best security of a free polity. And — the key point from synonymity — a select militia was never viewed as the people themselves. If “people” and “militia” are synonyms, “militia” must mean “*general militia*.”

We can now also see why Justice Scalia’s reading was too expansive. If “people” really means virtually all adult Americans, the operative clause loses its linkage to the preamble and becomes hugely overbroad. Fully half of Fourth Amendment rights-holders are females today and were females in 1789. But in 1789, women were not typically viewed as part of the general militia. Nor, as a rule, were women voters or jurors. But if Justice Scalia is right, then the Framers’ Second Amendment was in effect designed to read as follows: “A well regulated militia being necessary to the security of a free state, the right of persons — most of whom are not in the militia, have never been in the militia, and can never be in the militia — to keep and bear arms shall not be infringed.” Such a reading begins to border on non sequitur.<sup>77</sup> If “militia” and “people” are synonyms, the “people” here

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<sup>76</sup> See *Heller*, 128 S. Ct. at 2800 (noting that “the ordinary definition of the militia” encompassed “all able-bodied men”); see also *id.* at 2799 (“[T]he Militia comprised all males physically capable of acting in concert for the common defense.” (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)) (internal quotation marks omitted)).

<sup>77</sup> The “woman” question thus poses a dilemma for Justice Scalia. If he insists that women were centrally covered by the Second Amendment, the linkage between the preamble and the operative clause becomes more obviously attenuated. But if women are not covered, then how can we read the amendment as safeguarding a right of individual self-defense — a right surely every bit as vital to females as to males? Blackstone, for example, viewed the right to self-preservation as an inalienable civil right of all persons, as distinct from political rights, such as voting and of-

sensibly means something narrower than in the Fourth Amendment, which was, as we shall see, designed to encompass women.

2. *Holism Across Amendments: Intratextualism.* — At this point, we must move beyond the Second Amendment's two clauses to a broader form of "intratextual" analysis, examining how words and phrases recur in different parts of the Constitution. As previously noted, Justice Stevens saw the Second Amendment as connected to the Constitution's allocation of military power in Article I, Section 8, in part because the word "militia" prominently appears in both places.<sup>78</sup> Justice Scalia, by contrast, saw a particularly promising intratextual lead in the Fourth Amendment, which, like the Second, refers to "the right of the people." He suggested that since both Amendments use this same elaborate phrase, the phrase should mean the same thing, or something very similar, in both places.<sup>79</sup> Fourth Amendment rights-holders need not have any tight link to the militia, so neither should Second Amendment rights-holders.

Intratextual analysis is a centuries-old and often elegant form of holistic legal reasoning, but one that must be used with caution and close attention to context.<sup>80</sup> Constitutional words do not always mean the same thing when they recur. Some words are instead best read as clever chameleons that take their precise meaning and coloration from their immediate surrounding.<sup>81</sup> Consider the chameleon word "person." Sometimes the word is best read to include corporations, which deserve Fifth Amendment due process rights along with human beings. But other times the word is best read to exclude corporations, entities that have no souls to torment and thus are not protected by the Fifth Amendment Self-Incrimination Clause, which was designed in part to prevent spiritual torment. Corporations are not persons for the Article I Census Clause, but are persons with rights against economic discrimination under general equal protection principles.<sup>82</sup>

The word "people" is likewise a chameleon word, as is obvious when we ask the "woman" question: Does the constitutional phrase "the people" include women? None of the *Heller* Justices squarely

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face-holding, enjoyed by a select subset. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*141-44; see also AMAR, *supra* note 11, at 48-49, 261-62.

<sup>78</sup> See *Heller*, 128 S. Ct. at 2799-2800 ("[W]e agree . . . that 'militia' means the same thing in Article I and the Second Amendment.").

<sup>79</sup> See *id.* at 2790-91.

<sup>80</sup> See generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

<sup>81</sup> See *id.* at 775, 785, 793 & n.182, 801 n.203 (introducing and analyzing the concept of "chameleon" words).

<sup>82</sup> Judicial doctrine treats corporations as persons for purposes of economic equal protection in cases such as *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), but not as persons for purposes of voting-rights equal protection in cases such as *Reynolds v. Sims*, 377 U.S. 533 (1964). Thus, corporations are treated as alternately persons and nonpersons under the very same constitutional clause!



posed this question. It turns out that the answer is also both yes and no.

Take a quick look at the Constitution's other famous Preamble: "We the People . . . do ordain and establish this Constitution . . ." This Preamble described an extraordinary act of voting — an unprecedented and continent-wide process of ratifying the Framers' proposed Constitution. Women as a rule were not included in the actual ordainment votes. Nor were Founding-era women generally included in voting for state legislators or Congress. Almost immediately after the Preamble, the Constitution's Article I, Section 2 referred to "the people" as synonymous with these voters. Here, too, women were in effect excluded. Yet women were meant to enjoy Fourth Amendment rights and thus were included in "the people" for this part of the Constitution. What gives?

History and standard textualism are especially helpful interpretive tools here. Protecting women in their homes from intrusive searchers and snoopers was openly articulated as one of the Fourth Amendment's goals.<sup>83</sup> Likewise, the Third Amendment was motivated in part by a desire to protect women in their private homes from rough treatment, or worse, at the mercy of armed soldiers that an oppressive government might seek to quarter in private dwellings.<sup>84</sup> But Justice Scalia pointed to no similar evidence that any prominent participant in the process of drafting and ratifying the Second Amendment ever claimed it would encompass a woman's right to self-defense.

Textually, the Fourth Amendment's reference to "the people" intermeshed with two explicit references to "persons" — and women are surely *persons*.<sup>85</sup> Textually, Article I's reference to "the people" intermeshed with two explicit references to "Electors" (that is, voters) —

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<sup>83</sup> See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 776, 808–09 (1994) (quoting and analyzing a 1787 pamphlet calling for constitutional protection in a scenario in which a constable searching "for stolen goods, pulled down the clothes of a bed in which there was a woman and searched under her shift"). In keeping with this history, Justice Scalia has used the Fourth Amendment to invalidate a high-tech search technique that would enable the government to determine "at what hour each night the lady of the house takes her daily sauna and bath — a detail that many would consider 'intimate.'" *Kyllo v. United States*, 533 U.S. 27, 38 (2001).

<sup>84</sup> See, e.g., Robert A. Gross, *Public and Private in the Third Amendment*, 26 VAL. U. L. REV. 215, 219 (1991) (quoting colonist expressing hostility to Parliament's Quartering Act placing soldiers "abed" with America's "Wives and Daughters").

<sup>85</sup> So too are aliens. Longstanding commentary dating at least as far back as Jefferson's criticism of the Alien and Sedition Acts of 1798 has recognized the Fourth Amendment rights of even nonresident aliens to security in their persons and freedom from arbitrary arrest. Yet it would be outlandish to insist that such nonresident aliens had a Second Amendment entitlement to be part of America's general militia merely because these persons were protected by the Fourth Amendment.

and in 1789, women were generally not *Electors*. Finally, in the Second Amendment, as we have seen, the reference to “the people” intermeshed with an explicit reference to the “Militia”— and women were not, in 1789, part of the general *militia*.

If we truly seek to identify holistic constitutional patterns, the Second Amendment is closer conceptually to the Preamble and to Article I than to the Fourth Amendment. Eligible voters and eligible members of the general militia were roughly equivalent groups in late-eighteenth-century America.<sup>86</sup> The classical civic republican ideology at the heart of the Second Amendment envisioned a regime in which those who voted would in general serve as military defenders, and those who served as military defenders would in general vote (and also serve on juries).<sup>87</sup> Justice Scalia noted that there is a more elaborate textual overlap between the Second and the Fourth Amendment than between the Second Amendment and Article I.<sup>88</sup> It is a fair point, but ultimately not a decisive one without stronger evidence of the conceptual linkages between the two amendments than Justice Scalia provided.<sup>89</sup>

3. *Holism Across the Atlantic: Two Countries Divided by a Common Language?* — Justice Scalia did adduce considerable evidence from pre-1789 English law recognizing an individual right to have a gun at home for self-defense.<sup>90</sup> This English law vision did have deep conceptual connections to proto-Fourth Amendment ideas about the right to safeguard one’s home and one’s person from intrusion. But English law never articulated the right to arms in the same language as did the Second Amendment. The 1689 English Bill of Rights spoke of a right to arms in different accents than did the 1789 American Bill of Rights.<sup>91</sup> England was neither a federal system nor a regime based on popular sovereignty. The Founders’ America was both, and the themes of federalism and popular sovereignty ran close to the surface of the Second Amendment’s text. (Local “militia” would counterbalance a central army, and “the people” in this Amendment were the same “people” who had ordained the Constitution itself in an extraor-

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<sup>86</sup> See AMAR, *supra* note 11, at 48–49 & n.\*.

<sup>87</sup> See *id.*

<sup>88</sup> See *Heller*, 128 S. Ct. at 2790; see also *supra* p. 168.

<sup>89</sup> For an alternative account of the textual overlap that reads the Fourth Amendment’s “right of the people” as a subtle gesture in the direction of civil juries of the people, who were expected to play a significant role in enforcing the Fourth Amendment, see AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 326–27 (2005); see also AMAR, *supra* note 11, at 64–77.

<sup>90</sup> See *Heller*, 128 S. Ct. at 2792 n.7.

<sup>91</sup> See An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., c.2, § 7 (Eng.) [hereinafter English Bill of Rights] (“[T]he Subjects, which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law.”).

dinary act of popular sovereignty.) England embraced a classically liberal right of subjects; America, a classically republican vision of citizens.

Despite the many differences of geography, ideology, chronology, and legal wording separating English common law and the American Second Amendment, perhaps the American formulation of the arms-bearing right was designed to be utterly identical to the English. Or perhaps the Second Amendment aimed to add republican and federalist elements to the liberal English right without subtracting one iota from the libertarian self-defense core of English law.

But these are things to be proved, not assumed. As Justice Stevens stressed, Justice Scalia cited no decisive historical evidence from the drafting or ratification of the Second Amendment that the Amendment aimed to protect the English common law right to have a weapon for personal self-defense.<sup>92</sup> The limited evidence from 1787 to 1791 in fact tends to cut the other way. For example, in 1788 some Massachusetts ratifying convention delegates did float a rather English-sounding version of the right to arms. Their version made no mention of the militia, omitted the militaristic phrase “bear arms,” and sweepingly affirmed a right of all “peaceable citizens” to “keep[] their own arms.”<sup>93</sup> But this libertarian articulation of the right was never endorsed by the Massachusetts convention, much less by the First Congress.

Though Justice Scalia himself remarkably conceded that individual “self-defense had little to do with the [arms-bearing] right’s codification” in the Second Amendment, he nevertheless confidently concluded that self-defense was “the central component of the right itself”<sup>94</sup> because the Amendment was “widely understood to codify a pre-existing right, rather than to fashion a new one.”<sup>95</sup> In essence, he relied on the Second Amendment’s text to bridge the wide gap in his historical evidence: “The very text of the Second Amendment implicitly recognizes the pre-existence of the right . . . .”<sup>96</sup> Hence the Amendment’s reference to “*the* [preexisting] right” rather than to “*a* [wholly novel] right.”

Its use of “the,” however, does not necessarily mean that the Second Amendment reaffirmed the traditional English common law right rather than the more recent (but still pre-1789 and thus preexisting) right of the people to serve in militias in defense of their liberties, a right that had been made flesh by the American Revolution and that

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<sup>92</sup> See *Heller*, 128 S. Ct. at 2822–23 (Stevens, J., dissenting).

<sup>93</sup> 6 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1453 (John P. Kaminski & Gaspare J. Saladino eds., 2000).

<sup>94</sup> *Heller*, 128 S. Ct. at 2801 (emphasis omitted).

<sup>95</sup> *Id.* at 2804.

<sup>96</sup> *Id.* at 2797.

inspired the elaborate militia rules codified in Article I, Section 8. According to Justice Stevens, Justice Scalia's reliance on the preexisting character of the Second Amendment right "is of course beside the point because the right to keep and bear arms for service in a state militia was also a pre-existing right."<sup>97</sup>

In response, Justice Scalia sniffed that the supposedly preexisting right that Justice Stevens identified did not in fact exist in English law.<sup>98</sup> But so what? Consider intratextually the First Amendment, which likewise singles out "*the* [preexisting] freedom of speech." Freedom of speech for ordinary Englishmen outside of Parliament was *never* an English law right; American freedom of speech was instead a republican and popular sovereignty right born in the American Revolution itself.<sup>99</sup> By 1789, citizen free speech was indeed a preexisting right, implicit in the very structure of the now-ratified Constitution and its popular sovereignty bedrock. In fact, the right had been made flesh in the very process of ordaining the Constitution itself — a process in which the freest speech imaginable flowed for a year across the continent, an outpouring that went miles beyond English common law rights of expression for common Englishmen.<sup>100</sup>

Thus the "freedom of speech" language from the English Bill of Rights of 1689 changed its shape when it crossed an ocean, aged a century, and was codified in the American Bill of Rights of 1789. The First Amendment borrowed language from England, reworded it to some degree, and infused it with distinctly American (and relatively new) ideas about popular sovereignty and federalism. If all this was true of the First Amendment, why couldn't it be equally true of the Second?

4. *Holism and America's Other Constitutions.* — Perhaps the evidentiary gap in Justice Scalia's argument could have been filled by a long list of pre-1789 state constitutions echoing and constitutionalizing (albeit at the state level) the English common law right of arms for self-defense. But here, too, the evidence tends to cut against Justice Scalia. Most state constitutions discussed the right to bear arms in military and militia-related contexts.<sup>101</sup> Only two states, Pennsylvania and Vermont, appeared to affirm an individual constitutional right to a

<sup>97</sup> *Id.* at 2831 (Stevens, J., dissenting).

<sup>98</sup> *See id.* at 2798 n.16 (majority opinion).

<sup>99</sup> *See* AMAR, *supra* note 11, at 24–26, 223–25.

<sup>100</sup> *Cf.* English Bill of Rights, *supra* note 91, § 9 ("[T]he Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.").

<sup>101</sup> *See* AMAR, *supra* note 11, at 332 n.33.

gun for self-defense, and they did so in language quite different from the Second Amendment.<sup>102</sup>

Justice Scalia had better luck identifying a variety of other pre-1789 sources using the phrase “bear arms” in nonmilitary contexts.<sup>103</sup> The point is key because Justice Stevens would apparently deny Dick Heller’s claim even if Heller were in an organized militia, on the ground that Heller sought to use his gun for a nonmilitary reason, self-defense.<sup>104</sup> But virtually none of Justice Scalia’s pre-1789 sources involved use of the simple phrase “bear arms” without more. If we confine ourselves to evidence prior to 1789 (or 1791, when the Amendment was ratified), Justice Scalia had no knock-down response to Justice Stevens, who noted that the unadorned phrase “bear arms” most naturally has a military connotation, especially when used in legal sources.<sup>105</sup> Indeed, Justice Scalia had no knock-down response to himself, for Justice Stevens scored a direct hit when he quoted the language of an earlier Scalia dissent: “The Court does not appear to grasp the distinction between how a word *can* be used and how it is *ordinarily* used.”<sup>106</sup>

5. *Holism and Post-Founding History.* — The best evidence that the right to bear arms, in ordinary usage, had encompassed an individual right to self-defense à la England came from a boatload of post-1791 state constitutions, state case law, and legal commentaries that Justice Scalia cited or quoted at length.<sup>107</sup> But this later commentary is at best imperfect evidence of what the American people meant when they discussed, drafted, and ratified an arms-bearing amendment in the years between 1787 and 1791. Yes, 1810 was a long time ago, and pretty close to 1791 from our perspective. But if a future twenty-third-century historian seeks to understand the 1960s, I hope she does not treat the 1980s as decisive evidence. Even if most commentators in the years after 1791 read the Second Amendment through the prism of English common law and individual rights of self-defense, this approach may well have been anachronistic and incorrect.

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<sup>102</sup> See PA. CONST. art. I, § 21 (“The right of citizens to bear arms in defense of themselves and the State shall not be questioned.”); VT. CONST. ch. I, art. 16 (“[T]he people have a right to bear arms for the defence of themselves and the State.”). Although Vermont did ratify the Second Amendment, it did not become a state until 1791 and thus played no role in the discussions leading up to the Amendment in the various state ratifying conventions of 1787–1788 or in the actual drafting of the Amendment by the First Congress in 1789.

<sup>103</sup> See *Heller*, 128 S. Ct. at 2795 & n.10.

<sup>104</sup> See *id.* at 2822–23 (Stevens, J., dissenting).

<sup>105</sup> *Id.* at 2828–29.

<sup>106</sup> *Id.* at 2829 n.11 (quoting *Smith v. United States*, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting)).

<sup>107</sup> See *id.* at 2803–12 (majority opinion).

A quick look at Justice Scalia's post-1791 materials confirms that several of the most prominent sources did indeed distort the 1787-1791 public meaning. Many of the cited jurists and commentators read the Second Amendment's operative command as binding state governments, contra the orthodox public understanding of those who drafted and ratified the Bill of Rights — orthodoxy honored in John Marshall's canonical 1833 opinion in *Barron v. Baltimore*.<sup>108</sup> Other commentary that Justice Scalia cited proclaimed slavery itself unconstitutional.<sup>109</sup> Now, slavery was many things, but hardly unconstitutional (at least for an originalist). The very title of one work that Justice Scalia prominently invoked — “A Treatise on the Unconstitutionality of American Slavery” — should have tipped him off that something was amiss. If these commentators and courts got such big issues hugely wrong, then why should we heed what they had to say about more subtle and fine-grained issues? All these post-ratification sources are merely of persuasive authority, and here we have reasons to question their general reliability.

In other contexts, Justice Scalia would make mincemeat out of such unorthodox accounts of the Constitution. But locked as he was in gladiatorial combat with Justice Stevens, Justice Scalia reached for any weapon at hand, and saw these post-1791 sources as handy objects to hurl at his opponent without noticing that many of them were boomerangs.

6. *A Better Brand of Holism: Remembering the Ninth and Fourteenth Amendments.* — Yet for all these problems, Justice Scalia reached the right answer. Under proper originalist and textualist ground rules, the Constitution should indeed be read to protect an individual right to have a gun at home for self-defense.

Once again, the key is to read the Constitution in a holistic fashion and to widen our analysis beyond the Second Amendment. Consider two additional amendments, largely ignored by Justice Scalia, that strongly support his conclusions, shoring up the weak flanks of his argument that the previous pages have sought to expose.

True, the link between the opening and closing language of the Second Amendment is rather loose on Justice Scalia's reading. Also true, various antebellum sources may have distorted the original public meaning of the Second Amendment. But now add (as Justice Scalia did not, alas) the Ninth Amendment to the mix. This Amendment was a response to Founding-era concerns that textual enumerations and codifications of various rights might be construed in an unduly stingy manner so as to disparage implicit constitutional rights or other un-

<sup>108</sup> 32 U.S. (7 Pet.) 243 (1833).

<sup>109</sup> See *Heller*, 128 S. Ct. at 2807.

enumerated rights. The Ninth Amendment's text does not quite say that "the enumeration in the Constitution of certain purposes of rights shall not be construed to deny or disparage other purposes for those rights." But it does say something rather similar,<sup>110</sup> and it was designed to reassure the American public that the fundamental rights that they believed they already had would not be lost merely because only some of these rights were explicitly enumerated or because others were narrowly worded. Even if the English common law right of self-defense was different than the Second Amendment right, many Americans in the Founding era may have believed they had both rights — and the Ninth Amendment was designed to reassure such Americans that unduly narrow interpretations of the protected rights would be disfavored. And even if later Americans in the antebellum period were demonstrably mistaken about the correct reading of the Second Amendment as originally understood, their widespread mistake about the scope of their fundamental rights and their evident celebration of an individual right of arms for self-defense should be protected by the Ninth Amendment.<sup>111</sup>

Now add the Fourteenth Amendment to the mix. This Amendment proclaimed that all citizens would be protected in all their fundamental "privileges" and "immunities" — that is, in all their most essential rights and freedoms. The Amendment explicitly protected these fundamental freedoms against states ("No state shall . . ."), but its drafters and ratifiers also believed and said that the federal government was equally obliged to respect these fundamental rights. Reconstruction Republicans insisted that these fundamental rights inhered in the very fact of American citizenship.<sup>112</sup> These rights thus found shelter in the sweeping text of the Fourteenth Amendment's first sentence, which proclaimed all those born or naturalized in America to be full and equal citizens at both the state and federal level. To be a citizen was ipso facto to have fundamental rights, and this basic principle went without saying where rights against the federal government were concerned.<sup>113</sup> (The "No state" language was added as an explicit limit on states because the Supreme Court, in *Barron v. Baltimore*, had previously made clear that constitutional rights against states did not always go without saying. According to *Barron*, various rights guaranteed against the federal government did not apply against states in the

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<sup>110</sup> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

<sup>111</sup> See *supra* section I.A.4, p. 162–64.

<sup>112</sup> See generally AMAR, *supra* note 11, at 195–96 n.\*, 281–82 & n.\*.

<sup>113</sup> See *id.*

absence of express constitutional language to that effect, language akin to the “No state shall” language found in Article I, Section 10.<sup>114</sup>)

The Fourteenth Amendment did not itemize the privileges and immunities of American citizenship. Instead, like the Ninth, the Fourteenth invited interpreters to pay close attention to fundamental rights that Americans had affirmed through their lived experience and had memorialized in state bills of rights and in other canonical texts such as the Declaration of Independence and landmark civil rights legislation. And when it came to guns, a landmark companion statute to the Fourteenth Amendment, enacted by Congress in 1866, declared that “the right . . . to have full and equal benefit of all laws . . . concerning personal liberty [and] personal security . . . including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens.”<sup>115</sup> Here, in sharp contrast to the general tenor of Founding-era legal texts, the “bear arms” phrase was decisively and undeniably severed from the military context in a high-profile legal setting. Women as well as men could claim a “personal” right to protect their “personal liberty” and “personal security” in their homes. (Note the Fourth Amendment–style language and imagery infusing this restatement of the “bear arms” rights.)

The Reconstruction-era Congress emphasized that Southern blacks might need guns in their homes to protect themselves from private violence in places where they could not rely on local constables to keep their neighborhoods safe. When guns were outlawed, only outlaw Klansmen would have guns. This critical chapter in the history of American liberty furnishes compelling evidence of an individual right to have a gun in one’s home, regardless of the original meaning of the Second Amendment.<sup>116</sup>

Interestingly enough, several of the sources upon which the Reconstruction Republicans relied were the very antebellum sources that Justice Scalia cited.<sup>117</sup> As we have seen, these sources provide rather dubious evidence of what most Americans thought the Second Amendment meant when ratified.<sup>118</sup> Yet many of these very same sources provide solid evidence of what Americans did in fact think the Fourteenth Amendment was designed to confirm and accomplish. If the key text is the Fourteenth Amendment, these sources are not mere post-enactment misreadings of the Founders’ meaning, but rather pre-enactment evidence of the Reconstruction amenders’ vision. Thus

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<sup>114</sup> *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 248–49 (1833).

<sup>115</sup> Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173, 176.

<sup>116</sup> See AMAR, *supra* note 11, at 257–68.

<sup>117</sup> Many of these sources are discussed in great detail as preludes to the Fourteenth Amendment in AMAR, *supra* note 11, at 145–62, 257–66.

<sup>118</sup> See *supra* p. 174.



when Justice Stevens pooh-poohed various post-Civil War material cited by the Court as “better characterized as advocacy than good-faith attempts at constitutional interpretation,”<sup>119</sup> Justice Scalia should have countered that these sources are “*best* characterized as part of the Civil War amendment process through which America experienced a new birth of freedom and reglossed the Bill of Rights.”

7. *Holism and Harvard*. — All this leaves us with a puzzle: If adding the Ninth and Fourteenth Amendments to the mix would have dramatically strengthened Justice Scalia’s opinion from an originalist perspective, then why did he omit these holistic strengtheners?

As for the Ninth, perhaps he felt that reawakening one long-dormant part of the Bill of Rights was quite enough for a day’s work. But if the quest is to get the Second Amendment right and to take seriously the process by which Americans agreed to that Amendment, then consideration of the Ninth, drafted and ratified alongside the Second, is simply part of the mission.<sup>120</sup>

Or perhaps it might be said that precedent forecloses judicial recourse to the Ninth Amendment. But no Court case squarely bars reliance on the Ninth, and even if it did, the Ninth, no less than the Second, is ultimately higher law than any mere case.<sup>121</sup> In fact, precedent does exist for reading the Ninth in conjunction with another part of the Bill of Rights: Chief Justice Burger’s 1980 plurality opinion in *Richmond Newspapers, Inc. v. Virginia* notably invoked the Ninth Amendment alongside the First in support of a right of the public and the press to attend criminal trials.<sup>122</sup> Harvard Law School deserves much of the credit for this revival of the Ninth — the Ninth Amendment argument was presented to the Court by Harvard’s greatest gift to modern constitutional theory and practice, Professor Laurence Tribe.<sup>123</sup>

But for much of its history in the pre-Tribe era, Harvard played a less admirable role in educating its students — and through them, the American legal profession — about the proper meaning of the Fourteenth Amendment and about that Amendment’s relationship to the Bill of Rights. The Fourteenth was written and intended to make various parts of the Bill of Rights applicable against states, particu-

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<sup>119</sup> *Heller*, 128 S. Ct. at 2841 (Stevens, J., dissenting).

<sup>120</sup> Justice Scalia offered a crabbed view of the Ninth Amendment’s justiciability in his dissent in *Troxel v. Granville*, 530 U.S. 57 (2000), but his *Troxel* opinion did not consider how the Ninth might properly be considered by judges in conjunction with a textual right. *See id.* at 91–93 (Scalia, J., dissenting).

<sup>121</sup> Nor would any proper reliance interests bar recourse to the Ninth.

<sup>122</sup> 448 U.S. 555, 579 n.15 (1980).

<sup>123</sup> *See* Brief of Appellants at 53–59, *Richmond Newspapers*, 448 U.S. 555 (No. 79-243). *See generally* Akhil Reed Amar, *A Tribute to Larry Tribe*, 42 TULSA L. REV. 801 (2007).

larly those parts that proclaimed the rights of individuals (as distinct from the rights of states themselves). In the process of “incorporating” these rights against states, the Fourteenth also reglossed the earlier amendments and gave America a more liberal, more individualistic Bill of Rights than did the Founders. The story of how arms-bearing became a more individualistic right during Reconstruction is merely one part of a much larger story of how the Fourteenth transformed the Bill.<sup>124</sup>

Yet this is likely not the story that Antonin Scalia learned when he studied at Harvard and served as an editor of the *Harvard Law Review*. Back then, the views of Harvard Law School Professor Charles Fairman held sway in Cambridge, and Fairman’s work badly distorted the significance of the Fourteenth Amendment and its intimate relationship to the Bill of Rights.<sup>125</sup> In these distortions, Fairman received strong support from his mentor, Felix Frankfurter, whose brilliant career was tightly interwoven with the *Harvard Law Review*. Frankfurter had served as a student editor on Volume 19 of the *Review* and later acted as an informal academic advisor to *HLR* while on the Harvard Law School faculty, during which period he laid the foundations for what would ultimately become the annual *HLR* Supreme Court issue. Once on the Court, he relied heavily on Fairman’s work in a crusade to discredit scholarship and judicial opinions demonstrating the key linkages between the Bill of Rights and the Fourteenth Amendment.<sup>126</sup>

In starting his career as an *HLR* editor and ending it as a Supreme Court Justice, and in paying insufficient attention to the Fourteenth Amendment even though it has a great deal to teach us about the Bill of Rights, Antonin Scalia is thus part of a tradition.

Nor is he the only one.

## II. BEYOND THE DUEL: ROBERTS, BREYER, AND GINSBURG

### A. *The Politic Manager*

Exactly thirty years ago, John G. Roberts, Jr., served as the Managing Editor of the *Harvard Law Review*, with authority to divide the editorial workload among staff members.<sup>127</sup> Now he serves as the managing Justice of the United States, with similar authority to divide the judicial workload.

<sup>124</sup> The story is told in detail in AMAR, *supra* note 11.

<sup>125</sup> This is, I admit, a harsh assessment of Fairman, but one that I have tried to detail and defend at length elsewhere. See *id.* at 183 & n.\*, 187–93, 197–207, 303.

<sup>126</sup> This story is well told in Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197 (1995).

<sup>127</sup> David Leebron served as *HLR* President for Volume 92.

As one of the most anticipated cases of the decade, *Heller* was surely a plum. Yet the Chief Justice did not reserve the majority opinion for himself. Nor did he give the assignment to the Court's swing voter, Justice Kennedy, who has been in the majority in virtually every notable 5–4 case decided in the last three terms. (De facto, the Roberts Court thus far is the Kennedy Court — a reminder that even those who do not start their legal careers on the *Harvard Law Review* can amount to something.) Instead, Roberts gave the plum to the most senior Associate Justice on his side, an Associate Justice who is also the Court's most senior originalist/textualist.

With this act of judicial modesty, the Chief Justice showed shrewd judgment. John Roberts is a former appellate advocate par excellence and more a doctrinalist (and also, perhaps, a pragmatist) than an originalist. But in a case where no previous Court decision shed much light on the big issues at stake, the assignment sensibly went to a Justice whose preferred methodology better fit the task at hand. The first big opinion in a field, if done well, can lay out the first principles of constitutional text, history, and structure, and an originalist/textualist judge is well-suited to this task. Once the foundation has been properly laid, later cases can begin to build on it. Doctrinalist skills become particularly useful as the judicial inquiry shifts from first principles to fine points. Many of the Second Amendment cases to come will revolve around the doctrinal tiers, tests, and formulas that dominate appellate case law. There will be time enough for Chief Justice Roberts and other nonoriginalists to take the lead.<sup>128</sup>

But giving the *Heller* assignment to Antonin Scalia also meant giving the opinion to a quintessentially confrontational Justice. The word “confrontation” itself loomed large both in Justice Scalia's *Heller* opinion<sup>129</sup> and in a Confrontation Clause decision he handed down one day

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<sup>128</sup> Cf. PHILIP BOBBITT, *CONSTITUTIONAL FATE* 55 (1982) (observing that “reasoning from purpose . . . gives doctrinalism its power; it can't *provide* purpose” in the same way that originalism often can); cf. *also id.* at 49 (“[A Court composed only of classical doctrinalists] sounds more like the word of the *Harvard Law Review*: a group of industrious but largely convictionless students arriving at results.”). Philip Bobbitt and John Roberts clerked for the same Second Circuit judge, a judge who himself had begun his legal career as President of the *Harvard Law Review*. See *infra* p. 181.

<sup>129</sup> Justice Scalia limited recognition of an individual right to keep arms to situations of self-defense involving “confrontation” — that is, “conflict with another person” — as distinct from, say, hunting or recreation. *Heller*, 128 S. Ct. at 2793 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998)) (internal quotation marks omitted). The word was no casual slip; it appeared, with variations, a total of five times in Scalia's opinion. See *id.* at 2793, 2796, 2797, 2799, 2819. As in *Crawford*, whose methodological similarity to *Heller* was noted at *supra* p. 152, Justice Scalia saw the Framers as his kind of guys — manly men who envisioned and to some extent celebrated face-to-face conflicts.

earlier, *Giles v. California*.<sup>130</sup> More important still, Justice Scalia's style throughout *Heller* — and, frankly, throughout many of his finest opinions — is markedly combative, giving no quarter to the other side. Justice Scalia succeeded in holding a majority together in *Heller*, but he did little to broaden the coalition beyond the necessary five. At times, he seemed more intent on belittling, or at least besting, the dissenters than on persuading them.<sup>131</sup>

In this situation, an artful concurrence might have been particularly valuable. The Chief Justice could have penned his own supplemental analysis placing more emphasis on the Fourteenth Amendment as an open invitation to the members of the Court's more liberal wing to join the majority's outcome on an alternative theory. Political liberals would likely have been more apt to embrace the Fourteenth Amendment than the Second, given that the Fourteenth has been the font of so many politically liberal results.

Legal purists might wonder whether it is ever proper for a Justice to strategize in terms of judicial coalitions and political wings. But if anyone may properly attend to the institutional desirability of achieving wider Court consensus, it would be the Chief Justice. And nothing in the concurrence that we are imagining would have rested on improper legal arguments. On the contrary, a Fourteenth Amendment approach might have been both more legally satisfying and more politic for a Court seeking to transcend political divisions and culture wars.

True, the Fourteenth Amendment theory would have been a more sweeping basis for the outcome in *Heller* and thus in tension with Chief Justice Roberts's professed goal of deciding issues narrowly. But greater sweep here might have achieved another of the Chief's professed goals: consensus.<sup>132</sup> Sometimes a narrow decision can facilitate consensus, as in last Term's Indiana voter ID case, *Crawford v. Marion County Election Board*.<sup>133</sup> But other times, as perhaps could have been the case in *Heller*, consensus is best reached by a big tent that broadens the judicial analysis.

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<sup>130</sup> 128 S. Ct. 2678, 2681 (2008) ("We consider whether [under *Crawford*] a defendant forfeits his right to confront a witness against him when a judge determines that a wrongful act by the defendant made the witness unavailable to testify at trial.")

<sup>131</sup> See, e.g., *Heller*, 128 S. Ct. at 2790 n.5 (declaring that Justice Stevens was "dead wrong" on a point — a phrase never before used in the *United States Reports* to describe a member of the Court).

<sup>132</sup> See Linda Greenhouse, *In Latest Term, Majority Grows to More than Five of the Justices*, N.Y. TIMES, May 23, 2008, at A1.

<sup>133</sup> 128 S. Ct. 1610 (2008). Justice Stevens announced the judgment of the Court in an opinion joined by Chief Justice Roberts and Justice Kennedy, and Justice Scalia wrote a concurring opinion joined by Justices Thomas and Alito, yielding a 6–3 decision. See *id.* at 1615 (holding only that "the evidence in the record is not sufficient to support a facial attack on the validity of the entire statute").

Had the Chief succeeded in bringing the dissenters along via a Fourteenth Amendment theory, the Court could have made explicit what it only hinted at in Justice Scalia's majority opinion: that the right to arms for self-defense applies fully against the states.<sup>134</sup> Such an explicit ruling would also have required the Court to squarely overrule an 1876 case that became an indefensible legal derelict long ago. *United States v. Cruikshank*<sup>135</sup> held that the Fourteenth Amendment did not protect an individual arms-bearing right — or any other right in the first eight amendments, for that matter — against states.<sup>136</sup> *Cruikshank*'s general vision has been repudiated by the Court in hundreds of cases involving the other parts of the Bill of Rights that have been fully incorporated against the states. After *Heller*, it is hard to conceive how *Cruikshank* can still stand, so a Fourteenth Amendment concurrence would not really have swept further — just faster. Also, such a concurrence would have provided greater legal clarity, eliminating any confusion that may now exist among lower courts that might still feel formally bound by *Cruikshank* — despite *Heller*'s winks, nods, and logic — until the Supreme Court incants the magic words “hereby overruled.”

So why did the Chief Justice not show even more leadership in *Heller* via a Fourteenth Amendment concurrence? Perhaps he might have found driving the final nail in *Cruikshank*'s coffin an especially awkward task given his legal lineage. Here, too, the ghosts of Frankfurter and *HLR* hover above the current Court.

Twenty-nine years ago, immediately after his tenure as *HLR*'s Managing Editor, John Roberts served as a law clerk to Judge Henry Friendly, who himself had served as an *HLR* President and who was quite possibly the greatest twentieth-century jurist never to sit on the Supreme Court. Friendly was perhaps Felix Frankfurter's most notable protégé, and although Friendly was far more careful than Frankfurter before him, Friendly, too, balked at the idea that the Fourteenth Amendment was intended to make the Bill of Rights fully applicable against states.<sup>137</sup> Roberts's next boss, then-Associate Justice William H. Rehnquist, was even more hostile to incorporation, at least in his early years. As an undergraduate at Stanford, Rehnquist had studied directly under Charles Fairman and had enthusiastically imbibed

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<sup>134</sup> See *Heller*, 128 S. Ct. at 2813 n.23, 2816.

<sup>135</sup> 92 U.S. 542 (1876).

<sup>136</sup> See *id.* at 553 (“[The Second Amendment] is one of the amendments that has no other effect than to restrict the powers of the *national* government.” (emphasis added)).

<sup>137</sup> See, e.g., Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 933–38 (1965).

many of his mentor's ideas.<sup>138</sup> Years later, as a young Associate Justice, Rehnquist at times openly refused to accept the Warren Court's incorporation jurisprudence, marking him as the last Justice to proclaim the validity of Frankfurter's and Fairman's theories in the pages of the *United States Reports*.<sup>139</sup>

Even more than Antonin Scalia, then, John Roberts is by his training part of a tradition closely associated with the *Harvard Law Review*, a tradition that has, alas, misread the central meaning of the central amendment of the U.S. Constitution.<sup>140</sup>

### B. *The Democratic Pragmatist*

Stephen Breyer served as Articles Editor of the *Harvard Law Review* in 1963–1964<sup>141</sup> and the next year clerked on the Supreme Court for Justice Arthur Goldberg, who had recently filled the vacancy created by the retirement of Justice Frankfurter. Halfway into this clerkship year, Frankfurter's final published work poignantly appeared in print only days before his death under the title *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*.<sup>142</sup> The Memorandum, published (where else!) in the *Harvard Law Review*, had been prepared several years earlier with the assistance of Justice Frankfurter's then-clerk, John D. French,<sup>143</sup> who had served as *HLR* President when Antonin Scalia was Notes Editor. In Frankfurter's words, the Memorandum pulled together a wide "collection of Supreme Court cases rejecting claims that one or another or all of the specific provisions of the first eight amendments to the Constitution apply to the States through implicit adoption by, or 'incorporation' in, the Fourteenth."<sup>144</sup>

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<sup>138</sup> See Charles Lane, *Head of the Class*, STAN. MAG., July–Aug. 2005, available at <http://www.stanfordalumni.org/news/magazine/2005/julaug/features/rehnquist.html> ("Charles Fairman is a big piece of the story of Bill Rehnquist at Stanford," says John Q. Barrett, a law professor at St. John's University who interviewed Rehnquist as part of his research on Justice Jackson. "He was his very influential role model and teacher as an undergraduate.").

<sup>139</sup> See, e.g., *Codispoti v. Pennsylvania*, 418 U.S. 506, 535 (1974) (Rehnquist, J., dissenting) (citing with approval Fairman's anti-incorporation scholarship).

<sup>140</sup> If you doubt that some version of incorporation was part of the central meaning of the Fourteenth Amendment, please read AMAR, *supra* note 11, at 137–307. If you doubt that the Fourteenth is our central amendment, please conduct the following simple experiment. Pick the eight to ten cases you think are most important on issues of civil rights and civil liberties. I predict that the great majority of the cases you pick will be cases involving states and localities — Fourteenth Amendment cases, strictly speaking.

<sup>141</sup> The other Articles Editor for Volume 77 was Frederic J. Truslow. Michael Boudin was *HLR* President that year.

<sup>142</sup> 78 HARV. L. REV. 746 (1965).

<sup>143</sup> See *id.* at 746.

<sup>144</sup> *Id.*

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The Memorandum failed to sway a majority of the Court. Justice Goldberg and his successor, Justice Abe Fortas — neither of whom had strong ties to *HLR* or to Frankfurterian ideology — became the fifth votes on the Warren Court for what eventually became a tidal wave of cases applying almost all individual-rights provisions of the first eight amendments with full force against state and local governments. After this tidal wave between 1963 and 1969, only three significant rights remained to be applied against the states: the Fifth Amendment right to grand juries, the Seventh Amendment right to civil juries, and the Second Amendment right to keep and bear arms.

Given that Stephen Breyer came of age just as this tidal wave was hitting; given that the wave began as and because Justice Goldberg replaced Justice Frankfurter; given that Justice Breyer currently holds the very Court seat once held by Justices Frankfurter, Goldberg, and Fortas — given all this, one might have expected Stephen Breyer to be particularly intrigued by the Fourteenth Amendment angle on the Bill of Rights in general and on the right to keep and bear arms, one of its last unincorporated rights, in particular. One might also have expected Justice Breyer to find the Ninth Amendment angle intriguing, given that the first prominent mention of the amendment on the modern Court appeared in Justice Goldberg's concurrence in *Griswold v. Connecticut*,<sup>145</sup> decided the very year that Stephen Breyer clerked.

If these issues did intrigue Justice Breyer, he showed few signs of it in his separate *Heller* dissent, joined by Justices Stevens, Souter, and Ginsburg.<sup>146</sup> The omission is particularly unfortunate because a more direct engagement with the Ninth and Fourteenth Amendments could have helped Justice Breyer refine several of the themes evident in his *Heller* opinion and in his earlier oeuvre.

Stephen Breyer is a pragmatist.<sup>147</sup> But as with doctrinalism, pragmatism works best when it seeks to vindicate the larger purposes and values of the Constitution itself. Rather than usurping the Constitution's authority to make ultimate choices of value and purpose, appropriately constrained pragmatism leads to bounded instrumentalist judgments guided by the Constitution's own purposes, premises, protocols, and procedures.

Even if he or she were not bound by oath and honor to follow the Constitution, a truly wise pragmatic judge would choose to follow it because the document distills the wisdom of the American people over the course of centuries. Unfortunately, the preeminent exponent of le-

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<sup>145</sup> 381 U.S. 479, 486–93 (1965) (Goldberg, J., concurring) (discussing the history and role of the Ninth Amendment).

<sup>146</sup> *Heller*, 128 S. Ct. at 2847–70 (Breyer, J., dissenting).

<sup>147</sup> Full disclosure: I clerked for then-Judge Breyer on the First Circuit in 1984–1985.

gal pragmatism today, the extraordinary Judge Richard Posner, has often failed to appreciate the wisdom of the document.<sup>148</sup> Now, Richard Posner is a very smart man. (Let the record show that he, too, served as President of *HLLR* — during Stephen Breyer’s first year as a Harvard law student.<sup>149</sup>) But the Constitution is wise, and wise pragmatic judges become wiser still when they study the Constitution with great care.

Stephen Breyer is just the sort of wise pragmatist who has a proper sense of humility and a respect for the wisdom of the people as expressed in democratic decisionmaking. He often seeks to defer to democratic processes.<sup>150</sup> Because the Constitution itself embodies principles that have already passed an extraordinarily demanding democratic test — the test of democratic ratification — these principles deserve a special measure of judicial regard in any proper democratic calculus.

In his *Heller* dissent, Justice Breyer explained that he was loath to overturn the D.C. ordinance because “legislators, not judges, have primary responsibility for drawing policy conclusions from empirical fact.”<sup>151</sup> This is a grand Frankfurterian thought, but Justice Breyer himself has not always abided by it, as is evident in his stance in the partial-birth abortion cases.<sup>152</sup>

<sup>148</sup> See, e.g., Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, THE NEW REPUBLIC, Aug. 27, 2008, at 32, 33 (citing *Adamson v. California*, 332 U.S. 46 (1947) — scene of a famous duel between Justices Frankfurter and Black over incorporation — for the opposite of the case’s actual holding, and garbling other textual and historical issues related to incorporation).

<sup>149</sup> Posner’s Volume opened with a tribute essay to Learned Hand by Felix Frankfurter, featured a Foreword by Frankfurter’s prior clerk Alexander M. Bickel, showcased a three-part series by Frankfurter’s protégé Henry J. Friendly, and contained yet another article by yet another Frankfurter acolyte, Louis L. Jaffe. Felix Frankfurter, *Learned Hand*, 75 HARV. L. REV. 1 (1961); Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863 (1962); Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1055 (1962); Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1263 (1962); Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961).

<sup>150</sup> See, e.g., *Heller*, 128 S. Ct. at 2860–61 (Breyer, J., dissenting) (“[D]eference to legislative judgment seems particularly appropriate here, where the judgment has been made by a local legislature, with particular knowledge of local problems and insight into appropriate local solutions. . . . We owe that democratic process some substantial weight in the constitutional calculus.”); cf. *Bd. of Educ. v. Earls*, 536 U.S. 822, 841 (2002) (Breyer, J., concurring) (deferring to school board drug testing policy adopted via “public meetings” and a “democratic, participatory process”). See generally STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION* (2005).

<sup>151</sup> *Heller*, 128 S. Ct. at 2860 (Breyer, J., dissenting).

<sup>152</sup> See *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007); *Stenberg v. Carhart*, 530 U.S. 914 (2000).



Justice Breyer also claimed in *Heller* that “[t]he Framers recognized that the most effective democracy occurs at local levels of government.”<sup>153</sup> It is unclear whether this Anti-Federalist vision was in fact shared by most Federalists at the Founding. But even if most Framers did recognize this, did the Reconstruction generation? Unless Justice Breyer’s willingness to defer to local lawmakers is boundless, he needed to tell us when deference is less appropriate. Here he could have enlisted the Fourteenth Amendment, and even the Ninth, for that matter.

Though Justice Breyer plausibly believed that the Founders’ Second Amendment had little to do with individual self-defense, this belief should not have ended the case for him. He still should have reckoned with those clauses of the Constitution protecting unenumerated rights. When identifying the Ninth Amendment’s unenumerated rights “retained by the people,”<sup>154</sup> a judge should not decide what he or she personally thinks would be a proper set of rights. Instead, the judge should ask which rights have been recognized by the American people themselves through, for example, state constitutions and bills of rights, landmark civil rights laws, and customs established merely by living their lives freely across the country and over the centuries. Many of our most basic rights are simply facts of life, the residue of a virtually unchallenged pattern and practice on the ground in domains where citizens act freely and governments lie low. When a judge looks to sources such as these, the judge is acting in a democratically deferential fashion by consulting the actual practices and principles of the people themselves.

Consider, for example, one of the biggest cases decided during Breyer’s clerkship year, *Griswold v. Connecticut*. Connecticut criminalized the use of contraception even by married couples, prompting the Supreme Court to strike down the extraordinarily intrusive state law as unconstitutional. Writing separately in *Griswold*, the second Justice Harlan incorporated by reference an earlier opinion in which he had explained that the “conclusive” factor for him was “the utter novelty of [Connecticut’s] enactment. Although the Federal Government and many States have . . . forbidd[en] or regulat[ed] the distribution of contraceptives, none, so far as I can find, has made the *use* of contraceptives a crime.”<sup>155</sup> For Harlan, the basic practice of the American people rendered Connecticut’s oddball law presumptively

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<sup>153</sup> *Heller*, 128 S. Ct. at 2861 (Breyer, J., dissenting) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 575 n.18 (1985) (Powell, J., dissenting)).

<sup>154</sup> U.S. CONST. amend. IX.

<sup>155</sup> *Poe v. Ullman*, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting), *incorporated by reference in* *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring in the judgment).

unconstitutional. Today, nearly a dozen state constitutions<sup>156</sup> and countless statutes speak explicitly of a right to privacy — a right nowhere explicitly mentioned in the federal Constitution but surely one embraced by the people in principle and practice.

Now take Justice Harlan's sensible approach to the unenumerated right of privacy and apply it to Heller's claim that he has a right to have a gun in his D.C. home for self-defense.<sup>157</sup> Americans have, in fact, enacted lots of gun regulations, but few outright prohibitions of guns in homes as sweeping as the D.C. ordinance. The people have affirmed a right to keep guns in many modern state constitutions. Unlike most Founding-era documents, these modern texts routinely use the phrase "bear arms" outside the military context to protect, for example, guns for hunting, recreation, and/or self-defense.<sup>158</sup>

Here, then, are a couple of advantages for someone with Justice Breyer's sensibilities of trying to shift the focus away from the Second Amendment and towards the Ninth and Fourteenth Amendments. First, a Ninth-and-Fourteenth Amendment framework is more modest. Unusually draconian gun laws could be struck down because they lie outside the lived pattern of the American experience, while more mainstream gun laws could be upheld precisely because they have been accepted by the people in many places. If our nation's capital wants to argue that specially strict gun rules should apply there because the city faces unique risks, no rigid textual language from the Second Amendment would prevent judges from considering its pragmatic claims in the course of interpreting the boundaries of actual American practice. Once Justice Breyer rejected the Second Amendment, the question, strictly speaking, should have shifted to defining the precise contours of the Fourteenth Amendment "privilege" and the Ninth Amendment unenumerated "right" of gun possession for self-defense. By contrast, if the Second Amendment's language really did guarantee a right to guns in homes for non-military use, by what authority could judges allow a different approach in D.C.?<sup>159</sup>

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<sup>156</sup> See *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1430 n.5 (1982) (listing constitutional provisions in ten states). A similar list appears in Elbert Lin, *Prioritizing Privacy: A Constitutional Response to the Internet*, 17 BERKELEY TECH. L.J. 1085, 1130 n.276 (2002).

<sup>157</sup> For a similar effort to assess *Heller* in light of *Griswold*, see Cass R. Sunstein, *The Supreme Court, 2007 Term—Comment: Second Amendment Minimalism: Heller As Griswold*, 122 HARV. L. REV. 246 (2008).

<sup>158</sup> See Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 902 n.37, and sources cited therein.

<sup>159</sup> Justice Breyer tried to point to Founding-era evidence that urban areas were allowed greater discretion to restrict firearms, see *Heller*, 128 S. Ct. at 2848–50 (Breyer, J., dissenting), but his evidence was thin and doubtful.

True, the Fourteenth Amendment "incorporated" the Second, and thus the Second applies with full rigor against the states. But incorporation applies against states not the literal text of the

Second, the Ninth and Fourteenth Amendments are more modern and democratically responsive. The Ninth Amendment invites us to consider not only rights that have long been part of the American tradition, but also rights that have emerged in more recent practice or in state constitutional clauses of more recent vintage that are relatively easy to amend.<sup>160</sup> The Fourteenth Amendment directs our attention to the still-relevant problems of race and police protection or the absence thereof. The Second Amendment, however, harkens back to a lost eighteenth-century America where citizens regularly mustered for militia service on the town square and where a federal army was rightly suspect. This is not our world, as even Justice Scalia seemed to acknowledge in his closing passage.<sup>161</sup>

### C. *The Soft-Spoken Feminist*

As a second-year student at Harvard Law School, Ruth Bader Ginsburg became an editor of the *Harvard Law Review* in 1957,<sup>162</sup> but family circumstances impelled her to complete her legal studies at Columbia Law School, where she served as an editor of the *Columbia Law Review*. Later winning acclaim for her pathbreaking litigation success on behalf of sex equality, Ginsburg now sits as a Justice on the very Court she once helped to persuade as a crusading lawyer. Yet in *Heller*, this great advocate fell silent. Justice Ginsburg could have improved the Court's deliberations had she raised, as she has so often in her career, the "woman" question.

As explained above, focusing on women would have clarified the proper meaning of the word "people" in the Second Amendment. To start, it would have highlighted the awkwardness of reading eighteenth-century women into an amendment that, unlike the Fourth, was not designed with women in mind.<sup>163</sup> Furthermore, focusing on women would have clarified that the Fourteenth Amendment was centered on a civil right of self-defense for all citizens, male and female,

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Second Amendment, but rather the Second's basic individual right as refracted through the prism of the Fourteenth Amendment's "privileges" and "immunities." And the precise contours of these "privileges" and "immunities" are properly measured by examining actual American practices, state constitutional provisions, and so on. For much more analysis of this "refined incorporation," see AMAR, *supra* note 11, at 215–83.

<sup>160</sup> Most state constitutional protections of arms-bearing for hunting are the recent product of pro-gun social movements. For more on these movements, see Reva B. Siegel, *The Supreme Court, 2007 Term—Comment: Dead or Alive: Originalism As Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

<sup>161</sup> See *Heller*, 128 S. Ct. at 2822 ("Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation.").

<sup>162</sup> Richard N. Goodwin served as *HLR* President for Volume 71.

<sup>163</sup> See *supra* notes 83–85 and accompanying text.

whether or not these citizens were serving, had ever served, or would ever serve in an actual mustering militia.

Finally, asking the woman question might have shifted some attention to issues of collective arms-bearing outside the home, and in particular to questions concerning the role of women in America's twenty-first-century military structure. Justices Ginsburg and Scalia have already begun to debate these issues in the *United States Reports*. But first, a quick bit of background.

Ruth Bader Ginsburg and Antonin Scalia have a history. Though they did not serve on the same *HLR* Board, they did overlap as students at Harvard Law School.<sup>164</sup> After Harvard, both became well-respected law professors, and for four years they sat together on the D.C. Circuit. Justice Scalia reached the Supreme Court first, but apparently he never forgot his friend. When coyly asked, in the context of a Court vacancy, whether he would prefer to be stranded on a desert island with Laurence Tribe or Mario Cuomo, Scalia famously answered, "Ruth Bader Ginsburg."<sup>165</sup>

In 1996, the two friends dueled over the role of women in military academies. Writing for the Court in the VMI case, *United States v. Virginia*,<sup>166</sup> Ginsburg properly read the Fourteenth Amendment's equality guarantee to condemn a system in which Virginia woefully failed to offer its women equal opportunities for education in military matters and political leadership. Justice Scalia stood alone in dissent.

The VMI case reminds us that linkages continue to exist between military leadership and political leadership even in the modern world. VMI began as a military academy, but today its chief role is to train leaders.<sup>167</sup> Military leaders are often perceived as particularly experienced and credentialed to serve as political leaders. To exclude women from military service is thus to handicap them in the political arena.

In short, those who do not fight are often seen as having lesser rights to vote and to lead.<sup>168</sup> Thus we return to the classical republican vision underlying the Second Amendment, a vision that linked military and political participation. Women at the Founding were excluded from both.

But now, thanks to the Nineteenth Amendment, women are full political equals, with rights to vote, to be voted for, to serve in elective

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<sup>164</sup> Ginsburg attended Harvard from 1956 until 1958, when she transferred to Columbia. Scalia attended Harvard from 1957 until his graduation in 1960.

<sup>165</sup> See Margaret Carlson, *The Law According to Ruth*, TIME, June 28, 1993, at 38, 40.

<sup>166</sup> 518 U.S. 515 (1996).

<sup>167</sup> See *id.* at 520-22.

<sup>168</sup> For more on the interdependence of the political rights to vote, serve in the military, hold office, and sit on juries, see AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY, *supra* note 89, at 399-400 & n.\*, 426-28, 612 n.106; AMAR, *supra* note 11, at 48 & n.\*, 49, 216-18, 258-61, 271-74.

office, and to serve on juries.<sup>169</sup> They should also have a full and equal right to serve in the military. The Nineteenth Amendment expanded “the people” for Article I, Section 2 voting purposes, and the Second Amendment says that in general, these very same “people” — the voters — should form the republic’s basic military structure.<sup>170</sup> Thus the Second and Nineteenth Amendments, when read together holistically, affirm the political and military equality of men and women.

Justice Scalia in *Heller* scoffed at the idea that the “right to bear arms” might mean a right to serve in the military instead of, or even in addition to, a right to carry a gun.<sup>171</sup> He read the Second Amendment to cover liberty (the right to protect oneself) and property (the right to protect one’s home). But the Amendment as originally understood was not purely libertarian. It was also republican. It was about equality as well as liberty, about public service as well as private property.

Here’s the key point: this idea of military and political equality was at the heart of the VMI case.<sup>172</sup> Justice Scalia didn’t get it then, and perhaps he still doesn’t get it. But Justice Ginsburg does get it, as she proved in *Virginia*. It is thus especially unfortunate that she did not return to these themes in *Heller* as additional support for the idea that there is indeed a general right of Americans to serve equally in the military, regardless of race or sex.<sup>173</sup>

### III. BEYOND THE COURT: OBAMA

In 1990, Barack Obama became President of the *Harvard Law Review*. Now he seeks to become nothing less than President of the United States.

In the immediate aftermath of *Heller*, Senator Obama spoke favorably about a right to own a gun for self-protection, but he spoke with apparent reference to the Second Amendment and without mentioning the Fourteenth.<sup>174</sup> It would be unfair to expect an elaborate

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<sup>169</sup> See *id.*

<sup>170</sup> See *supra* section I.B.2.

<sup>171</sup> See *Heller*, 128 S. Ct. at 2794–98 & n.16. Here again we see Justice Scalia’s focus on objects, such as guns, as distinct from social structures, such as the military or the polity.

<sup>172</sup> See *United States v. Virginia*, 518 U.S. at 520.

<sup>173</sup> Or, dare I say, sexual orientation. For this vision to become fully plausible to jurists, it may well be necessary for a social movement to endorse and publicize this egalitarian understanding of the Second and Nineteenth Amendments. On the general significance of social movements, see Siegel, *supra* note 160.

<sup>174</sup> See, e.g., Posting of Lisa Tozzi to The Caucus: The New York Times Politics Blog, <http://thecaucus.blogs.nytimes.com/2008/06/26/candidates-react-to-supreme-courts-gun-ruling/> (June 28, 2008, 12:32).

scholarly exposition when the Senator's most pressing task was to get himself elected. But the Constitution is not merely what judges say it is, and well-trained lawyers outside the judiciary, such as Barack Obama, should not feel shy about participating in the constitutional conversation.

Thankfully, Senator Obama has not generally felt shy. Earlier in his campaign, he wrote and delivered a historic speech at the National Constitution Center. Speaking about race in America, the Senator did an extraordinary job of integrating Founding and Reconstruction themes into an epic constitutional narrative.<sup>175</sup>

Senator Obama's very candidacy is a powerful embodiment of a Reconstruction vision in which blacks, under the Fifteenth Amendment, would be full political equals with a right to vote and to be voted for on the same terms as whites.<sup>176</sup> Indeed, Barack Obama's very existence as a natural-born child of a white American-citizen mother and a black African-immigrant father is a testament to Reconstruction; Founding-era legislation opened the naturalization process only to foreign-born whites, leaving it to the Fourteenth Amendment and its companion statutes to open the way for a more racially inclusive naturalization system.<sup>177</sup>

A President Obama might well have a unique opportunity to undo some of the damage done by the *HLR* tradition. Perhaps better than any previous scholar, lawyer, or judge, he may be able to help his fellow citizens see the Reconstruction Amendments in their proper place: at the center, rather than the periphery, of the unfolding American epic. All this should come quite naturally for a President Obama, given the themes of his remarkable career. The Reconstruction Amendments offer Americans a more *universally inclusive* vision than the Founding-obsessed sagas that still hold sway in so many venues. It will also be easier to achieve a genuine narrative of *national reconciliation* once we widen our focus beyond the Founders, many of whom were slaveholders or men who accommodated slaveholders. And finally, attention to the Reconstruction Amendments can enable *post-partisan* Democrats to give proper credit to the Grand Old Party of Lincoln. Who better to do this than a tall, slim fellow from Illinois who also happens to be a gifted constitutional lawyer?

<sup>175</sup> See Senator Barack Obama, Address at the National Constitution Center: A More Perfect Union (Mar. 18, 2008) (transcript available at <http://my.barackobama.com/page/content/hisownwords>).

<sup>176</sup> See AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY, *supra* note 89, at 399–400 & n.\*.

<sup>177</sup> See Act of Mar. 26, 1790, 1 Stat. 103; Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256.